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,	CIVIL ACTION CASE NO. 07-CV-2602 (EFM/JPO)
v.	
EMBARQ CORPORATION, et al.,	CLASS ACTION
Defendants.	

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

Page

Page

Page

Federal Statutes:

Other Authorities:

INTRODUCTION

Plaintiffs oppose defendants' Motion for Summary Judgment seeking dismissal of the Count Two ERISA Breach of Fiduciary Duty claims of the 17 named plaintiffs (Doc. 338).

Each plaintiff can present evidence to establish that the Company breached its fiduciary duty in misrepresenting (through both affirmative misrepresentations and omissions) that the plans provided them with secure retiree medical and life insurance for their lifetimes, and that each suffered harm as a result. Accordingly, the motion should be denied.

RESPONSE TO DEFENDANTS' STATEMENT OF FACTS[1]

Plaintiffs incorporate by reference their responses to paragraphs 1 through 75 as set forth in Plaintiffs' Memorandum in Response to Defendants' Motion for Summary Judgment on Named Plaintiffs' First and Third Claims for Relief (Contractual Vesting Claims) (Doc. 358). Plaintiffs' responses to all other paragraphs follow:

76. Admitted.

A. WILLIAM DOUGLAS FULGHUM

77. Admitted.

78. Disputed. Fulghum mailed an election form on March 21, 1996, but did not make the decision to retire until July, 1996.[2]

79. Admitted.

80. Disputed. Benefits Supervisor Phillips ("Phillips") and Benefits Representative Bland ("Bland') both told Fulghum he would have medical benefits throughout retirement as long as he paid his premiums.[3]

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[1] Plaintiffs' Response to Defendants' Statement of Facts is herein referred to as "SUF".

[2] Fulghum Tr. at 36:13-18, 37:7-11; 199:1-10; Fulghum Aff. ¶¶ 32, 49 (PL APP 426). The deposition transcript of Plaintiff Fulghum is located at Doc. 340-15, p. 77 to Doc. 340-16, p. 18 (DEF APP 1131-1181). The evidence cited as PL APP refers to the documents and evidence located in the Plaintiffs' Appendix of documents filed with this Memorandum.

81. Disputed in part. Bland described the grandfathered life insurance benefit to Fulghum.[4]

82. Disputed in part. Fulghum testified as quoted; however, counsel interrupted him. Phillips discussed with Fulghum the medical and life insurance benefits he would have, telling him he would have them throughout his retirement.[5]

83. Disputed in part. Fulghum had the referenced conversation, but Bland did not discuss the alleged reservation of rights language (ROR) on the last page of her letter and expressly told Fulghum his life insurance benefits would last for the remainder of his life.[6]

84. Disputed in part. Bland sent the referenced letter to Fulghum, but the quotations omit language regarding retiree medical and life insurance benefits and pension benefits. The alleged ROR is after a list of benefits the Company undisputedly did not have the right to terminate.[7]

85. Disputed in part. Fulghum gave the testimony quoted; however, Fulghum did not testify he read the alleged ROR and if he had, he would not have understood that it reserved the Company's right to terminate his benefits after he retired.[8]

86. Disputed. The alleged ROR was not consistent with other documents Fulghum received; Fulghum did not recall receiving the quoted brochure. If he had read the alleged ROR in the brochure, he would not have understood that benefits could be terminated after retirement.[9]

87. Disputed. The Company sent Fulghum Dep. Ex. 3, part of SPD 1, but without the "Legal Information" section.[10]

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[3]Fulghum Aff. ¶¶ 14, 23-27, 30-31, 50, 52 (PL APP 421-23, 427); Fulghum Tr. at 79:18-80:20, 82:2-83:11, 187:18-188:14, 195:12-196:7; Fulghum Dep. Ex. 3, 11 (DEF APP 1182, 1229).
[4] Fulghum Aff. ¶¶ 23, 29-32, 51 (PL APP 422-23, 427); Fulghum Tr. at 79:18-80:20; 181:5-183:2.
[5] Fulghum Tr. at 79:18-80:20; Fulghum Aff. ¶ 23 (PL APP 422).
[6] Fulghum Aff. ¶¶ 30, 51, 53 (PL APP 423, 427); Fulghum Tr. at 181:5-183:2.
[7] Fulghum Dep. Ex. 11 at Fulghum000130-133 (DEF APP 1229).
[8] Fulghum Aff. ¶¶ 37, 55 (PL APP 424, 427-28); Fulghum Tr. at 71:24-72:2.
[9] Fulghum Aff. ¶ 56 (PL APP 428); Fulghum Tr. at 101:19-103:11.
[10] Fulghum Dep. Ex. 3 (DEF APP 1182); SPD 1, Def. Ex. A-1 (Doc. 324-3); Fulghum Tr. at 34:8-11, 104:11-107:6.

88. Disputed in part. The quoted language was only one reason for Fulghum's understanding that he had lifetime benefits.[11]

89. Disputed in part. The quoted language is on page 3 of the document. Plaintiffs object to paragraph no. 89 because it violates Fed.R.Civ.P. 56 (c) and Rules of Practice of the U. S. District Court for the Local District of Kansas, Rule 56.1 (a) by substituting speculation and argument for "statements of fact." Paragraph 89 is speculation because Fulghum did not read the language because it is located on the page following the Index, is not listed in the Index, and is not referenced in the section he read on "When Coverage Ends."[12]

90. Disputed in part. The document contains the quoted language, but Plaintiffs object to paragraph 90 for the reasons stated in response to paragraph 89. Fulghum does not recall reading the quoted language before he retired, but even if he had read it, he would not have understood that the Company could terminate his benefits.[13]

91. Disputed in part. The document contains the quoted language, but Plaintiffs object to paragraph 90 for the reasons stated in response to paragraph 89. Fulghum did not read the quoted language before he retired because it is located on the first page of Appendix A, it is not listed in the Index, and it is not referenced in the section he read on "When Coverage Ends." If he had seen this language, it would have been consistent with his understanding that the Company could make changes or terminate medical coverage or options in the Plan before he retired, but not after retirement.[14]

B. <u>BETSY BULLOCK</u>

92. Admitted.

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[11] Fulghum Aff. ¶ 12, 23, 26 (PL APP 420); Fulghum Tr. at 27:8-28:11, 32:20 – 33:2; SPD 1, Def. Ex. A-1 at EQ_FUL_0108 (Doc. 324-3).
[12] Fulghum Tr. at 28:12-29:12-30:7; Fulghum Aff. ¶ 41 (PL APP 425).
[13] Fulghum Aff. ¶ 43 (PL APP 425).
[14] Fulghum Aff. ¶ 42 (PL APP 425).

93. Disputed in part. It is admitted SPD 5 (medical and optional life insurance) and SPD 9 (grandfathered life insurance) were in effect when Bullock retired. It is denied that SPD 5 describes the CT&T grandfathered life insurance benefits.[15]

94. Disputed in part. Bullock had the referenced conversation, but paragraph 94 omits the fact that during the conversation, Phillips told Bullock that the medical and life insurance benefits would last throughout her retirement and that the life insurance benefits were specifically guaranteed by United/Sprint in its contract for the purchase of CT&T.[16]

95. Disputed in part. Bullock received the document with the quoted language; however, the quoted sentence is followed by a sentence showing the language referred to the Insurance Company's limited right to terminate employee coverage, not the Company's right to terminate retiree coverage: "The group policy may be terminated by the Insurance Company if, on any anniversary date, less than 75% of the employees then eligible are enrolled."[17]

96. Disputed in part. Bullock gave the testimony quoted; however, when originally asked about the meaning of the alleged ROR she testified, "I don't know." The defense attorney never read the second sentence of the alleged ROR discussed in Paragraph 95.[18]

97. Disputed in part. Bullock received the document, but it is a certificate of insurance. Bullock only looked at the parts on surgical coverage. The quoted section covers the carrier's right not to renew the contract. It does not reserve a right to cancel her retiree coverage.[19]

[15] SPD 5, Def. Ex. A-5 (Doc. 324-7 at 41) (EQ_Ful_0362). The deposition transcript of Plaintiff Bullock is located at Doc. 340-5, p. 18 to Doc. 340-6, p. 34 (DEF APP 292-392).
[16] Bullock Tr. at 135:19-138:9, 305:6-308:1; Bullock Aff. ¶¶ 8-12 (PL APP 232-33).
[17] Bullock Dep. Ex. 1 at 000007 (DEF APP 393).
[18] Bullock Tr. at 80:17-81:13; Bullock Dep. Ex. 1 at 00007 (DEF APP 393).
[19] Bullock Dep. Ex. 4 (DEF APP 401); Bullock Tr. at 82:25-85:9; Bullock Aff. ¶ 48 (PL APP 243-44).

98. Disputed in part. Bullock received SPD 1 and SPD 2; however, for an analysis of the alleged ROR provisions see Plaintiffs' Mem. Opposing S.J. on the Contractual Vesting Claims at 8-12 (Doc. 358).

99. Disputed in part. Bullock had an e-mail exchange with Phillips at the time of a proposed Sprint merger; however, she and Phillips both understood the e-mails to mean that her medical and life insurance benefits would be secure if they were not changed before she retired.[20]

100. Disputed in part. Bullock had an e-mail exchange with Phillips about the potential reclassification of her division; however, she and Phillips both understood the e-mails to mean that she would be able to retain her grandfathered life insurance benefits for life if she was with one of the CT&T divisions at retirement.[21]

101. Disputed. Bullock understood if an employee retired from one of the CT&T divisions the grandfathered life insurance benefits were secure for life.[22]

102. Disputed in part. While she was an active employee Bullock was aware medical benefits changed for *active* employees, but not for retirees.[23]

103. Admitted.

104. Disputed in part. SPDs 5 and 9 have alleged ROR provisions; however, for an analysis of the alleged ROR provisions see Plaintiffs' Mem. Opposing S.J. on the Contractual Vesting Claims at 12-21 (Doc. 358).

105. Admitted.

[20] Bullock Dep. Ex.19 (DEF APP 426); Bullock Tr. at 159:21-160:2, 175:21-176:12,196:1-205:3; Bullock Aff. ¶¶ 50-55 (PL APP 244-46); Phillips Dep. Ex. 19 (PL APP 533-534); Phillips Dep. at 131:7-138:8.
[21] Bullock Dep. Ex. 19 (DEF APP 426); Bullock Tr. at 204:3-205:3; Bullock Aff. ¶¶ 50-55 (PL APP 244-46).
[22] Bullock Tr. at 204:3-205:3.
[23] Bullock Tr. at 80:17-81:13, 201:17-202:17, 234:4-17.

106. Disputed in part. Bullock received the brochure with the cited language; however, Bullock did not interpret the language as giving the Company the right to change her retirement medical benefits after she retired.[24]

107. Admitted.

108. Disputed in part. The document contains the quoted language; however, Bullock is not sure she read the language. If she had read it, she would have understood that Sprint was reserving the right to amend or terminate the retirement medical plan for active employees who had not yet retired.[25]

109. Admitted.

110. Disputed. Paragraph 110 mischaracterizes Bullock's testimony. When asked about the quoted excerpt of the Holland letter, Bullock said: "It sounds to me like that could be changed drastically at any time. But I do not see where it says that it may be changed if I retire with the 2001 package."[26]

111. Disputed. SPD 4 appears to be a document from 1997, not 2001. Bullock does not recall receiving it and was not asked about it at her deposition. Bullock Aff. ¶ 60 (PL APP 248).

112. Disputed in part. Bullock attended a webcast and took notes; however, she understood the webcast to be referring to the possibility of phasing out "the new plan," that is, the SHARE account plan, not the benefits for existing retirees under which she was retiring.[27]

113. Admitted.

[24] Bullock Tr. at 220:17-230-21, 229:20-22; 230:15-19; Bullock Dep. Ex. 22 (DEF APP 428).
[25] Bullock Dep. Ex. 22 at 000792 (DEF APP 428) Bullock Tr. at 230:22-232:22, 233:5-234:17; Bullock Aff. ¶ 56 (PL APP 246-47).
[26] Bullock Dep. Ex. 22 (DEF APP 428); Bullock Tr. at 314:14-15:1.
[27] Bullock Tr. at 284:5-285:25.

114. Disputed in part. Bullock understood CT&T could increase premiums for her retiree medical benefits; however, she understood if the medical premiums increased, the Company would continue to pay its share.[28]

C. WILLIAM GAMES

115. Admitted.

116. Disputed in part. See answer to paragraph 93.

117. Admitted.

118. Disputed in part. Games did not literally ask Westfall whether Sprint could change his benefits; however, he asked Westfall how long he would have his retiree benefits and she said "you will get this until you die."[29]

119. Disputed in part. Games understood Sprint had the right to change retiree medical insurance premiums, but he also understood the premiums would continue to be prorated and the Company would pay its share.[30]

120. Disputed in part. Games received the Holland letter and enclosures; however, he only scanned over them. When shown the cited ROR language he said it was consistent with his understanding the Company was reserving the right to change retiree benefits for active employees who had not yet retired.[31]

121. Disputed in part. Games received the referenced SPD with the quoted language; however, he did not recall when he got it or whether he read it. He would not have understood it gave the right to amend or terminate benefits after he retired.[32]

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[28] Bullock Tr. at 396:21-24; 397:11-15.
[29] Games Tr. at 221:7-25; 225:1-10, 388:12-20. The deposition transcript of Plaintiff Games is located at Doc. 340-16, p. 90 to 340-18, p. 19 (DEF APP 1253-1351).
[30] Games Tr. at 125:8-126:18, 356:22-358:9.
[31] Games Tr. at 41:12-13; 110:25,381:1-21.
[32] Games Dep. Ex. 14 (DEF APP 1366); Games Tr. at 283:1-286:21.

122. Disputed in part. Games received the referenced documents, including the quoted enrollment form; however, Games testified he was not familiar with the cited SPD.[33]

123. Admitted.

124. Admitted.

D. JOHN DOUGLAS HOLLINGSWORTH

125. Admitted

126. Disputed in part. See answer to paragraph 93.

127. Disputed in part. Although Hollingsworth cannot identify "a person, a time, and a date" in which he was told he would have lifetime retiree benefits, he repeatedly testified his managers and HR reps told him that if he retired by the end of 2001, he would keep his benefits throughout his retirement.[34]

128. Disputed in part. Hollingsworth gave the testimony quoted, but he also was told by managers and HR reps he would have retiree benefits throughout retirement.[35]

129. Disputed in part. It is admitted that Hollingsworth received the referenced documents. However, he did not interpret the documents to state a Company right to change his retirement medical benefits after he retired; instead he understood if he retired by the end of 2001, he would retain the current FlexCare medical and life insurance plans throughout retirement.[36]

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[33] Games Dep. Ex. 9 (DEF APP 1364. Games Tr. at 249:3-252-22.
[34] Hollingsworth Aff. ¶¶ 9, 28-31, 37, 59 (PL APP 487, 491-92, 496); Hollingsworth Tr. at 132:6-133:3, 152:2-167:10, 192:18-193:1, 199:10-25, 207:17-214:13, 224:20-232:19, 249:11-250:14, 316:1-4, 346:9-348:7, 353:9-355:21, 359:22-361:17, 365:2-10. The deposition transcript of Plaintiff Hollingsworth is located at Doc. 340-19, p. 21 to Doc. 340-20, p. 39 (DEF APP 1413-1515).
[35] *Id.*
[36] Hollingsworth Dep. Ex. 9, 10 (DEF APP 1516, 2144); Hollingsworth Aff. ¶ 13-17, 20 (PL APP 488-89); Hollingsworth Tr. at 193:6-194:3, 202:14-203:19, 222:5-21, 243:4-247:15, 283:1-285:2-15.

130. Disputed. It is admitted that Hollingsworth discussed retirement with his wife, administrative assistant to the Director of Customer Service Operations, but he did not primarily rely upon her. [37] He did not primarily rely upon his wife.[38]

131. Admitted.

132. Disputed. Hollingsworth testified he was aware his wife attended a webcast presentation, but he did not speak with his wife about the presentation or see her handout or notes or discuss the quoted language with his wife before he retired.[39]

133. Disputed in part. Hollingsworth believed the Company could change his medical premiums, deductibles, and co-payments during retirement because of his experience as an active employee, but he understood that the Company's "right" to terminate benefits did not apply to those who already retired.[40]

134. Disputed in part. Hollingsworth's wife Nellie gave him the checklist as stated, as it was part of her job duties to do so. She frequently provided such checklists to employees and used it to discuss their benefits with them.[41]

135. Disputed in part. Hollingsworth did testify that the first sentence of paragraph 5 did not specifically say how long the medical insurance would continue.[42] However, he understood from reading the checklist he would have medical insurance throughout his retirement as long as he paid the premium.[43] Hollingsworth did not testify the "benefits listed in the checklist are

[37] Hollingsworth Dep. Ex. 21 (DEF APP 1548); Hollingsworth Tr. at 72:11-22, 73:2-14, 186:15–187:9, 204:7-205:5, 257:23-258:4, 345:12-21, 350:23-351:18, 382:17-383:7; Hollingsworth Aff. ¶¶ 7, 24-25 (PL APP 487, 490).
[38] See Plaintiffs' Statement of Facts below. SAF ¶¶ 95-98.
[39] Hollingsworth Tr. at 268:9-270:20, 305:24-306:10, 314:24-315:16, 316:13-23; Hollingsworth Dep. Ex. 15 (DEF APP 1542-43); Hollingsworth Aff. ¶¶ 36, 63 (PL APP 492, 496).
[40] Hollingsworth Tr. at 83:16-25, 84:1-16; 97:3-4, 203:20-204:6, 218:9-20, 345:14-11, 302:14-303:20; 363:8-364:24; Hollingsworth Aff. ¶¶44, 63 (PL APP 496).
[41] Hollingsworth Dep. Ex. 21 (DEF APP 1548); Hollingsworth Aff. ¶¶ 7, 24-25, 60 (PL APP 487, 490, 496); Hollingsworth Tr. at 72:11-22, 73:2-14, 204:7-205:5, 257:23-258:4, 345:12-21, 350:23-351:18, 382:17-383:7.
[42] Hollingsworth Tr. at 388:5-389:3.
[43] Hollingsworth Aff. ¶ 27 (PL APP 490-91).

described in more detail in other documents." He only acknowledged the checklist referred to an attachment listing FlexCare rates and a special tax notice that he did not receive.[44]

136. Disputed. Hollingsworth submitted a letter of intent on October 24, 2001, but he understood that he was not obligated to retire at that time and could change his mind at any time before his last day of work on December 31, 2001.[45]

E. DONALD CLARK

137. Admitted.

138. Disputed in part. SPD 16 and 17 are documents relevant to Clark, but the pages of SPD 16 labeled "Bullock 158-168" cover retiree medical insurance and those labeled "Bullock 169-173" cover retiree grandfathered life insurance. SPD 17 is the CBA in effect when Clark retired.

139. Disputed in part. Clark testified about the Chief Operator; however, he recalled her name, Mildred Pierce, and he testified that she told him she would obtain the information he was requesting and provided him with a checklist of retirement benefits.[46]

140. Disputed in part. Admitted as to oral representations, but Chief Operator Pierce provided Clark with the checklist that described his lifetime benefits.[47]

141. Admitted.

142. Admitted.

143. Admitted.

144. Disputed. Paragraph 144 is inaccurate. Clark identified both a book he received when he was hired and the checklist which he received from Chief Operator Pierce and from HR

[44] Hollingsworth Tr. at 386:23-387:25, 391:3-22; Hollingsworth Aff. ¶ 66 (PL APP 497).
[45] Hollingsworth Dep. Ex. 22 (PL APP 484); Hollingsworth Tr. at 12-14, 351:23-352:11; Hollingsworth Aff. ¶¶ 36, 67 (PL APP 492, 497).
[46] Bullock Exhibit No. 39(PL EX 12), Clark Tr. at 119:5-14, Clark 2nd Tr. at 9:8-11, 10:4-23,12:25-13:14.
[47] Bullock Dep. Ex. 39 (PL EX 12); Clark 2nd Tr. at 9:8-11, 10:17-21.

Representative Gayle Phillips, as describing lifetime benefits.[48] He was not sure if these were misleading documents because he understood then and understands now that his retiree medical and life insurance benefits are lifetime benefits.[49]

145. Admitted.

146. Disputed. Paragraph No. 146 implies Clark received a letter in 1976 containing purported reservation of rights language. He never received such a letter. Clark retired in 1976, and the letter shown to him was for a different person who retired in 1989, thirteen years later.[50]

147. Disputed. Paragraph No. 147 misconstrues Clark's testimony. Although he testified about other reasons he wanted to retire, Clark clearly stated he would not have retired if he had known that CT&T was reserving its right to terminate his benefits because he could not afford to retire without the assurance of having lifetime benefits.[51]

F. KENNETH CARPENTER

148. Disputed in part. It is admitted that Kenneth Carpenter ("K. Carpenter") was employed from approximately 1965, but his retirement was effectuated on January 1, 1998.[52]

149. Admitted.

150. Disputed in part. It is admitted that K. Carpenter attended a group meeting conducted by HR Director Groves and HR rep Gorney on March 26, 1996. He had not decided to retire before meeting with Groves and Gorney, and only accepted retirement, and did not search for another position with the Company between March 1996 and January 1998, because Groves and

[48] Clark Tr. at 67:9-68:20,119:5-14, 159-162; Clark 2nd Tr. at 10:4-13:4, 13:22-15:22; Bullock Ex 39.
[49] Clark Tr. at 184:1-21, 192:17-25; Clark Aff. ¶ 33 (PL APP 285-86).
[50] Dorman Dep. Ex. 1 (DEF APP 1004); Clark Tr. at 148:6. Clark Aff. ¶ 34 (PL APP 286).
[51] Clark Tr. at 184:1-21, 192:17-25.
[52] K. Carpenter Tr. at 25:25-26:2. The deposition transcript of Plaintiff K. Carpenter is located at Doc. 340-9 p. 36 through Doc. 340-10 p. 13 (DEF APP 597-646).

Gorney assured him of lifetime retiree medical benefits.[53]

151. Disputed. Groves and Gorney told K. Carpenter that his wife Betty, also a Company employee eligible for early retirement, could suspend her retiree medical coverage and be covered under Ken's coverage. Groves and Gorney continued that this coverage would last until Ken's death, when Betty could then reinstate her own coverage under the retiree medical plan.[54]

152. Disputed. K. Carpenter was expressly told by Groves and Gorney that his retiree medical benefits could not change during his lifetime.[55]

153. Disputed in part. It is admitted that K. Carpenter attended a group meeting with HR rep Etzwiller on November, 5, 1997. This meeting occurred nearly two months before K. Carpenter's retirement began. In that meeting, Etzwiller told him that the retiree life insurance benefits were for life and the amount of the benefits would remain the same.[56]

154. Disputed in part. It is admitted that K. Carpenter received benefit related documents, and disposed of them when replacement documents were provided for the current year. Defendants' citations to "benefit-related documents that included ROR provisions" is misleading because the documents referenced in the deposition citations are forms without ROR language, active employee booklets, or other unidentified documents for which it cannot be known whether any form of alleged ROR language is contained.[57]

155. Disputed in part. It is admitted that K. Carpenter received the active medical SPD referenced in Paragraph 155. Plaintiffs dispute Paragraph 155 because it provides an incomplete statement of the textual portions and other evidence relevant to the proper analysis of this active

[53] K. Carpenter Tr. at 31:2-18 ("what was said in that meeting made me feel that it was safe to go ahead and retire"); K. Carpenter Aff. ¶ 2 (PL APP 269).
[54] K. Carpenter Tr. at 30:13-23; K. Carpenter Aff. ¶ 2, Ex. 1 (PL APP 269, 272).
[55] K. Carpenter Tr. at 104:6-16, K. Carpenter Aff. ¶ 2 (PL APP 269).
[56] K. Carpenter Tr. at 25:25-26:2, 57:17-25, 60:1-16, 72:8-23, 75:22-76:3; B. Carpenter Aff. Ex. A (PL APP 268).
[57] *See, e.g.*, K. Carpenter Tr. at 61:23-62:2; 64:16-66:15 & 117:11-21; 71:4-12; 101:5-13 (active employee medical SPD); 136:25-137:9. *See also* K. Carpenter Tr. at 182:19-184:24 (K. Carpenter did not receive retiree medical SPD).

employee medical SPD. The SPD does not in any way refer to the retiree medical or life insurance plans at issue in this case. K. Carpenter testified that the alleged ROR language can only be interpreted to be applicable to the Company's rights regarding medical benefits provided to active employees, not retirees. K. Carpenter does not recall receiving a retiree medical SPD, and was expressly told by Groves and Gorney that his *retiree* medical coverage was lifetime.[58]

156. Disputed in part. Plaintiffs refer the Court to their response to Paragraph 155, above.

157. Disputed in part. It is admitted that K. Carpenter testified that UTC-Ohio had the right to change health care insurance options, prescription drug formulary and the cost of medical insurance, but the Company did not have the right to terminate the retiree medical benefits plan.[59] Further, the director of HR and two HR reps expressly told him that his retiree medical and life insurance benefits were for life. *See* paragraphs 150-153, *supra.*

158. Disputed in part. It is admitted K. Carpenter signed the form, but the statement regarding an active employee SPD did not refresh his recollection that he received such SPDs.[60]

159. Disputed in part. The director of HR and two HR reps expressly told him that his retiree medical and life insurance benefits were for life. *See* paragraphs 150-153, supra. K. Carpenter took notes of these representations and has produced them in this litigation.[61]

160. Admitted.

161. Admitted.

G. <u>BETTY CARPENTER</u>

162. Disputed in part. It is admitted that Betty Carpenter ("B. Carpenter") was employed by UTC-Ohio starting in 1978, and that her last day worked was November 1, 1996, but she

[58] K. Carpenter Tr. at 61:18-22, 102:17-104:9.
[59] K. Carpenter Tr. at 102:24-104:9, 119:5-21.
[60] K. Carpenter Tr. at 106:20-107:3.
[61] *See* B. Carpenter Aff. Ex. A (PL APP 268); K. Carpenter Aff. Ex. 1 (PL APP 272).

remained an employee, receiving active employee benefits, until retiring on November 1, 1997.[62]

163. Disputed. B. Carpenter's husband, Ken met with HR rep Etzwiller and specifically asked her whether the retiree life insurance benefits were "for life." Etzwiller stated the life insurance was "for life" and that amount, $23,000, could never change. Immediately after the meeting, B. Carpenter reviewed K. Carpenter's meeting notes, stating lifetime $23,000 life insurance.[63]

164. Disputed in part. It is admitted that B. Carpenter did not attend the March 1996 group meeting, however, B. Carpenter discussed the meeting with her husband, Ken, at the time the meeting took place. B. Carpenter understood the representations described in Paragraph 151 to mean that both she and her husband would be provided retiree medical benefits for life. Ken took notes at this meeting, and B. Carpenter reviewed the notes at the time they were drafted.[64]

165. Admitted.

166. Disputed in part. It is admitted that B. Carpenter signed a 1998 Retiree Flexcare Enrollment Form, but that form does not refer to a "medical SPD." In addition, B. Carpenter retired on November 1, 1997, not on the September 8, 1997 date in which the form was signed. Further, B. Carpenter never received an active employee or retiree SPD concerning medical or life insurance benefits. The Retiree Flexcare Enrollment Form did not contain an ROR.[65]

167. Disputed in part. It is admitted that B. Carpenter never received an SPD before or after retiring. Her knowledge of the plans was learned through discussions she had with her husband and reading his notes of meetings he had with HR, as described in paragraphs 163 and 164.

168. Admitted.

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[62] B. Carpenter Tr. at 75:19-76:11. The deposition transcript of Plaintiff B. Carpenter is located at Doc. 340-8 p.27 through Doc. 340-9 p. 8 (DEF APP 530-569).
[63] B. Carpenter Tr. at 57:17-25, 59:1-9, 60:1-16; B. Carpenter Aff. ¶ 5 & Ex. A (PL APP 265, 268).
[64] B. Carpenter Tr. at 54:22-55:21, 56:3-8, 98:18-99:4, 141:3-22.
[65] B. Carpenter Dep. Ex. 14 (DEF APP 595); B. Carpenter Tr. at 53:23-60:1, 85:15-19, 107:13-15; B. Carpenter Aff. ¶ 6 (PL APP 265).

H. SUE BARNES

169. Admitted.

170. Admitted.

171. Disputed in part. Manager Gloria Jones ("Jones") did tell Barnes she had to retire by April 1, 2003 to "keep" and "secure" her benefits, but not in "informal conversations." Barnes had two scheduled meetings with Jones and also met her pursuant to an open door policy.[66]

172. Disputed in part. Based on her experience as an active employee, Barnes assumed her deductibles and out-of-pocket costs could change during retirement, but she did not understand the Company had reserved the right to terminate her benefits.[67]

173. Disputed in part. It is admitted that Barnes did not contact Human Resources, but Jones never "referred" Barnes to Human Resources.[68]

174. Disputed in part. It is admitted that Barnes discarded documents after being laid-off in 1986 and 2007, but she kept and produced in discovery a notice from Jones, the retirement correspondence from Means, and her retirement paperwork.[69]

175. Disputed. The "Sprint Retiree Life Insurance" document confirmed Barnes' understanding that her grandfathered life insurance benefits were lifetime benefits. Barnes also believed the retiree life insurance was for life because the document used the term "grandfather," and she had "heard all of [her] life [that] grandfathered meant you're grandfathered in, you keep it."[70]

176. Disputed in part. The document contains the quoted language; however, the entire

[66] Barnes Aff. ¶¶ 10-12, 14-16, 58 (PL APP 140-41, 146); Barnes Tr. at 27:4-7, 35:9-25, 37:8-40:21, 145:2-7. The deposition transcript of Plaintiff Barnes is located at Doc. 340-2, pp. 1-44 (DEF APP 1-44).
[67] Barnes Tr. at 84:12-22, 85:12-23; Barnes Aff. ¶¶ 39-42, 59 (PL APP 144, 146).
[68] Barnes Tr. at 47:10-25; 48:14-18; Barnes Aff. ¶ 60 (PL APP 146-47).
[69] Barnes Aff. ¶ 61 (PL APP 147).
[70] Barnes Tr. at 76:3-12; Barnes Aff. ¶¶ 36, 62 (PL APP 143, 147).

document confirmed Barnes' understanding she had to retire to secure her benefits for life.[71]

177. Disputed in part. It is admitted that Barnes does not recall receiving a document specifically saying her benefits would be "secured," but the Company repeatedly advised her the retiree benefits would be "secured" if she retired by April 1, 2003.[72]

178. Disputed in part. It is admitted the retirement packet said to "familiarize yourself with the packet," but Barnes was not advised this otherwise, as is implied.[73]

179. Disputed in part. The quoted language is Section 5 of the "General Information" document, but it did not indicate to Barnes the Company reserved the right to change or terminate her health insurance benefits and she did not believe the language applied to her because she was enrolled in the Indemnity Plan with no premiums.[74]

180. Disputed in part. Although Company management distributed CBAs, they came long after the CBA was settled and Barnes did not receive all of them during her employment.[75]

181. Disputed in part. The referenced CBA was in effect, but Barnes did not receive it before she retired.[76]

182. Disputed in part. The quoted language is included in the CBA, however, the quote omits the final modifying phrase: "including changing the level of Company contributions, deductibles, out of pocket maximums, and requiring retiree contributions, so long as the changes are uniformly applied to all eligible retirees" and Barnes did not have the CBA before retiring.[77]

183. Disputed. The CBA does not state the retiree medical plan could be terminated after retirement. It specifically states: "Employees in the bargaining unit on or prior to November 29,

[71] Barnes Aff. ¶¶ 13, 63 (PL APP 141, 147); Barnes Tr. at 53:6-55:21.
[72] Barnes Tr. at 52:33-25.
[73] Barnes Dep. Ex. 4 at Barnes000006 (DEF APP 173).
[74] Barnes Dep. Ex. 4 at Barnes000007-10 (DEF APP 173); Barnes Aff. ¶ 26, 27-29, 66 (PL APP 142-43, 147, 148); Barnes Tr. at 66:17-19, 78:24-79:17.
[75] Barnes Tr. at 26:18-27:11, 30:1-6, 67:17-20.
[76] Barnes Dep. Ex. 1 (DEF APP 45)("2002-05 CBA"); Barnes Tr. at 29:22-25, 30:1-6.
[77] Barnes Dep.Ex.1 at EQ_FUL_032629 (DEF APP 45). Barnes Tr. at 30:1-6.

1999, *and subsequently retiring will retain their health care coverage in place at the time of their retirement*."(emphasis added)[78] If Barnes had seen this language, it would have confirmed her understanding she had lifetime medical and prescription drug benefits.[79] Furthermore, Barnes did not testify in the manner paragraph 183 is phrased. If the Company had told Barnes in writing her benefits could be amended or terminated after retirement, she would have realized it was promising lifetime benefits and also saying it might take them away in the future.[80]

I. JAMES WOODIE BRITT

184. Admitted.

185. Admitted.

186. Disputed in part. It is admitted that an HR told Britt he would have paid retiree medical benefits for as long as he lived, but Britt identified the employee as a female from an "upper position" in HR at Company headquarters and gave a physical description of her.[81]

187. Disputed. Britt testified that at the meeting with the HR he learned of the grandfathered life insurance benefits, and she specifically promised he would have $26,000 worth of life insurance throughout retirement.[82]

188. Disputed. Before the meeting, Britt did not know about his grandfathered life insurance, but he learned that it was a lifetime benefit at the meeting.[83]

189. Disputed. Paragraph 189 provides incomplete and misleading citations to Britt's deposition testimony. Although Britt initially testified he decided to retire before he met the HR Rep, later in his deposition, after reviewing documents produced by the Company, including his

[78] Barnes Dep. Ex. 1 at EQ_FUL_032629 (DEF APP 45).
[79] Barnes Tr. at 149:10-21, 150:4-8; Barnes Aff. ¶ 52 (PL APP 145).
[80] Barnes Tr. at 50:5-52:7; Barnes Aff. ¶ 68 (PL APP 145).
[81] Britt Tr. at 161:17, 279:24-280-25. The deposition transcript of Plaintiff Britt is located at Doc. 340-4, p. 20 to Doc. 340-5, p. 15 (DEF APP 215 -289).
[82] Britt Tr. at 96:13-97:4, 253:21-254:22, 270:9-270-14, 281:15-283-3, 290:8-291:19.
[83] Britt Tr. at 96:13-97:4, 253:21-254:22, 270:9-270-14, 281:15-283-3, 290:8-291:19.

own handwritten letter to HR and his letter to his boss, he explicitly testified that he made the decision to retire after meeting with the HR Rep.[84]

190. Admitted.

191. Admitted.

192. Disputed. At the meeting with the HR Rep, Britt received a checklist of benefits similar to Fulghum Dep. Ex. 18 (PL EX 11) which included representations he would have medical and life insurance benefits throughout his lifetime. He relied on this document to retire.[85]

193. Disputed in part. SPD 10 contains the quoted language; however, at no time before this lawsuit began did Britt ever receive SPD 10 or any other document attempting to reserve the right to terminate his benefits. He had no knowledge of any alleged reservation of rights before the Company terminated his benefits.[86] For an analysis of the alleged ROR provisions see Plaintiffs' Mem. Opposing S.J. on the Contractual Vesting Claims at 21-24 (Doc. 358).

194. Disputed in part. Britt did testify he did not read the CBA before retiring or recall its contents.[87] However, Britt testified he knew the CBA contained the "the rules and regulations pertaining to employment and benefits," that he relied on it, and that his claims are based upon his understanding that the benefits he had under the CBA were promised for retirement.[88]

195. Disputed. Although the CBA refers to benefits "during the term of the agreement" for active employees, it was Britt's understanding that the CBA determined what his benefits would be throughout his retirement and those were the benefits he had for twenty-two years of retirement until the Company terminated them in 2007.[89]

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[84] Britt Dep. Ex. 20, 21 (PL APP 215, 216-218); Britt Tr. at 248:22-251:2, 259:8-263:3, 269:7-12.
[85] Britt Tr. at 252:6-255:23, 258:3-6; 269:7-271:12.
[86] Britt Aff. ¶ 24 (PL APP 226).
[87] SPD 19, Def. Ex. A-19 (Doc. 324-21); Britt Dep. Ex. 3 (PL APP 151-208); Britt Tr. at 108:14-110:11.
[88] Britt Dep. Ex. 3 (PL APP); Britt Tr. at 60:21-61:10, 105:21-108:9, 109:2-117:17; Britt Aff. ¶ 25 (PL APP).
[89] Britt Tr. at 60:21-61:10, 105:21-108:9, 109:2-117:17; Britt Aff. ¶ 25 (PL APP 226-27); Britt Dep. Ex. 3 (PL APP 151-208).

196. Disputed. The quoted language of paragraph 196 refers to the rights of active employees and the CBA being cancelled for active employees. Britt understood retirees would have the benefits they retired with under the CBA for their entire lives.[90]

J. DORSEY DANIEL

197. Admitted.

198. Admitted.

199. Disputed in part. It is admitted that Daniel "can't recall all the names" of the people he talked to about retirement benefits, but he discussed them with VP Herb Henderson in the summer of 1997 and understood his life insurance and medical benefits were lifetime benefits.[91] During his 30 years as a Company manager, he discussed retirement benefits with supervisors, HR reps, co-workers, and subordinates and the word "lifetime" was used in documents they discussed.[92]

200. Disputed in part. Daniel received the referenced documents containing the quoted language and assumes he read them.[93] However, the documents actually confirm his understanding that changes in retirement plans were only for those who retired after the changes.[94]

201. Disputed. It is admitted Daniel received the cited documents,[95] but they address only the pension plan and other benefits available to Sprint and Centel employees and have nothing to do with his contested benefits as a CT&T employee. Daniel does not recall reading the alleged

[90] Britt Dep. Ex. 3 (PL APP 151-208); Britt Tr. at 60:21-61:10, 105:21-108:9, 109:2-117:17; Britt Aff. ¶ 25 (PL APP 226-27).
[91] Daniel Tr. at 18:1-10, 16-24, 59:22-60:6, 127:13-20, 168:6-19, 202:10-204:25; Daniel Aff. ¶¶ 25, 56 (PL APP 311). The deposition transcript of Plaintiff Daniel is located at Doc. 340-10, p. 70 to Doc. 340-11, p. 35 (DEF APP 703-755).
[92] Daniel Dep. Ex. 7 at Daniel000146 (DEF APP 756), Daniel Dep. Ex. 20 (DEF APP 2183); Daniel Tr. at 27:3-10; 125:14-126:11, 127:13-20. Daniel Aff. ¶ 56 (PL APP 316).
[93] Daniel Dep. Ex. 9 (DEF APP 766); Daniel Dep. Ex. 10 (PL APP 291-306); Daniel Tr. at 77:12-81:25.
[94] Daniel Aff. ¶¶ 15-16, 57 (PL APP 309, 316).
[95] Daniel Aff. Ex. 1, Daniel00044-46 (PL APP 319-321).

ROR language, but if he did, he would have understood the Company could change or eliminate the particular benefits listed for those who had not yet retired.[96]

202. Disputed in part. It is admitted Daniel relied upon the checklist and a document entitled "W. Dorsey Daniel" (the "Pension/Retiree Benefits Document"), but not the "retirement package."[97] Daniel also relied on the promise of lifetime medical and life insurance benefits contained in checklists he received and provided to subordinates throughout his employment.[98]

203. Disputed in part. It is admitted that the checklist constituted a promise of lifetime benefits, but the promise covered not just medical insurance (paragraph 7), [99] but also life insurance (paragraph 6).[100]

204. Disputed. Daniel received the referenced document in his office mailbox during August, 1997 and reviewed it before deciding to retire. It shows deductible rates for 1996 in his handwriting.[101] Daniel clarified at his deposition when he received this document and amended his discovery responses accordingly.[102]

205. Disputed in part. Daniel received the cited letter containing the language quoted, but the documents attached to Daniel Dep. Ex. 7 were not all the documents attached to the letter.[103] Daniel read the quoted language almost two years after he made the decision to retire. Because the prior pages of the letter detailed benefits that could not be changed, such as pension benefits, Daniel understood the ROR language applied to future retirees, not those already retired.[104]

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[96] Daniel Aff. ¶ 58 (PL APP 316).
[97] Daniel Dep. Ex. 7 at Daniel000146 (DEF APP 756); Daniel Dep. Ex. 20 (DEF APP 2183); Daniel Tr. at 125:14-126:11, 162:16-166:22, 167:13-168:19, 191:17-192:5, 196:9-22, 202:10-204:7, 204:9-25.
[98] Daniel Tr. at 127:13-20; Daniel Aff. ¶ 17 (PL APP 309-10).
[99] Daniel Dep. Ex. 20 (DEF APP 2183); Daniel Tr. at 204:9-25; Daniel Aff. ¶¶ 28, 60 (PL APP 311, 316).
[100] Daniel Dep. Ex. 20 (DEF APP 2183);Daniel Tr. at 202:10-204:7; Daniel Aff. ¶¶ 27, 60 (PL APP 311, 316).
[101] Daniel Dep. Ex. 26 (DEF APP 2169), Daniel Dep. Ex. 7 (DEF APP 756); Daniel Dep. Ex. 26 (DEF APP 2169-2173); Daniel Tr. at 189:5-192:5; Daniel Aff. ¶¶ 30, 61 (PL APP 311-12, 317).
[102] Daniel Dep. Ex. 26 (DEF APP 2169-2173); Daniel Aff. ¶ 61 (PL APP 317).
[103] Daniel Dep. Ex. 7 at Daniel000142 (DEF APP 756), Daniel Dep. Ex. 26 (DEF APP 2169-2173).
[104] Daniel Tr. at 43:10-44:11, 154:7-12, 175:21-176:4; Daniel Aff. at ¶ 44 (PL APP 314).

206. Disputed. At his deposition, Daniel was asked about the "retirement package" he received in 1997 before he decided to retire.[105] Immediately before the section quoted, Daniel testified the paperwork did not state the Company had a right to terminate his medical benefits.[106] Paragraph 206 quotes a snippet of testimony, but leaves out: "I had an understanding that as a retiree they couldn't take away your benefits like medical and so forth. But I didn't quite understand did that mean they could increase the rate of something, but I knew that you couldn't take it away."[107] Daniel's testimony throughout his deposition was that he was unaware the Company had reserved any right to terminate his benefits.[108]

K. TIMOTHY DILLON

207. Disputed in part. It is admitted Dillon worked for Florida Telephone and North Supply Company, but he remained an active employee until at least January 2003, when his retirement became effective. From November 9, 2001, the date he last reported to his office, through January of 2003, Dillon remained an active employee, receiving active medical and life insurance benefits, and accruing service for his pension.[109]

208. Admitted.

209. Disputed. Stan Fisher, the president of Northern Supply – the Company for which Dillon worked most of his career and from which he retired – told him multiple times in the 1980s and 1990s that the retiree welfare benefits were "for life."[110]

210. Admitted.

211. Disputed in part. It is admitted that at group meetings conducted by HR reps to explain

[105] Daniel Aff. ¶ 63 (PL APP); Daniel Tr. at 183:1-15.
[106] Daniel Tr. at 182:18-25.
[107] Daniel Tr. at 183:23-184:3.
[108] See, e.g. Daniel Tr. at 55:6-12, Daniel Tr. at 111:3-23.
[109] Dillon Tr. at 106:10-107:14; Dillon Aff. ¶ 2 (PL APP 323-24). The deposition transcript of Plaintiff Dillon is located at Doc. 340-11 p. 71 through Doc. 340-12 p. 38 (DEF APP 791-850).
[110] Dillon Tr. at 187:2-189:23.

the implementation of the Company's new retirement medical plan beginning in 2002, Dillon nor anyone else asked if the benefits were for life. However, at those group meetings, the HR reps stated that if employees retired before 2002, they would receive "lifetime pension benefits" and "lifetime medical benefits." Accordingly, Dillon understood that if he accepted the early retirement prior to 2002, he was guaranteed retiree medical for life.[111]

212. Disputed in part. Before effectuating his retirement in 2003, Dillon had a conversation with HR rep Hollie Pastor ("Pastor"), in which Pastor told Dillon that his retiree medical benefits would continue until he reached age 65, and then, when he went on Medicare, the Company would provide supplemental medical coverage, including prescription drug ("Rx") coverage. This is the same representation Dillon received from HR rep Carol Moser ("Moser") in 2000 or 2001. At that same meeting, Pastor confirmed that his retiree life insurance was lifetime. At that meeting, Dillon documented Pastor's statement in a handwritten note.[112]

213. Disputed. Dillon received annual enrollment materials for the active employee medical and life insurance plans. He received annual booklets summarizing his pension, stock options and 401k balances, but did not receive SPDs describing his active employee benefits.[113]

214. Disputed in part. It is admitted that when Dillon was contemplating retirement in 2001, he requested retirement documentation from HR. Dillon requested retirement documentation to determine what was offered in terms of medical coverage for his wife during his retirement. [114]

215. Admitted.

216. Disputed in part. It is admitted that SPD 5 contains the statement set forth in Paragraph

[111] Dillon Tr. at 108:15-110:4.
[112] Dillon Tr. at 80:5-81:25, 108:15-108:23, 109:22-110:4, 163:15-164:14, 227:7-228:14; Dillon Dep. Ex. 9 at Dillon000134, Life Insurance Confirmation Sheet (PL APP 322).
[113] Dillon Tr. at 29:3-32:18, 35:3-38:15.
[114] Dillon Tr. at 78:18-24.

216. Plaintiffs dispute Paragraph 216 because it provides an incomplete statement of the textual portions and other evidence relevant to the proper analysis of SPD 5. Plaintiffs respectfully refer the Court to Plaintiffs' Counter-Statement of Material Facts at 12-17, found in Doc. 358.

217. Disputed in part. It is admitted that the section of SPD 5 entitled "Appendix A-Medical Coverage" contains the statement set forth in Paragraph 217. Plaintiffs dispute Paragraph 217 for the same reasons set forth in Paragraph 216.

218. Disputed in part. Page 9 of SPD 5, under the heading "When Coverage Ends" states: "Your coverage under the Retiree Medical Plan ends when: you die, or you do not pay your share of the cost of your coverage." SPD 5, Def. Ex. A-5 (Doc. 324-7). This statement confirmed in writing for Dillon that he had lifetime retiree medical benefits. According to Dillon, any alleged ROR language did not apply to him because of the lifetime language on page 9 of the SPD, in addition to representations from HR reps, received both before and after he obtained the SPD, of lifetime retiree medical and life insurance.[115]

219. Disputed in part. The deposition testimony cited by defendants concerned the enrollment materials describing medical plan options, and Dillon testified that he understood the options through these documents, and did not need to refer to other material.[116]

220. Disputed. Defendants misleadingly state that Dillon believed that "certain presumptions about the retiree benefits program turned out not to be true." Deposition references cited by defendants relate to spousal medical coverage offered to retirees following death of the retiree, and not about the lifetime nature of retiree medical and life insurance guaranteed to retirees.[117]

L. WILLIE DORMAN

221. Disputed in part. Willie Dorman's first name is "Willie" instead of "William."

[115] Dillon Tr. at 84:4-21, 92:7-24, 108:24-112:3, 180:22-182:4, 222:3- 223:14.
[116] Dillon Tr. at 159:10-18, 168:11-169:12.
[117] Dillon Tr. at 92:25-93:11, 98:5-98:25.

222. Admitted

223. Disputed in part. Dorman testified as stated, except he identified Milford Lamb ("Lamb"), the CT&T Personnel Manager, as being the employee who trained supervisors that retiree benefits would remain in effect until death.[118]

224. Disputed in part. Dorman could not recall a specific conversation with General Manager Vernon Hodges, but Dorman testified he spoke to Hodges on multiple occasions and Hodges told him the retiree medical benefits and grandfathered life benefits were lifetime benefits.[119]

225. Disputed in part. It is admitted that Dorman did not ask anyone at Sprint Corporate Headquarters in Kansas about retiree benefits, but the HR department for Dorman was always at CT&T in North Carolina.[120]

226. Disputed in part. Dorman received a brochure discussing the new FlexCare plan for retirees containing the quoted language, but he did not recall reading the alleged ROR language before he retired.[121] The ROR language is consistent with his understanding that the medical plan could be amended or terminated for active employees, but not employees who had already retired.[122]

227. Disputed in part. It is admitted Dorman received the SPD. He understood both employees and retirees would pay more for medical benefits under Flexcare and that the Company could adjust costs. However, Dorman also understood that employees who had retired before 1991 would keep their free medical benefits under the Indemnity plan.[123]

228. Disputed in part. It is admitted that Dorman received the SPD, but the quoted portion

[118] Dorman Tr. at 38:10-14, 113:1-4; 382:1-5, 397:5-400:10; Dorman Aff. ¶ 15 (PL APP 329). The deposition transcript of Plaintiff Dorman is located at Doc. 340-13, p. 8 to Doc. 340-14, p. 38 (DEF APP 895-1003).
[119] Dorman Tr. at 190:5-192:11, 382:25-384:2.
[120] Dorman Tr. at 148:20-25; Dorman Aff. ¶ 77 (PL APP 340).
[121] Dorman Dep. Ex. 2 (DEF APP 1008); Dorman Tr. at 157:14-158:12, 374:22-375:21.
[122] Dorman Tr. at 160:10-163:2-14; Dorman Aff. ¶ 64 (PL APP 337).
[123] Dorman Dep. Ex. 2 (DEF APP 1008); Dorman Tr. at 153:18-155:6; 157:14-158:12, 319:17-320:7, 327:6-23; 374:22-375:21; Dorman Aff. ¶ 79 (PL APP 340).

begins with "The Company expects to continue the Retiree Medical Plan indefinitely."[124] Dorman does not believe he read the alleged ROR language on page 3 before he retired because when he read the "When Coverage Ends" section on page 17 he saw coverage ends when you die but did not see any reference to page 3. Page 3 is also completely omitted from the Index.[125] The alleged ROR language is consistent with his understanding that the Company may change or terminate the medical plan for active employees, but not those who already retired.[126]

229. Disputed. Dorman received the cited document containing the quoted language, but he does not recall reading that language.[127] If he read it, it would have confirmed his understanding the Company could change or terminate benefits for active employees, not retirees.[128]

230. Disputed in part. Dorman received the cited document and it contains the quoted language, although it is quoted out of order.[129] Dorman does not recall reading it before he retired and did not rely on it to retire. The EOB is consistent with his understanding that the Company can change or terminate benefits for active employees, not retirees.[130]

231. Disputed in part. Dorman received a letter dated December 15, 1993 with an attachment; however, it had nothing to do with Dorman's grandfathered life and retiree medical benefits, but only addressed the pension plan, savings plan, and the life insurance available to Sprint and Centel employees, not CT&T employees.[131] Dorman does not recall reading the alleged ROR language quoted, but if he did, he would have understood that the Company could change or eliminate the particular benefits listed for its active employees.[132]

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[124] Dorman Dep. Ex. 13 (DEF APP 1074); SPD 1, Def. Ex. A-1 (Doc. 324-3); Dorman Aff. ¶ 80 (PL APP 340).
[125] Dorman Tr. at 246:13-21; 366:4-9.
[126] Dorman Tr. at 251:1-8; Dorman Aff. ¶¶ 64, 80 (PL APP 337, 340).
[127] Dorman Dep. Ex. 8 (PL APP 1027); Dorman Tr. at 203:24-204:14; Dorman Aff. ¶ 81 (PL APP 340).
[128] Dorman Tr. at 202:20-203:7.
[129] Dorman Dep. Ex. 23 (DEF APP 1124) ("Dorman EOB").
[130] Dorman Tr. at 345:10-16.
[131] Dorman Dep. Ex. 14 (DEF APP 1121); Dorman Tr. at 262:11-263:21.
[132] Dorman Tr. at 260:12-15, 262:2-6, 263:23-264:5.

232. Disputed in part. Dorman understood the Company could change the costs of the FlexCare retiree medical insurance in the future, but it was his understanding that the retiree portion and the Company's portion of the costs would be a fixed percentage throughout his retirement.[133] Dorman understood that the FlexCare plan itself was locked in and he did not understand the Company could amend the plan itself.[134]

233. Disputed in part. It is admitted that Dorman did not read the benefits booklets and insurance certificates he received when he was hired, but the life insurance benefit was not "grandfathered" at that time.[135]

234. Disputed. Dorman received multiple checklists promising retirees life insurance and medical benefits for life and provided them to his subordinates throughout his employment from 1968 until his retirement in 1994.[136] He received a checklist when he retired.[137]

235. Disputed in part. Although it is admitted the checklists changed, they were updated, "[v]ery infrequently because the benefits were solid. They never changed."[138] Dorman responded to counsel's detailed questions about documents mentioned in a checklist Bullock received in 1997, for example, an attachment with rates for Flexcare coverage.[139] Dorman's other testimony dealt with benefits not at issue in this action.[140]

236. Disputed in part. Dorman gave the testimony quoted; however, severance benefits were just one factor in Dorman's retirement decision. Dorman testified he retired because he also understood that he had lifetime life insurance and medical benefits; he would never have retired

[133] Dorman Aff. ¶ 52 (PL APP 335-36).
[134] Dorman Tr. at 153:18-155:6, 319:17-320:7, 327:6-23; Dorman Aff. ¶ 84 (PL APP 341).
[135] Dorman Tr. at 113:12-114:15, 131:11-22, 133:4-22.
[136] Dorman Tr. at 29:2-4, 38:21-40:5, 42:1-20, 43:23-45:18, 47:18-48:6, 49:15-23, 50:4-51:6, 52:4-9, 54:10-6, 63:13-17, 68:16-19, 367:13-375:21, 373:3-16, 382:7-23, 390:8-392:3, 415:10-17, 429:1-430:5; Dorman Aff. ¶ 86 (PL APP 341).
[137] Dorman Tr. 373:3-16, 429:1-430:5); Dorman Dep. Ex. 26; Dorman Aff. ¶ 47 (PL APP 335).
[138] Dorman Tr. at 49:15-23.
[139] Dorman Tr. at 280:17-282:8.
[140] Dorman Tr. at 272:22-25, 276:15-277:12, 278:13-17, 280:10-16, 294:5-295:8, 291:5-292:17.

if he had known the Company could change or terminate his benefits after retirement.[141]

237. Disputed. Dorman admitted the defense attorney read the words of an alleged ROR provision in a letter to John Burgess correctly, but said Burgess would definitely disagree with the attorney's interpretation.[142] The alleged ROR language did not inform Dorman the Company had the right to terminate medical and grandfathered life insurance after an employee retires.[143]

M. CALVIN BRUCE JOYNER

238. Admitted, except that Joyner is known by his middle name, "Bruce."

239. Admitted.

240. Disputed. Paragraph 240 highlights snippets from Joyner's deposition, but misrepresents its gist. Both meetings with Phillips occurred before Joyner made his decision to retire and he recalls the main points that they discussed.[144] During the 1991 meeting, Phillips and Joyner reviewed his retiree health and life insurance benefits.[145] She provided him with a checklist of retirement benefits and they discussed it.[146] During the 1993 meeting, they again reviewed a checklist of benefits that included his retiree health and life insurance.[147] Based on his conversations with Phillips and their discussions of the checklists, Joyner understood his retiree medical and life insurance would be intact until he died. He relied on this understanding to retire.[148] Although he cannot quote Phillips verbatim, the word "lifetime" was in the checklists, and she conveyed the message that his retiree life and health benefits would be intact until he

[141] Dorman Tr. at 164:16-165:3; Dorman Aff. ¶¶ 69, 88 (PL APP 338, 342).
[142] Dorman Tr. at 65:20-68:15.
[143] Dorman Tr. at 380:14-21.
[144] Joyner Tr. at 60:13-61:22, 64:10-75:7, 270:12- 274:4, 298:15-303:16, 317:23-320:3, 332:21-333:23. The deposition transcript of Plaintiff Joyner is located at Doc. 340-20, p. 75 to Doc. 340-21, p. 73 (DEF APP 1551-1635).
[145] Joyner Tr. at 60:13-61:22; 63:10-16; 64:10-75:7.
[146] Dorman Dep. Ex. 26 at Joyner000123 (DEF APP 1128); Joyner Tr. at 60:13-61:22, 63:10-16, 64:10-75:7, 270:12- 274:4, 298:15-303:16, 317:23-320:3, 332:21-333:23.
[147] Dorman Dep. Ex. 26 at Joyner000124 (DEF APP 1128); Joyner Tr. at 60:13-61:18, 75:9-77:21, 270:12- 274:4, 298:15-303:16, 317:23-320:3, 332:21-333:23.
[148] Joyner Tr. at 74:15-75:6, 225:14-18; 302:21-303:7, 333:13-23.

died.[149]

241. Admitted.

242. Disputed in part. It is admitted that Joyner read over documents he received, but he did not read every page of every document.[150]

243. Disputed in part. Joyner received a brochure containing the language quoted; however, Joyner scanned it without reading every word.[151] He did not understand it to reserve the right to terminate retiree medical or life insurance benefits after a person has retired.[152] Because the brochure refers to pension benefits which cannot be terminated lawfully, Joyner believed the purported ROR language did not refer to either pension benefits or retiree medical benefits, which he understood could not be terminated.[153]

244. Disputed in part. Joyner received SPD 1 and it contains the quoted language. Although the ROR language does not specifically refer to active employees, Joyner interpreted it to apply to those who have not yet retired because of his experience as an Assistant Vice President at the Company and his dealings with HR representatives.[154]

245. Disputed in part. Appendix A of SPD 1 contains the reservation of rights language quoted. However, Joyner did not understand that the language would allow the Company to terminate his medical coverage after he retired; rather, his understanding was that his benefits could not be terminated after he retired.[155] For an analysis of the alleged ROR provisions see Plaintiffs' Mem. Opposing S.J. on the Contractual Vesting Claims at 8-12 (Doc. 358).

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[149] Dorman Dep. Ex. 26 at Joyner000123-124 (DEF APP 1128); Joyner Tr. at 332-336, 318-319, 302:21-303:7, 333:13-23.
[150] *See, e.g.*, Joyner Tr. at 227:3-4.
[151] Joyner Dep. Ex. 15 (DEF APP 1701); Joyner Tr. at 241:13-14.
[152] Joyner Tr. at 305:15-307:5.
[153] Joyner Tr. at 305:15-307:11.
[154] (Def. Ex. A-1)(Doc. 324-3); Joyner Dep. Ex. 14 (DEF APP 1651); Joyner Tr. at 82:11-83:5, 229:9-10; 230:16-19, 227:15-228:18249:11-268:20, 316:5-25.
[155] Joyner Tr. at 237:8-238:25.

246. Disputed in part. Before his retirement, Joyner received the referenced EOB, but the document does not contain the Benefits Continuation language purporting to reserve the Company's right to change the benefits.[156] At his deposition, Joyner was shown a document produced by Plaintiff Dorman (Joyner Dep. Ex. 13) (DEF APP 1647), not Joyner Dep. Ex. 12 (DEF APP 1644).[157] Joyner understood the language quoted from that document to be consistent with his understanding the Company could terminate the benefits for those who had not yet retired, but not the benefits for those who already retired. Joyner did not understand the ROR language to impact existing retirees. If Joyner had read the ROR language, he would not have understood that it applied to retiree medical and life insurance benefits after retirement.[158]

247. Disputed in part. It is admitted that Joyner's copy of the EOB did not include the page with the purported reservation of rights provision and he said it was possible it could have been lost in his files, but he also testified he did not understand that provision to give the Company the right to terminate benefits for those already retired and it would not have applied to him.[159]

248. Disputed in part. It is admitted that Joyner bases his claim, in part, on the "When Coverage Ends" provision of SPD 1 (Joyner Dep. Ex. 14) and the language quoted. However, he also bases his claim on checklists he received from Phillips that promised lifetime benefits and upon representations made by Phillips.[160]

249. Disputed in part. Joyner was asked about a checklist containing the quoted language. However, paragraph 249 implies that Joyner's claim of misrepresentation is based upon that checklist alone. Joyner received two other checklists during meetings with Phillips in 1991 and

[156] Joyner Dep. Ex. 12 (DEF APP 1644).
[157] Joyner Tr. at 203:16-209:15.
[158] Joyner Tr. at 209:15-213:17.
[159] *Id.*
[160] See paragraph 240 above.

1993 that he relied on in making his retirement decision.[161] The language quoted in paragraph 249 does not come from either of those.[162] To the extent paragraph 249 implies that the checklists cannot be interpreted without reference to an SPD, it is incorrect. The checklists are self-explanatory documents. Human Resources personnel gave them to prospective retirees, like Joyner, with the expectation that they would rely upon them.[163] There was no need for a retiree to refer to an SPD to understand the checklists. They were used by HR personnel during discussions with retirees as an easy way for them to understand their benefits.[164]

250. Disputed. Joyner's employment ended voluntarily. His position was being eliminated during a restructuring, but he was not terminated involuntarily and could have remained employed with the Company.[165] He would not have retired if he had known the Company could eliminate his retiree medical and life benefits after his retirement began.[166]

251. Disputed in part. It is admitted that Joyner was shown the ROR provision in the retiree letter of John Byrd. However, Joyner did *not* understand the letter to properly reserve the Company's right to eliminate retiree medical and life insurance benefits.[167] Joyner understood the Company could not lawfully terminate pension benefits mentioned in the letter and concluded the ROR language could not possibly apply to the medical and life insurance benefits either.[168]

N. <u>ROBERT KING</u>

252. Admitted.

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[161] See paragraph 240 above.
[162] *Compare* Dorman Dep. Ex. 26 at Joyner000121 *with* 123 and 124 (DEF APP 1128); Joyner Tr. at 60:13-61:22, 64:10-75:7, 271:23-272:6, 274:7-18, 298:15-303:16, 317:23-320:3, 332:21-333:23.
[163] Phillips Tr. at 90:14-95:17.
[164] Joyner Tr. at 271:23-272:6.
[165] Joyner Tr. at 130-131; 297:17-22.
[166] Joyner Tr. at 292-293, 297-298.
[167] Joyner Tr. at 277:2-280:24; 307:13-311:22.
[168] Joyner Dep. Ex. 10 (DEF APP 1636); Joyner Tr. at 308:4-311:22.

253. Admitted.

254. Disputed. King's claim is not based on "an alleged omission in a single conversation he had with Mary Rose." HR rep Rose in fact told King at that meeting that his retiree medical and life insurance would remain the same for the rest of his retirement. In addition, King propounded written questions to HR rep P.J. Ladd ("Ladd") in which Ladd stated that dental coverage is part of the retiree medical plan, and that King and his wife were entitled to continue that coverage for their "lifetime." This confirmed for King that the retiree medical plan, of which dental coverage was a part, was lifetime. In addition, King asked Ladd about the amount of life insurance he would receive as a retiree and for how long the insurance would last. Ladd responded that he was eligible for a maximum of $25,000, and did not state any right to change, leading King to understand he would retain the $25,000 retiree life insurance for life. In 2006, King received an email response to his questions about the retiree life insurance benefits in which HR rep Lavender stated that the amount of his retiree life insurance would remain the same until his death, and his premiums would "remain the same during [his] life time."[169]

255. Disputed in part. Plaintiffs admit that King received a copy of SPD 1 in 1990 and it includes the statement set forth in Paragraph 255. Plaintiffs dispute Paragraph 255 because it provides an incomplete statement of the textual portions and other evidence relevant to the proper analysis of SPD 1. Plaintiffs respectfully refer to Plaintiffs' Counter-Statement of Material Facts at 8-12, found in Doc. 358.

256. Disputed in part. Before he decided to retire, King reviewed the table of contents of SPD 1 to determine where in the document it states when coverage ends, and understood from this

[169] King Aff. ¶¶ 1-2 (PL EX 8); King Tr. at 45:16-46:21 (PL APP 520-21); King Tr. at 202:12-204:24; (DEF APP 1840 - 1841); King Tr. at 206:8-21. The deposition transcript of Plaintiff King is located at Doc. 340-22 p. 64 through Doc. 340-23 p. 1-28 (DEF APP 1721-1777).

text, stating the benefit ends "when you die", that his retiree medical benefits were lifetime.[170]

257. Disputed in part. King received this memorandum in 1992 in response to his questions posed to Ladd, however, King testified that Ladd's answer to "Q9" did not state an ROR. Ladd was answering King's question about whether the Company would pay 85% of his premiums for the rest of his retirement. King testified that "[Ladd] does not say that they won't pay [medical premiums] for my lifetime, [only that] they will not pay 85 percent during my lifetime." King also testified that the language defendants quote in italics: "…features may change from year to year," also did not signify that the Company had the right to amend or terminate *the plan*. The word "features," viewed in the context of Ladd's paragraph, was limited to the "price tags, out-of-pocket maximums, things like that," and that this language did not indicate to King that the Company could terminate the plan. King also testified that Ladd's answer in "A11" did not state that the Company could terminate the plan. Ladd was responding to King's question about the plan's spousal coverage after he turns 65 and goes on Medicare, and his statement about what will happen in the future clearly concerned the issue of costs for the medical benefits for Medicare-eligible retirees, not that the Company could terminate the plan.[171]

258. Disputed. King did not testify that the responses from Ladd meant that the Company could reduce or terminate the retiree benefits. Defendants take King's quote out of context. As stated above, Ladd's responses to King's questions confirmed for King that his retiree medical and life insurance benefits were lifetime. In addition, King testified that he understood the phrase "the responses were subject to change" to mean that Ladd could make additional changes to the memorandum, as he had done by his handwritten notes on the memorandum. King testified that the promise of lifetime retiree benefits was made by the Company for those who

[170] SPD 1, Def. Ex. A-1 at 17 (Doc. 324-3); King Tr. at 64:7-25.
[171] King Tr. at 99:1-4, 199:18-200:18, 201:3-202:3, (DEF APP 1838 - 1839).

retired under then-existing plans, allowing changes for active employees, but after retirement.[172]

O. LAUDIE COLON MCLAURIN

259. Disputed in part. McLaurin goes by "Colon."[173]

260. Admitted.

261. Disputed in part. It is admitted that Plant Manager Donald E. Clark (no relation to Plaintiff Clark) and McLaurin did not refer to any documents when McLaurin was making his retirement decision. However, his conversations with Clark took place before McLaurin made his retirement decision.[174] Clark specifically told McLaurin his retiree medical and life insurance were for life and at no cost.[175] McLaurin relied upon that representation to retire.[176]

262. Admitted.

263. Disputed in part. McLaurin testified he received booklets describing retiree medical benefits while he still employed, but McLaurin did not testify that he "did not receive any documents from the Company suggesting that his retirement benefits were for life;" instead, he testified he does not know what the booklets said and did not read or rely on them.[177]

264. Disputed in part. It is admitted that McLaurin retired when he reached 55 years of age and had 35 years of experience with the Company; however, he testified that the retiree medical and life insurance benefits were extremely important to him and he would not have retired but for the promise made by Company representatives that he would receive these benefits for the rest of his life.[178] McLaurin denies telling Doug Hollingsworth that he would have retired at age

[172] King Tr. at 61:11-63, 197:6-9, 202:12-19.
[173] McLaurin Aff. ¶ 1 (PL APP 522).
[174] McLaurin Tr. at 37:1-5; 37:24-38:10. The deposition transcript of Plaintiff McLaurin is located at Doc.340-24, pp. 14-49 (DEF APP. 1846-1881).
[175] McLaurin Tr. at 50:12-51:18; 72:16-73:13.
[176] McLaurin Tr. at 18:5-15, 36:24-40:23, 50:12-56:5, 72:16-73:13, 119:15-120:8.
[177] McLaurin Tr. at 36:18-22; 69:4-71:16, 82:9-87:15, 90:24-91:24.
[178] McLaurin Tr. at 57:10-59:13, 72:16-73:10, 77:2-16, 78:15-19.

55 regardless of the lifetime promise of medical and life insurance benefits.[179]

P. WANDA SHIPLEY

265. Admitted

266. Admitted

267. Disputed in part. It is admitted that in Spring 1999, Shipley and others met with HR employee Walters to discuss an offer of retirement. Walters expressly stated that the retiree medical and life insurance was for life.[180]

268. Admitted.

269. Disputed in part. It is admitted that the written package provided to Shipley by Walters was lost to a flood in 2001. Shipley received SPD 6 in the mail, and before making her decision to retire, reviewed the section under the heading "When Coverage Ends," which states: "Your coverage under the Retiree Medical Plan ends when: you die, or you do not pay your share of the cost of your coverage." Shipley also reviewed the section "When Does Coverage End" under the Basic Retiree Life Insurance Appendix (Appendix D) before making the decision to retire. That section similarly states: "The basic life insurance coverage ends on the date of your death." These written statements were consistent with what Walters had told Shipley about the lifetime nature of the retiree medical and life insurance benefits.[181]

270. Disputed in part. Plaintiffs admit that Shipley was offered a written retirement package by Walters that stated that her retirement medical and life were for life. Shipley testified that this package expressly stated that her retiree medical and life insurance benefits were for life.[182]

271. Disputed in part. It is admitted that Shipley received the letter from Davidson, but she

[179] McLaurin Aff. ¶ 17 (PL APP 526-27).
[180] Shipley Tr. at 8:25-11:11-16, 19:19-21. The deposition transcript of Plaintiff Shipley is located at Doc 340-24 p. 50 through Doc 340-25 p. 19 (DEF APP 1882-1931).
[181] Shipley Tr. at 25:11-12, 108:24-109:7, 191:10-193:4, (DEF APP 1944).
[182] Shipley Tr. at 9:6-16, 9:24-10:10, 42:3-12, 192, 191:10-193:4.

had served her last day of work more than a year prior to receipt of the letter, and did not thoroughly review the letter. In addition, defendants do not inform the Court that alleged ROR language is found on the last page of the letter, which includes nothing but a line about returning completed forms by a certain date, the alleged ROR and Davidson's signature, and follows language in the previous two pages discussing many other benefits, such as pension benefits, for which the Company undisputedly did not have the right to reduce or terminate.[183]

272. Disputed. No "Retiree Medical Plan packet" was enclosed with Davidson's letter.[184]

273. Admitted.

274. Disputed in part. It is admitted that SPD 6 contains the statement set forth in Paragraph 274, and that Shipley received and reviewed SPD 6 prior to her decision to retire. Plaintiffs dispute Paragraph 274 because it provides an incomplete statement of the textual portions and other evidence relevant to the proper analysis of SPD 6. Plaintiffs respectfully refer to Plaintiffs' Counter-Statement of Material Facts at 12-17 (Doc. 358). Further, because Walters expressly stated that retiree medical and life were for life, the language quoted by defendants did not indicate to her that the Company had the right to terminate her retirement benefits.[185]

275. Disputed. Shipley skimmed SPD 6, and did not read some of the alleged ROR provisions because they are found in the SPD without headings, and she therefore did not see them. In any event, Walters told Shipley that the retiree medical and life were lifetime, and believed that once she retired, those benefits were as promised – lifetime. While she skimmed the SPD, the "When Does Coverage End" provision "jumped out like a tiger at [her]" because it stated what had been told verbally to her by Walters.[186]

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[183] Shipley Tr. at 27:12-15; 71:3-4 (Shipley's last day of work was June 30, 1999).
[184] Shipley Tr. at 33:10-12.
[185] Shipley Tr. at 9:6-16, 9:24-10:10, 65:2-7, 186:12-20.
[186] Shipley Tr. at 61:16-62:4, 65:2-7, 192:15-193:4.

276. Disputed. Had Shipley not been told that her retiree medical and life were lifetime if she chose to accept retirement, she would have continued working for the Company for a number of years beyond 2001. In addition, in late 1999, Shipley's last supervisor, Steve Brown, asked if she would like to return to perform contract work. Shipley declined because she did not feel the need to work due to the promise of lifetime retiree medical and life. Had Shipley been told of the Company's alleged ROR, she would have accepted Brown's offer, and continued working beyond 2001. Further, had Shipley been told of the alleged ROR, she would have avoided certain discretionary expenditures and generally been more prudent with her expenses.[187]

Q. CARL SOMDAHL[188]

277. Admitted.

278. Admitted.

279. Disputed in part. In March of 1998, HR rep Chichester told Somdahl that the retiree medical benefits would continue for his "lifetime."[189]

280. Disputed in part. Somdahl discussed his retirement benefits with corporate head office HR rep Linda Smith ("Smith"), who told him his retiree medical and life insurance were for life and "didn't leave [him] any question that there was ever going to be any problem."[190]

281. Disputed in part. Corporate HR rep Balough confirmed to Somdahl in a telephone conversation that his retiree medical benefits "would be there" throughout his retirement.[191]

282. Disputed in part. Although Somdahl's handwritten notes do not contain the word "lifetime," they do demonstrate that he discussed the retiree medical and life insurance benefits

[187] Shipley Tr. at 12:19-13:7, 23:20-24:16, 141:10-14, 188:11-19; Shipley Aff. ¶¶ 4-6 (PL APP 597-98).
[188] The deposition transcript of Plaintiff Somdahl is located at Doc 340-25 p. 67 through Doc. 340-26 p. 1-42 (DEF APP 1979-2032).
[189] Somdahl Tr. at 23:15-24:16.
[190] Somdahl Tr. at 74:11-76:2.
[191] Somdahl Tr. at 51:9-21, 125:8-21, 194:21-196:4.

with human resources personnel and that they told him the benefits were lifetime.[192]

283. Disputed in part. It is admitted that Somdahl received the employee handbook in 1991, however, plaintiffs dispute Paragraph 283 because it provides an incomplete statement of the textual portions and other evidence relevant to its proper analysis. The alleged ROR language quoted in Paragraph 283 is in a handbook entirely directed to employees, not retirees, and expressly states that the handbook is not intended to be all-inclusive. The handbook provides general information for multiple *active* employee policies and benefits, including compensation, discipline, meals, performance appraisals, etc. Somdahl testified that he probably looked at the Table of Contents and read only the specific parts applicable to him.[193]

284. Disputed in part. The "About Your Benefits" section in the employee handbook provides terse descriptions of a plethora of benefits provided to *active* employees, including the Company's credit union, employee educational assistance, active employee medical, life, dental and vision benefits, holidays, personal days off, etc. The generic reservation language cited by defendants therefore appears to pertain to active employees. This 60 page employee handbook dedicates three paragraphs to the Company's "Retirement Plan," in which the "retirement package" is described as including a pension plan, savings plan and retiree medical plan. Promissory language of lifetime benefits for all three of these benefits is included: "This retirement package is designed to help ensure that you will be financially secure when you retire." (DEF APP 2131). Nothing more is stated about the retiree medical benefits component of the Company's "retirement package," including any language separating out the medical component from the other vested portions of the "retirement package." [194]

285. Disputed in part. Smith told Somdahl in his telephone call with her that she would mail

[192] Somdahl Tr. at 51:7-52:15, APP 2033; Somdahl Tr. at 74:11-75:21; (DEF APP 2076).
[193] (DEF APP 2086); Somdahl Tr. at 161:19-163:6-22; (DEF APP 2089-2143).
[194] (DEF APP 2122-2136); (DEF APP 2131); Somdahl Tr. at 164:6-15.

him a copy of the Retiree Medical Plan SPD, however, in discussing the SPD, Smith told Somdahl in no uncertain terms that the retiree benefits described in the SPD were "lifetime benefits," and despite sending out the SPD did not suggest to Somdahl that he read it.[195]

286. Admitted.

287. Disputed. Plaintiffs dispute Paragraph 287 because it provides an incomplete statement of the textual portions and other evidence relevant to the proper analysis of SPD 3. Plaintiffs respectfully refer to Plaintiffs' Counter-Statement of Material Facts at 8-12, found in Doc. 358. Further, Smith did not instruct him to read the SPD. When Somdahl receives a document like an SPD, he reviews the table of contents to "see if [he needs] to look at anything." The sections on "When Coverage Ends" and the Rx program "caught [his] attention" because the "When Coverage Ends" sections states unequivocally that "the benefits were available … until death, and [he] accepted that," and he did not have Rx coverage as a union employee, but would have that coverage as a retiree. The statement in the "When Coverage Ends" section is consistent with what he was told by various Company representatives, including Ray Murray ("Murray"), the District Manager of United Telephone of the Northwest, and HR reps Chichester and Balough.[196]

288. Disputed in part. It is admitted that a section of SPD 3 includes the statement contained in Paragraph 288, but dispute the paragraph for the reasons found in Doc. 358 at 8-12.

289. Disputed in part. Somdahl's medical coverage was important in his decision to retire, and he would not have retired had he known of the ROR. He understood the details of the retiree medical benefits because HR reps mailed him information that outlined what his coverages and costs would be. Before accepting employment, Somdahl was assured by District Manager Murray that retirement benefits were for life. Based upon his conversations with Murray and HR

[195] Somdahl Tr. at 74:11-75:8.
[196] Somdahl Tr. at 56:2-57:24, 74:11-75:8, 194:21-196:4.

reps Chichester, Smith, and Balough, he understood his retirement benefits were lifetime.[197]

290. Disputed in part. Plaintiffs dispute Paragraph 290 because it does not provide a statement of the textual portions of "Appendix B-Prescription Drug Program," improperly characterizes the language as an "ROR provision," and does not describe the location of the language. The textual portions of "Appendix B-Prescription Drug Program," characterized as an "ROR provision," states that the plan contains a "retail plan where you use a prescription drug card to purchase prescriptions from a pharmacy participating in network and a mail service plan" (bold in original). This is followed by language stating that "any of the coverages" can change or terminate, suggesting that certain of the specific services or methods of providing benefits (like the pharmacy network or mail service plan) might change, but not stating that the plan itself may be terminated. (DEF APP 2065). Somdahl did not review this page because the actual information about the prescription program begins on the next page, and DEF APP 2065 contains nothing more than the cited language. *Compare* DEF APP 2065 with DEF APP 2066.[198]

291. Disputed in part. The cited language indicated to Somdahl that he would have medical and life insurance until death, and is akin to statements by Murray, Chichester, and Balough.[199]

292. Somdahl would not have retired had he known of the ROR. He would have continued working in his position another three to five years (until 2002 – 2004), and longer if he was placed in a less physically demanding position.[200]

[197] Somdahl Tr. at 42:2-43:20, 51:9-21, 58:14-17, 63:10-15, 74:11-75:8, 125:8-21; 134:6-16, 189:21-191:25, 194:21-196:4; Somdahl Aff. ¶ 2 (PL APP 599).
[198] Somdahl Tr. at 65:6-9.
[199] Somdahl Tr. at 32:4-7, 194:7-12.
[200] Somdahl Tr. at 59:18-25-58:14-17; Somdahl Aff. ¶ 2 (PL APP 599).

PLAINTIFFS' STATEMENT OF ADDITIONAL UNDISPUTED FACTS[201]

A. BENEFITS MANAGER LISA HUX[202]

1. Benefits Manager Hux worked for the Company for thirty-seven years (1979-2006) and regularly had discussions with managers at CT&T regarding retirement benefits. It was a common understanding among management that the Company was obligated to provide retiree health and life insurance throughout employees' retirements.[203]

2. For the Sprint Mid-Atlantic Region, Hux supervised the Benefits and Pension Manager, the Insurance Benefits Supervisor, the Pension and Savings Supervisor, the Employee Data Supervisor, the Budget Coordinator and their direct reports.[204]

3. Hux worked with numerous Sprint benefits executives in Kansas City, including Vice President E.J. Holland, Jr., Director of Benefits Ross Christopher, and Director of Benefits Strategy Randy Parker. The Kansas City executives depended on Hux and her staff to advise them about issues concerning local personnel.[205]

4. Hux had the "grandfathered life insurance" program throughout her employment. It was "grandfathered" twice while she was there. Hux herself drafted the 1994 grandfathering resolution and considered this life insurance to be a vested benefit.[206]

5. In 2000, Hux made a list of the active employees who would be eligible for the CT&T grandfathered life insurance when they retired.[207]

6. Hux had both group meetings, individual one on one meetings, and conference calls with

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[201] Plaintiffs' Statement of Additional Undisputed Facts is herein referred to as "SAF".
[202] The deposition transcript of Lisa Hux is located at PL EX 15 (Doc. 358-16 at 2).
[203] Hux Tr. at 9:23-12:23; 26:4-28:13.
[204] Phillips Dep. Ex. 2 (PL APP 529); *Id.* at 12:3-13:25.
[205] Hux Tr. at 33:16-35:21, 35:23-36:5, 47:5-7.
[206] Hux Tr. at 15:2-18, 17:3-23, 18:6-19, 36:6-37:16; Hux Tr. at 40:13-41:13; 279:15-16; Phillips Dep. Ex. 12 (PL APP 532). The grandfathered life insurance benefit was separate and distinct from the death benefit offered through the Voluntary Employee Benefit Association (VEBA), a 501(c)(9) trust. *Id.*
[207] Hux Tr. at 40:13-18; Hux Dep. Ex. 61 at EQ_FUL_208613.

employees in which she explained their retirement benefits. During her career, Hux counseled at least 1,500 employees with regard to their retirement insurance benefits.

7. Hux told retiring employees they would have medical insurance throughout their retirements and life insurance until they died.[208] Hux considered these representations to be a promise of lifetime benefits.[209]

8. Hux approved the checklists[210] that her staff provided to employees considering retirement.[211] The checklist says "*life insurance 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). Hux considered this to be a promise of lifetime benefits.[212]

9. The same checklist states: "*If the retiree is participating in the group medical care … insurance may be continued after retirement . . . Medical insurance will be continued at no cost for the retiree and their dependants*." (emphasis added)[213] Hux considered this to promise continuation of medical insurance throughout the retiree's life.[214]

10. Hux herself understood that the Company was promising to provide medical insurance to retirees after they reached age 65. In 1995, Hux wrote a "Dear Retiree" letter and Q & A explaining how retiree medical benefits would coordinate with Medicare at age 65.[215]

11. Hux knows that HR reps told employees concerned about the new SHARE program that they had to retire by the end of 2001 to retain their grandfathered life insurance and FlexCare medical insurance for the remainder of their lives. Employees were forced to waive vacation

[208] Hux Tr. at 25:13-26:16, 28:14-29:19.
[209] Hux Tr. at 28:14-29:7; 32:9-16, 33:8-14.
[210] Phillips Dep. Exs. 7-10 (PL EX 10) and Bullock Dep. Ex. 39 (PL EX 12).
[211] Hux Tr. at 29:20-31:12.
[212] Hux Tr. at 31:18-32:8. 32:2-8.
[213] Bullock Dep. Ex. 39 (Phillips Dep. Ex. 7)(PL EX 12).
[214] Hux Tr. at 32:22-33:14.
[215] Hux Tr. at 52:10-54:5; Phillips Dep. Ex. 30 (PL APP 535-538).

time to keep this lifetime coverage if its use put them into 2002.[216]

12. Hux testified that bargaining unit employees retained the benefits stated in their CBAs throughout their retirements unless the CBA stated otherwise.[217]

13. Hux understood Dorman's EOB to be a promise of lifetime benefits.[218]

14. Hux testified that the ROR, "The Company expects to continue the benefits described for the foreseeable future. However, the Company reserves the right to amend, discontinue, or terminate these benefits" does not clearly explain the Company's right to amend, terminate or discontinue the retiree medical benefits.[219] Asked if there is any way for a retiree reading the document to know which benefit the ROR language refers, she testified, "I think it's ambiguous. I don't think it's very clear exactly what it is relating to."[220]

15. Hux was also shown an ROR paragraph in the Dorman EOB saying the Company will not treat the retiree any less favorably than other retirees similarly situated. Hux testified this "similarly situated" language does not allow for termination of benefits.[221]

16. Hux testified the "When Coverage Ends" section of SPDs stating coverage ends "when you die" was a lifetime promise, and was consistent with what she told retirees.[222]

17. Hux denied the purported ROR in letters sent to retiring employees was sufficiently clear to reserve a right to terminate the retiree medical and life benefits.[223]

18. Upon reviewing multiple letters sent to retiring employees, Hux testified the purported ROR language was not specific about the benefits the Company could amend, discontinue or

[216] Hux Tr. at 57:19-62:12.
[217] Hux Tr. at 67:17-69:17.
[218] Hux Tr. at 163:3-8; 158:24-164:16; 289:2-8; Dorman Dep. Ex. 23 (DEF APP 1124).
[219] Hux Tr. at Hux Tr. at 161:24-162:9, 163:3-8; 158:24-164:16; Dorman Dep. Ex. 23 (DEF APP 1124).
[220] Hux Tr. at 290:3-16; 284:16-290:2, 322:9-7; Dorman Dep. Ex. 23 (DEF APP 1124).
[221] Hux Tr. at 286:7-287:3; Dorman Dep. Ex. 23 (DEF APP 1124).
[222] Barnes Dep. Ex. 18 (PL APP 81-138); Hux Tr. at 265:18-268:6.
[223] Hux Tr. at 168:11-169:13, 173:5-185:19.

terminate and she believed the language was ambiguous.[224]

19. Hux has no doubt whatsoever that she represented to retiring employees, both in groups and individually, that they would have retiree medical coverage throughout their retirements as long as they paid their share of the premiums, and that the retiree life insurance would continue for the remainder of their lifetimes.[225]

20. Hux considered her statements to be promises by the Company: "I was a mouthpiece for the Company."[226]

21. Hux never told an employee the Company was reserving its right to amend, terminate or discontinue the retiree benefits.[227]

B. BENEFITS SUPERVISOR GAYLE PHILLIPS[228]

22. Benefits Supervisor Phillips worked for the Company thirty years (1970-2001) in the benefits arena. One of her superiors was Hux.[229]

23. Phillips counseled thousands of retirees and managers, face to face and in group meetings, and never told them the Company was reserving its right to terminate the benefits.[230]

24. Phillips had her staff create "checklists" distributed to retirement-eligible employees at group and individual retirement planning sessions, and CT&T managers explaining the retirement benefits.[231] Phillips expected employees to rely upon these checklists.[232]

25. The checklists stated that "Medical care insurance would be continued at no cost[233]or

[224] Phillips Dep. Ex. 41, 42, 43, 44 (PL APP 581-); Hux Tr. at 298:6-311:18; 323:15-19.
[225] Hux Tr. at 315:15 – 316:-20.
[226] Hux Tr. at 326:15.
[227] Hux Tr. at 325:9-22.
[228] The deposition transcript of Phillips is located at PL EX 9 (Doc. 358-10).
[229] Phillips Tr. at 8:8-9:21;12:13-20.
[230] Phillips Tr. at 42:15-45:2, 45:20-46:3.
[231] Phillips Dep. Exs. 7-11 (PL EX 10); Fulghum Dep. Ex. 18 (PL EX 11); Bullock Dep. Ex. 39 (PL EX 12); Phillips Tr. at 90:14-95:17, 122:6-14.
[232] Phillips Tr. at 93:1-95:6.
[233] *See e.g.*, Phillips Dep. Ex. 7 (PL EX 10); Dorman Dep. Ex. 26 (DEF APP 1128).

provided the monthly premium was is paid.[234]

26. Phillips instructed retiring employees that they would continue to have medical insurance throughout their retirements.[235]

27. The checklists specified life insurance was for "the remainder of the retiree's lifetime."[236]

28. Phillips was involved in preparing SPDs for most of her career, including the SPDs relating to the grandfathered life insurance.[237] Phillips herself understood the grandfathered life to be a lifetime benefit for retirees.[238]

29. In an e-mail exchange with Bullock when Sprint was considering a merger, Phillips addressed the right to change or terminate benefits. The message was that if Bullock retired before the benefits were changed she would have the benefits during retirement.[239]

30. In 2001, benefits administration was centralized in Kansas City. Phillips identified a document at that time showing which retirees were entitled to the grandfathered life benefit.[240]

31. Phillips could have told Bullock that she would have medical and life insurance throughout retirement and that the life insurance was "written down in blood" in the contract the Holderness family negotiated for the sale of CT&T to United Telephone.[241]

32. Phillips met with Joyner multiple times, giving him the checklists, and stating that his retiree medical would remain as long as he paid the premiums.[242]

33. During the thirty years that she counseled employees about retirement, Phillips

[234] *See e.g.*, Phillips Dep. Exs. 8-10 (PL EX 10); Daniel Dep. Ex. 20 (DEF APP 2183)
[235] Phillips Tr. at 99:16-21.
[236] *See e.g.*, Phillips Dep. Exs. 7-10 (PL EX 10); Phillips Tr. at 52:9-53:4;99:22-100:15.
[237] Phillips Tr. at 247:19-251:4.
[238] Phillips Tr. at 101:4-10.
[239] Phillips Dep. Ex. 19 (PL APP 533-534); Phillips Dep. at 131:7-138:8.
[240] Phillips Dep. Ex. 16 (PL EX 14); Phillips Tr. at 156:1-161:21.
[241] Phillips Tr. at 215:1-216:23.
[242] Phillips Dep. 218:11-220:14.

understood they would have lifetime medical benefits after they retired.[243]

C. PLAINTIFF DONALD CLARK[244]

34. Chief Operator Pierce gave Clark the checklist promising lifetime retiree benefits.[245] She was a management employee authorized to speak on behalf of the Company regarding benefits.[246]

35. Clark also spoke to Phillips about retirement and she mailed him the checklist.[247]

36. The checklist described the grandfathered life insurance as one times the retiree's salary "for remainder of the retiree's lifetime." Based on this document and his discussions with Pierce and Phillips, Clark understood he would have Company-paid life insurance until he died.[248]

37. The checklist also described lifetime medical benefits: "Medical care insurance will be continued at no cost for the retiree and their dependents."[249]

38. Based on these promises, Clark retired in 1976. He made many financial decisions from the time of his retirement until his benefits were eliminated in 2007 based upon his understanding of lifetime retiree medical and life insurance: 1) not seeking other life insurance, 2) buying antique cars, 3) expensive home remodeling from 2003 to 2007. [250]

D. PLAINTIFF JAMES WOODIE BRITT[251]

39. Britt met with an "upper position" HR Rep who gave him a checklist and explained his

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[243] Phillips Dep. at 9:8-14; 38:7-10, 212:10-18.
[244] The Affidavit of Plaintiff Clark (PL APP 280) summarizes the facts relevant to his claim for breach of fiduciary duty. The deposition transcript of Plaintiff Clark's 1st deposition was filed as Doc. 340-10, p. 16-69 (DEF APP 649-702). The deposition transcript of Plaintiff Clark's 2nd deposition was filed as PL EX 17 (Doc. 358-18).
[245] Bullock Exhibit No. 39**,** Clark Tr. at 113:24-119:5-14; Clark 2nd Tr. at 6:23-13:4; Clark Aff. ¶¶ 12-13 (PL APP 280-281).
[246] Clark Tr. at 119:5-14; Clark 2nd Tr. at 10:4-13:4; Clark Aff. ¶ 13 (PL APP 281).2nd Tr. at 6:23-7:10.
[247] Clark Tr. at 159-162; Clark 2nd Tr. at 13:22-15:22; Clark Aff. ¶ 14 (PL APP 284).
[248] Bullock Dep. Ex. 39, Clark 2nd Tr. at 10:22-12:24; Clark Aff. ¶ 16-17 (PL APP 281-282).
[249] Bullock Dep. Ex. 39; Clark Aff. ¶ 18 (PL APP 282).
[250] Clark Aff. ¶ 28 (PL APP 284).
[251] The Affidavit of Plaintiff Britt (PL APP 219-229) summarizes the facts relevant to his claim for breach of fiduciary duty. The deposition transcript of Plaintiff Britt is located at Doc. 340-4, p. 20 to Doc. 340-5, p. 15 (DEF APP 215 -289).

benefits using it.[252] This employee was blond, medium build, and about 35 to 40 years old. Benefits Supervisor Phillips admitted it could have been her. [253]

40. The HR Rep explained the Company would provide a fully paid retiree medical insurance plan, stating he would have it "as long as you and your wife lived."[254]

41. The HR Representative also told Britt he would the grandfathered life insurance benefit at one times his salary ($26,000) for the rest of his life.[255]

42. Britt's also understood that his retirement benefits were secured by the CBA when he made his retirement decision.[256]

43. Britt relied on these representations of lifetime retiree medical and life in deciding to retire and take his pension as a 100% annuity with no survivor benefit.[257] He was never told orally or in writing of the Company's alleged ROR.[258]

44. From his retirement until 2007, Britt made annual spending decisions in reliance on the Company's representations of paid lifetime medical and life insurance, including buying an expensive riding lawnmower in 2003.[259]

E. PLAINTIFF LAUDIE COLON MCLAURIN[260]

45. In Spring 1988, before McLaurin made the final decision to retire, Plant Manager Clark told him that his retiree life insurance, health insurance, and telephone concession were going to be provided by the Company "for life." It was after that conversation that McLaurin made his

[252] Fulghum Dep. Ex. 18; Britt Tr. at 252:6-255:23; 258:3-6; (DEF APP 2153); Britt Aff. ¶ 9 (PL APP 221-222).
[253] Britt Tr. at 69:25-72:6; 95:9-97:4,148:20-150:15,158:6-162:23, 170:19-172:25, 173:6-174:1, 250:13-259:2; Britt Aff. ¶ 8 (PL APP 221); Phillips Tr. at 213:7-214:6.
[254] Britt Tr. at 158:16-19; *see also* 256: 2-23, 267:24-268:8; 269:7-269-25; Britt Aff. ¶ 9-10 (PL APP 221-222).
[255] Britt Tr. at 96:13-97:4, 253:21-254:22, 270:9-270-14, 281:15-283-3, 290:8-291:19; Britt Aff. ¶ 11 (PL APP 222).
[256] Britt Tr. at 60:21-61:10, 105:21-108:9, 109:2-117:17; Britt Aff. at ¶ 25 (PL APP 226-227). Britt Dep. Ex. 3 (PL APP 151-208); SPD 19, Def. Ex. A-19 (Doc. 324-21).
[257] Britt Tr. at 148:5-149:4, 239:13-249:25; Britt Aff. ¶ 14 (PL APP 223).
[258] Britt Tr. at 121:24-122:5, 256:25-257:22; Britt Dep. Ex. 8 (PL APP 209-211); Britt Aff. ¶ 12 (PL APP 222-223).
[259] Britt Aff. ¶ 17 (PL APP 224).
[260] The Affidavit of Plaintiff McLaurin (PL APP 522-528) summarizes the facts relevant to his claim for breach of fiduciary duty. The deposition transcript of Plaintiff McLaurin is located at Doc.340-24, pp. 14-49 (DEF APP. 1846-1881).

decision to retire.[261]

46. McLaurin understood he would have lifetime life and health benefits at no cost.[262]

47. Before McLaurin retired he had never been told that the Company was reserving a right to amend or terminate his benefits. If he had been told, he would not have retired when he did.[263]

48. McLaurin made numerous financial decisions in reliance on his understanding that he would have lifetime medical and life insurance including: 1) foregoing the purchase of additional life insurance before being diagnosed with prostate cancer and 2) purchasing a bed and breakfast business in 2000 and then paying for expensive upgrades and liability insurance until he had to shut the business down in 2009.[264]

F. PLAINTIFF WILLIE DORMAN[265]

49. During Dorman's 35 year career, the Company used the lure of lifetime retiree benefits, including medical and life, to recruit and retain employees. Construction Foreman Glenn Allen was the first manager to tell Dorman that even though the wages were less than he could otherwise obtain, he should continue working for CT&T because he would have "lifetime" retirement benefits.[266]

50. In the early 1960's, Construction Foreman Raymond Finch told employees they would have "lifetime" benefits if they worked for CT&T long enough to retire.[267]

51. In 1968, Dorman was promoted to management. Personnel Manager Milford Lamb ("Lamb") trained him that retirement life insurance and medical benefits were "lifetime"

[261] McLaurin Tr. at 18:5-15, 36:24-40:23, 49:12-55:5, 72:16-73:2, 119:15-120:8; McLaurin Aff. ¶ 5 (PL APP 523).
[262] McLaurin Tr. at 19:2-8, 48:4-49:20.
[263] McLaurin Tr. at 57:10-59:13, 72:16-73:10, 77:2-16, 78:15-19; McLaurin Aff. ¶ 7 (PL APP 524).
[264] McLaurin Tr. at 13-23, 19:2-8, 48:4-49:20119:15-120:8; McLaurin Aff. ¶¶ 6, 10-12 (PL APP 523-525).
[265] The Affidavit of Plaintiff Dorman (PL APP 327-343) summarizes the facts relevant to his claim for breach of fiduciary duty. The deposition transcript of Plaintiff Dorman is located at Doc. 340-13, p. 8 to Doc. 340-14, p. 38 (DEF APP 895-1003).
[266] Dorman Tr. at 378:1-20; Dorman Aff. ¶ 12 (PL APP 329).
[267] Dorman Aff. ¶ 14 (PL APP 329).

benefits. Lamb told the new managers to recruit and retain employees, by telling them they could retire at 50 years of age and receive lifetime medical and life insurance.[268] After this meeting, Dorman frequently told potential and active employees that the life and medical insurance was lifetime if they retired with CT&T.[269]

52. As a manager, Dorman told workers at hundreds of meetings that the life insurance and medical benefits were lifetime benefits.[270]

53. As part of his job duties as a Foreman, Dorman conducted exit interviews with retiring employees where he gave them retiree benefit "checklists" that were supplied by Lamb and his staff and told them the benefits were for life.[271]

54. Dorman estimates that he discussed the checklist with approximately 1,500 active employees during his employment. [272] The checklist was updated throughout the years, but the benefits stayed the same, stating the grandfathered life insurance was a "lifetime" benefit and medical benefits would continue during retirement.[273] They did not include any language indicating that the Company could terminate these benefits.[274]

55. After Dorman became a District Manager in 1976, he had multiple conversations with his boss, Division Plant Manager Vernon Hodges ("Hodges") during which Hodges said the retiree benefits were lifetime benefits.[275]

56. As part of Dorman's job duties, he was required and authorized by the Company to provide managers and supervisors with information he received from HR about retiree

[268] Dorman Tr. at 38:10-14, 113:1-4, 382:1-5, 397:5-400:10; Dorman Aff. ¶ 15 (PL APP 329).
[269] Dorman Tr. at 384:4-13; Dorman Aff. ¶ 16 (PL APP 329-330.
[270] Dorman Tr. at 384:4-388:14, 392:8-393:14, 395:16-396:7, 397:5-7; Dorman Aff. ¶ 16 (PL APP 329-330).
[271] Dorman Tr. at 38:21-40:5, 29:2-4, 52:4-9, 54:10-6; 382:7-23; Dorman Aff. ¶ 17 (PL APP 330); See facts stated in Hux and Phillips sections above regarding the checklists.
[272] Dorman Aff. ¶ 28 (PL APP 332); Dorman Dep. Ex. 26 (DEF APP 1128).
[273] Dorman Tr. at 49:15-23.
[274] Dorman Tr. at 367:13-375:21; Dorman Aff. ¶ 28 (PL APP 332).
[275] Dorman Tr. at 190:5-192:11, 382:25-384:2; Dorman Aff. ¶ 19 (PL APP 330).

benefits.[276] He told employees what he had always been told by management and HR, that these benefits were "guaranteed for life" and "remain there until you die."[277]

57. Dorman understood that the Company had the right to change benefits for its active employees, but that these changes did not apply to employees who had previously retired because retirees locked in their retirement benefits for the rest of their life.[278]

58. Dorman had a copy of the Medical SPD in effect when he retired that he kept in his office.[279] The text on page 17 stating: "Your coverage on the Retiree Medical Plan ends - when you die, or – you do not pay your share of the cost of your coverage"[280] confirmed his understanding that after someone retired, they would have medical coverage until they died, and that the Company could not terminate the benefit after retirement. [281]

59. When he was contemplating retirement, Dorman received and relied upon a checklist describing his own retirement benefits, including the grandfathered life insurance and FlexCare medical benefits.[282]

60. Dorman's retirement paperwork stated he would receive grandfathered life insurance in the amount of $76,000 for "5 years and after."[283]

61. Dorman's managers and supervisors throughout his employment never told him that the Company had the right to change or terminate these retirement benefits after retirement.[284]

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[276] Dorman Aff. ¶ 21 (PL APP 331).
[277] Dorman Tr. at 63:19-24, 127:23-128:10; Dorman Aff. ¶ 29 (PL APP 332).
[278] Dorman Tr. at 65:12-18, 115:11-24, 119:3-19, 120:21-121:5, 124:25-126:11, 129:8-18, 161:2-162:23, 170:20-25, 186:4-190:13; Dorman Aff. ¶ 30 (PL APP 332).
[279] Dorman Dep. Ex. 13 (DEF APP 1121); Dorman Tr. at 160:1-3, 244:24-245:22, 361:7-362:4; Dorman Aff. ¶ 33 (PL APP 333).
[280] Dorman Dep. Ex. 13 at 17 (DEF APP 1074); SPD 1, Def. Ex. A-1 at EQ_FUL_0108 (Doc. 324-3).
[281] Dorman Dep. Ex. 13 (DEF APP 1121); Dorman Tr. at 238:17-239:16, 246:22-247:12, 248:5-14, 252:4-9, 253:16-20, 362:18-367:4; Dorman Aff. ¶¶ 34, 51 (PL APP 333, 335).
[282] Dorman Dep. Ex. 26 at Joyner000124 (DEF APP 1128). Dorman Tr. at 373:3-16, 429:1-430:5; Dorman Aff. ¶ 47 (PL APP 335).
[283] Dorman Dep. Ex. 9 at EQ_FUL_001810 (Doc. 82-15); Dorman Tr. at 206:21-25; 210:8-11, 388:19-390:1; Dorman Aff. ¶ 53 (PL APP 336).
[284] Dorman Tr. at 204:15-205:3, 380:10-13, 391:8-12; Dorman Aff. ¶¶ 57, 61 57 (PL APP 336-337).

62. Dorman would not have retired if he had understood that the Company was reserving the right to change or terminate his medical or grandfathered life insurance after he retired; he would have continued working until at least 2003, when he was 65 years old.[285]

63. Dorman relied on his understanding that he would have life insurance throughout his retirement when he elected to decline optional life insurance coverage at the time of his retirement and when he elected to take his pension as a lifetime annuity.[286]

64. Dorman made many financial decisions based on his understanding that he had lifetime medical and life insurance. Had he known of the ROR, he would have 1) spent less money on the vacations and 2) purchased less expensive automobiles.[287]

G. PLAINTIFF CALVIN BRUCE JOYNER[288]

65. As an Assistant Vice President, Joyner was well aware of the common understanding among management that once an employee retired, the Company did not have the right to terminate medical and life insurance benefits.[289] When Joyner scanned the Medical SPD, he read the section of SPD 1 entitled "When Coverage Ends" and understood that the only two conditions under which termination could occur: (1) if he died or 2) failed to pay his share of the premium.[290]

66. Joyner began his retirement planning in 1991. On multiple occasions, before making a decision to retire, Joyner met with Phillips. She told him that retiree medical and life insurance

[285] Dorman Tr. at 89:1-21, 164:20-165:3; Dorman Aff. ¶¶ 43, 69 (PL APP 334, 338
[286] Dorman Tr. at 211:11-213:3; Dorman Aff. ¶¶ 70-71 (PL APP 338-339).
[287] Dorman Aff. ¶ 71 (PL APP 339).
[288] The Affidavit of Plaintiff Joyner (PL APP503-519) summarizes the facts relevant to his claim for breach of fiduciary duty. The deposition transcript of Plaintiff Joyner is located at Doc. 340-13, p. 8 to Doc. 340-14, p. 38 (DEF APP 895-1003).
[289] Joyner Tr. at 249:11-268:20, 316:5-25; Joyner Aff. ¶ 13 (PL APP 505).
[290] Joyner Dep. Ex. 14 (DEF APP 1651); SPD 1, Def. Ex. A-1 (Doc. 324-3); Joyner Tr. at 116:17-117:3; 226:1-8, 312:1-313:11; Joyner Aff. ¶ 16 (PL APP 506).

benefits would last throughout his retirement.[291]

67. On each occasion, Phillips provided him with a checklist showing that he would have grandfathered life insurance at one times his salary for his lifetime and medical insurance as long as he paid the premium.[292] She always spoke of the benefits lasting throughout his retirement, and that his benefits would be intact and remain in place until he died.[293]

68. Joyner also discussed his retirement benefits with CT&T President D. Wayne Peterson, itemizing his benefits for Peterson and telling him he understood the medical and life insurance benefits to be for his "lifetime." Peterson responded by saying he would look into assisting Joyner with retirement.[294]

69. Joyner relied on his understanding that he had lifetime retiree medical and life insurance benefits when making the election to take his pension benefit as a 100% annuity, and if he know of the ROR, would not have made this choice.[295]

70. If he had known of the ROR, Joyner also would have made different financial decisions after his retirement including: 1) not taking numerous expensive vacations and 2) not purchasing expensive automobiles in 2004 and 2005.[296]

H. PLAINTIFF DORSEY DANIEL[297]

71. VP Henderson presented Daniel with a special early retirement package but said Daniel

[291] Joyner Tr. at 60, 90-92, 152-153, 302:15-19; 313:13-21; Joyner Aff. ¶ 21 (PL APP 507-511).
[292] Evidence regarding the first meeting: Dorman Dep. Ex. 26 at Joyner000123 (DEF APP 1128); Joyner Tr. at 60:13-61:22, 64:10-75:7, 270:12- 274:4, 298:15-303:16, 317:23-320:3, 332:21-333:23; Joyner Aff. ¶ 22 (PL APP 508); Evidence regarding the second meeting: Dorman Dep. Ex. 26 at Joyner000124 (DEF APP 1128); Joyner Tr. at 144:8-11; 298:15-299:21, 302:7-303:16, 318:7-319:7; Joyner Aff. ¶ 29-30 (PL APP 509-510).
[293] Joyner Tr. at 211:2-4, 253:8-12; 333:13-23; Joyner Aff. ¶ 34 (PL APP 510-511).
[294] Joyner Tr. at 129:2-136:24; Joyner Tr. at 137:13-15.
[295] Joyner Tr. at 149:3-11; Joyner Aff. ¶ 36, 42 (PL APP 511-12).
[296] Joyner Aff. ¶ 43 (PL APP 512-513).
[297] The Affidavit of Plaintiff Daniel (PL APP307-321) summarizes the facts relevant to his claim for breach of fiduciary duty. The deposition transcript of Plaintiff Daniel is located at Doc. 340-10, p. 70 to Doc. 340-11, p. 35 (DEF APP 703-755).

would remain employed if he did not take the package.[298] After reviewing the package, Daniel spoke in detail with Henderson about his pension and his retirement benefits. During this conversation, Henderson told Daniel that (1) his medical insurance would continue and (2) the amount of life insurance both at retirement and the amount after five years. Daniel understood from their conversation that his life and medical insurance benefits were lifetime benefits.[299]

72. Either VP Henderson or HR staff also gave Daniel a two-page checklist that detailed his life insurance benefits at one times his salary "for the remainder of the retiree's life" and continuation of medical insurance provided the monthly premium was paid.[300] Daniel relied upon this checklist in making the decision to retire early.[301]

73. Daniel was never told by VP Henderson or any HR personnel that the Company had the right to change or terminate his benefits.[302]

74. Daniel also received a benefits document from HR titled "W. Dorsey Daniel." The document stated his life insurance was "$228,000 (1st five years)" and "$114,000 (after 5 years for lifetime)" at "[n]o cost to retiree."[303] Daniel understood he would have $114,000 in life insurance benefits for the rest of his life.[304]

75. After receiving the information from Henderson and HR, Daniel made the decision to accept the special package and retire.[305] Daniel would not have retired had he understood that the Company was reserving the right to change or terminate his retiree medical and life insurance

[298] Daniel Tr. at 34:5-15; Daniel Aff. ¶ 22 (PL APP 310).
[299] Daniel Tr. at 15:6-12, 17:17-20, 34:5-15; 125:14-126:11, 127:1-6, 158:7-25, 159:16-160:25 Daniel Aff. ¶¶ 19-25 (PL APP 310-311).
[300] Daniel Dep. Ex. 20 (DEF APP 2183); Daniel Tr. at 125:14-126:11; 204:9-25; Daniel Aff. ¶ 26-28 (PL APP 311).
[301] Daniel Dep. Ex. 20 (DEF APP 2183); Daniel Tr. at 125:14-126:11; Daniel Aff. ¶ 29 (PL APP 311).
[302] Daniel Tr. at 182:18-184:3; Daniel Aff. ¶ 43 (PL APP 313-314).
[303] Daniel Dep. Ex. 7 at Daniel000146 (DEF APP 756); Daniel Tr. at 162:16-166:22, 167:13-168:5, 191:17-192:5, 196:9-22; Daniel Aff. ¶ 30 (PL APP 311-312).
[304] Daniel Tr. at 168:6-19; Daniel Aff. ¶ 30 (PL APP 311-312).
[305] Daniel Tr. at 161:23-162:7, 195:2-8; Daniel Aff. ¶ 31 (PL APP 312).

benefits.[306]

76. Daniel made financial decisions regarding spending every year since retirement based on the Company's promise of lifetime medical and life insurance including: 1) spending on vacation trips to Las Vegas and to Alaska in 2006 and 2) purchase of new vehicles in 2001 and 2005. [307]

I. PLAINTIFF WILLIAM DOUGLAS FULGHUM[308]

77. After receiving a letter regarding the Sprint Transition Separation Plan, Fulghum spoke with Phillips about retirement benefits and he understood her to say he would have grandfathered life insurance and medical benefits throughout his retirement.[309]

78. On July 18, 1996, HR Rep Bland sent Fulghum a letter itemizing the retiree benefits. Fulghum understood the letter to promise continued medical coverage throughout his retirement and grandfathered life insurance at one times his salary for the rest of his life.[310]

79. In the last week of July 1996, he met with Bland who told him after five years of retirement, his life insurance would be one times his annual salary for his lifetime.[311]

80. After his conversations with Phillips and Bland, Fulghum made the decision to retire. Neither of them ever told him of the ROR.[312] Fulghum would not have retired if he was told of the ROR. He would have continued working for the Company until sometime between 62 to 65

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[306] Daniel Tr. at 17:2-16, 49:13-19, 93:6=94:24, 97:16-99:16, 101:21-102:23; Daniel Aff. ¶¶ 7-8, 45 (PL APP 308, 314).
[307] Daniel Aff. ¶ 47 (PL APP 314-315).
[308] The Affidavit of Plaintiff Fulghum (PL APP 419-429) summarizes the facts relevant to his claim for breach of fiduciary duty. The deposition transcript of Plaintiff is located at Doc. 340-15, p. 77 to Doc. 340-16, p. 18 (DEF APP 1131-1181).
[309] Fulghum Tr. at 79:18-80:20; Fulghum Aff. at 23 (PL APP 422).
[310] Fulghum Tr. at 67:24-68:4; Fulghum Dep. Ex. 11 (DEF APP 1229); Fulghum Aff. ¶ 24-26 (PL APP 422-427).
[311] Fulghum Tr. at 195 at 3-10; Fulghum Aff. ¶ 29 (PL APP 423). Fulghum Tr. at 82:2-83:11, 187:18-188:14, 195:12-196:7. At the time of his deposition, Fulghum testified that it was either Phillips or Bland who told him he would have life insurance benefits for the rest of his life. After reviewing all the documents, Fulghum believes that Bland is the person who told him his grandfathered life insurance was a lifetime benefit when they met in Wake Forest. Fulghum Tr. at 181-183:1-2, 187:8-17, 197:4-199:10; Fulghum Aff. ¶ 30-31 (PL APP 423).
[312] Fulghum Tr. at 199:1-10; Fulghum Aff. ¶ 32 (PL APP 423).

years old (2000 through 2003).[313]

81. Fulghum relied on the promise of life insurance throughout retirement when he elected to receive pension benefits in the form of a life annuity with no survivor benefits.[314]

82. Had Fulghum known of the ROR, he would have spent less money on vacations in1996-2007 and would not have gifted thousands of dollars to his son in 2004-2007.[315]

J. PLAINTIFF BETSY BULLOCK[316]

83. Bullock personally knew Benefits Supervisor Phillips and Benefits Specialist Bland, who were designated by CT&T to answer questions regarding retirement benefits.[317]

84. Phillips told Bullock that when the Holderness family sold CT&T to defendants, there were provisions in the sales contract to protect employees' life insurance benefits.[318]

85. In a conversation with Phillips in the 1980's, Phillips told her she would have medical benefits and life insurance benefits for the rest of her life.[319] Phillips emphasized "your life insurance is written down in blood."[320]

86. In May, 1990, Bullock got the checklist of benefits promising the "grandfathered" life insurance benefit for life at no cost and the continuation of medical insurance.[321]

87. In July 1997, Bullock checked with Bland on her eligibility for early retirement.[322] Bland sent her a pension estimate and attached a checklist similar to the May, 1990 version promising grandfathered life insurance throughout her life and medical insurance throughout her retirement

[313] Fulghum Tr. at 26:2-13, 114:11-115:9, 116:2-8; Fulghum Aff. ¶ 44 (PL APP 425).
[314] Fulghum Tr. at 54:10-19, 55:25-56:6, 66:14-22; Fulghum Aff. ¶ 45 (PL APP 426).
[315] Fulghum Aff. ¶ 46, 47 (PL APP 426).
[316] The Affidavit of Plaintiff Bullock (PL APP 230-263) summarizes the facts relevant to her claim for breach of fiduciary duty. The deposition transcript of Plaintiff Bullock is located at Doc. 340-5, p. 18 to Doc. 340-6, p. 34 (DEF APP 292-392).
[317] Bullock Tr. at 61:11-25,196:19-197:7; Bullock Aff. ¶ 9 (PL APP 232).
[318] Bullock Tr. at 160:24-25; 137:21- 138:9, 199:9-21; Bullock Aff. ¶ 10 (PL APP 232).
[319] Bullock Tr. at 135:19-138:9, 305:6-308:1; Bullock Aff. ¶ 11 (PL APP 232).
[320] Bullock Tr. at 306:14-307:14. Bullock Aff. ¶ 12 (PL APP 232-233).
[321] Bullock Tr. at 338:14-342:2; Bullock Dep. Ex. 39 (PL EX 12); Bullock Aff. ¶¶ 14, 17-18 (PL APP 233-234)
[322] Bullock Tr. at 61:20-62:1, 134:17-135:16.

as long as she paid her share of the premium.[323]

88. In October 2001, Bullock received a Company notice that she had to retire by December 31, 2001 to keep her lifetime retiree medical and grandfathered life insurance.[324] Based upon information that she learned from HR supervisors and paperwork she received about the retirement programs, she understood that she was required to retire by the end of 2001 in order to lock in these benefits for the rest of her life.[325]

89. In October, 2001, Bullock received a brochure entitled, "Important News for Everyone! Sprint Retiree Benefits." She was concerned because the brochure said Sprint was changing its retirement benefit plans for people who retired after the end of the year.[326] In response to an inquiry about the brochure, on November 7, 2001, Gaylene VanHorn, a Corporate Benefits Manager from Kansas City indicated in an e-mail that Bullock would receive the grandfathered life insurance benefit if she retired by the end of the year.[327]

90. On November 6, 2001, Bullock sent in a "Retirement Letter of Intent."[328] HR Rep Mina Rezayazdi ("Rezayazdi") informed Bullock that to retain the promised retiree benefits package throughout her retirement, including retiree medical and life insurance, she was required to waive five weeks of accrued vacation time and retire in 2001.

91. Rezayazdi required that Bullock send her a waiver of her accrued vacation before she would process her retirement paperwork. On December 4, 2001, Bullock made her retirement decision and faxed the waiver so her retirement would be approved, adding "*Waived in Protest*

[323] Bullock Aff. ¶¶ 20-22, Ex. 1 at 001225-001227 (PL APP 235-236, 251-253).
[324] Bullock Tr. at 345-346.
[325] Bullock Tr. at 107:23-25; Bullock Aff. ¶ 25 (PL APP 236).
[326] Bullock Dep. Ex. 23 (DEF APP 430);Bullock Aff. ¶ 25-29 (PL APP 236-237).
[327] Bullock Dep. Ex. 40 (PL EX 16); Bullock Tr. at 346:15-349:8; Bullock Aff. ¶ 28 (PL APP 237).
[328] Bullock Aff. Ex. 2 at EQ_FUL_003901; Bullock Aff. ¶ 32 (PL APP 238).

25 Days Vacation waived to enable me to receive the 2001 benefit package."[329] Bullock's decision to retire at the end of 2001 was directly based upon the promise that if she retired by December 31, 2001, she would receive medical and life insurance benefits for life.[330]

92. If Bullock had known that the Company could terminate her benefits even if she retired before 2002, she would have taken a 50% pension contingent annuity,[331] and would not have taken 1) annual vacations, 2) early election of (lower) Social Security benefits in 2005, 3) purchase of an expensive automobile in 2005.[332]

K. PLAINTIFF JOHN DOUGLAS HOLLINGSWORTH[333]

93. In Fall 2001, Hollingsworth, an insulin-dependent diabetic who needed medical coverage, received correspondence from the Company indicating he needed to retire in 2001 to maintain his FlexCare retiree medical insurance and grandfathered life insurance.[334]

94. His wife Nellie, an administrative assistant to the Director of Operations, gave Hollingsworth a "checklist" describing lifetime medical and life insurance benefits. She was authorized to provide this checklist to employees.[335]

95. In October 2001, Hollingsworth spoke with his supervisor, David Walker, and later with District Manager Pete O'Toole, about the changes in retiree benefits and the fact that he would need to retire by the end of the year to keep his medical benefits.[336]

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[329] Bullock Dep. Ex. 41 at Bullock 000863 (PL EX 16) (emphasis added); Bullock Tr. at 349:17-352:5; Bullock Aff. ¶¶ 33-35 (PL APP 238-239).
[330] Bullock Tr. at 159: 18; 160:8-161:7, 226:14-18; Bullock Aff. ¶ 38 (PL APP 240).
[331] Bullock Tr. at 177:14-179:4; Bullock Aff. ¶ 39, Bullock Aff. Ex. 3 at Bullock 000879 (PL APP 240, 256).
[332] See 2nd Bullock Tr. at 168:13-169:16; Bullock Aff. ¶ 40 (PL APP 240-241).
[333] The Affidavit of Plaintiff Hollingsworth (PL APP486-500) summarizes the facts relevant to his claim for breach of fiduciary duty. The deposition transcript of Plaintiff Hollingsworth is located at Doc. 340-19, p. 21 to Doc. 340-20, p. 39 (DEF APP 1413-1515).
[334] Hollingsworth Tr. at; Hollingsworth Aff. ¶ 21-22 (PL APP 489).
[335] Hollingsworth Dep. Ex. 21 (DEF APP 1548); Hollingsworth Tr. at 72:11-22, 73:2-14, 204:7-205:5, 257:23-258:4, 345:12-21, 350:23-351:18, 382:17-383:7; Hollingsworth Aff. ¶¶ 25-26 (PL APP 490), Hollingsworth Dep. Ex. 21 (DEF APP 1548).
[336] Hollingsworth Tr. at 152:2-7; 153:8-13, 154:13-158:4-25, 207:17-214:13, 359:22-361:17; Hollingsworth Aff. ¶¶ 28-29 (PL APP 491).

96. Before her husband made the decision to retire, Nellie Hollingsworth contacted HR reps Camille Burdette and Christie Principe ("Principe") who verified that he needed to retire in 2001 to keep his current retirement benefits.[337]

97. Hollingsworth submitted a Retirement Letter of Intent ("RLI"), but in a phone call Principe told him he had to forfeit his accrued vacation pay to retain his grandfathered life insurance and FlexCare medical benefits. She sent him a second RLI saying he was forfeiting his vacation pay and he signed and returned it.[338]

98. Manager Walker, Manager O'Toole, and HR Rep Principe never told Hollingsworth the Company had the right to change or terminate his benefits.[339]

99. If Hollingsworth was told of the ROR, would not have retired and would have continued working until sometime between 2006 and 2009.[340]

100. Hollingsworth relied on the fact that he would have grandfathered life insurance throughout his retirement when he made his election to not take additional optional life insurance.[341] Hollingsworth returned to work part-time for Outsource in 2003. Had he known the Company had the right to terminate or reduce his life insurance and medical benefits, he would have returned before 2003 and worked more hours.[342]

L. PLAINTIFF WILLIAM HOWARD GAMES[343]

101. In Fall 2001, after receiving information that he had to retire by the end of 2001 to keep

[337] Hollingsworth Dep. Ex. 10 (DEF APP 2144); Hollingsworth Tr. at 166:15-167:10, 168:4-14, 169:18-21, 223:10-284:2, 224:20-225:4; Hollingsworth Aff. ¶ 31 (PL APP 491).
[338] Hollingsworth Tr. at 126:5-25, 127:1-8, 228:10-229:20, 232:12-19, 249:11-250:14, 353:9-19, 254:4-355:21; Hollingsworth Aff. ¶ 37-38, Aff. Ex. 1, Hollingsworth 000013-14 (PL APP 492, 500).
[339] Hollingsworth Tr. at 344:14-11, 361:19-363:4; Hollingsworth Aff. ¶ 45 (PL APP 494).
[340] Hollingsworth Tr. at 132:6-133:3, 192:18-193:1, 199:10-25, 347:1-348:7, 365:2-10; Hollingsworth Aff. ¶¶ 8, 53, 54 (PL APP 487, 495).
[341] Hollingsworth Aff. ¶ 55 (PL APP 495).
[342] Hollingsworth Tr. at 133:6-142:17, 149:20-25; Hollingsworth Aff. ¶ 56 (PL APP 495).
[343] The Affidavit of Plaintiff Games (PL APP 475-481) summarizes the facts relevant to his claim for breach of fiduciary duty. The deposition transcript of Plaintiff Games is located at Doc. 340-16, p. 90 to 340-18, p. 19 (DEF APP 1253-1351).

his Flexcare benefits, Games called HR Rep Barbara Westfall ("Westfall"), who stated that if he continued working at the Company after 2001, he would lose the Flexcare medical insurance plan in retirement.[344]

102. In late November, 2001, Games asked Westfall how long he would have his retiree medical benefits if he decided to leave by the end of 2001. She told him his benefits would never be cut and specifically said he would have the benefits until he died.[345]

103. Prior to making his decision to retire, Games received a "What If I Retire?" worksheet from Westfall showing retirement options. This sheet confirmed that he had to quit working by the end of the calendar year or he would lose his retiree FlexCare medical coverage.[346]

104. If Games had known of the ROR, he would have followed his original plan and continued working until 2005.[347] He also would have made different spending decisions during his retirement including foregoing purchase of an expensive new car in 2006.[348]

M. PLAINTIFF SUE BARNES[349]

105. When Barnes asked about upcoming benefit changes, her boss, Operator Services Manager Gloria Jones, told her she was going to get information from HR Manager Mike Fuller and /or Labor Relations Manager Larry Drew.[350]

106. A few days later, Jones told Barnes that to "secure" her benefits during retirement, she needed to retire by March 31, 2003.[351] Barnes understood from Jones that the previous collective bargaining agreement (CBA) was going to be extended. Barnes understood that if she

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[344] Games Tr. at 41:14-44:8, 53:4-54:16, 55:8-59:22, 90:18-92:1, 139:18-21, 218-222, 219:12-221:5; Games Aff. ¶¶ 6, 8 (PL APP 476, 477).
[345] Games Tr. at 90:18-92:1, 218-222, 219:12-221:5; Games Aff. ¶ 8 (PL APP 477).
[346] Games Dep. Ex. 2 (PL APP 474); Games Tr. at 92:16-94:10, 97:5-110:20.
[347] Games Tr. at 54-55.
[348] Games Aff. ¶ 15 (PL APP 478-479).
[349] The Affidavit of Plaintiff Barnes (PL APP 139-150) summarizes the facts relevant to his claim for breach of fiduciary duty. The deposition transcript of Plaintiff Barnes is located at Doc. 340-2, pp. 1-44 (DEF APP 1-44).
[350] Barnes Tr. at 38:19-39:14, 40:10-21; Barnes Aff. ¶ 11 (PL APP 140).
[351] Barnes Tr. at 35:9-25, 27:4-7, 39:15-40:9, 145:2-7.

retired by March 31, 2003, she would retain for her lifetime the medical and grandfathered life insurance benefits she had under the CBA in effect at the time she retired.[352]

107. After this meeting, Jones posted a notice: "I know that many of you are trying to decide should I retire or not. . . You do have to retire by April 1st to retire under current retirement. . . I will work with you to make sure you put the correct date on your letter of intent. . . . If on March 31st you say to me you want to cancel your retirement and continue to work, then you continue your employment with Sprint. Again I will be glad to talk with you and assist in any way getting information for you."[353]

108. The notice posted by Jones confirmed Barnes' understanding that she had to retire to secure her current retirement benefits, including the retiree medical and life, for life.[354]

109. In multiple conversations, Jones repeatedly told Barnes and others that if she retired by March 31, 2003, she would "secure" or "keep" the same benefits she had at that time throughout retirement.[355]

110. Barnes' retirement package contained verification that her medical insurance would become supplemental to Medicare when she turned 65 and that she would have the grandfathered life insurance at one times her salary after five years of retirement.[356]

111. Barnes would not have retired in 2003 had she known of the ROR. [357]

[352] Barnes Tr. at 30:7-31:9, 46:18-47:2; Barnes Aff. ¶ 12 (PL APP 140-141).
[353] Barnes Dep. Ex. 2 (DEF APP 172); Barnes Tr. at 53:6-55:21.
[354] Barnes Tr. at 53:6-55:21; Barnes Aff. ¶ 13 (PL APP 141).
[355] Barnes Tr. at 36:19-37:7, 37:8-17, 38:4-11; Barnes Aff. ¶¶ 14-17 (PL APP 141).
[356] Barnes Tr. at 147:113-18; Barnes Dep. Ex. 4 at Barnes000008 and 34Barnes000034 (DEF APP 173); Barnes Aff. ¶ 23-26, 35-36 (PL APP 142-143).
[357] Barnes Tr. at 34:10-24, 35:9-14, 36:19-25, 37:8-17, 52:16-22, 56:16-58:24, 71:24-72:3, 79:25-80:10, 89:21-90:1; Barnes Aff. ¶¶ 6, 53-55 (PL APP 139-140, 145-146).

N. PLAINTIFFS KENNETH AND BETTY CARPENTER[358]

112. K. Carpenter attended a group meeting conducted by HR Director Harland Groves ("Groves") and HR rep Betty Gorney ("Gorney") on March 26, 1996, who told him that his medical coverage would last until death, and his wife Betty, also an employee eligible for early retirement, could suspend her retiree medical coverage and be covered under Ken's medical benefits until Ken's death, when Betty's coverage would be reinstated. B. Carpenter understood this representation to mean that both she and her husband would be provided retiree medical benefits for life.[359]

113. K. Carpenter was expressly told by Groves and Gorney that his retiree medical benefits could not change during his lifetime, and K. Carpenter drafted notes of this discussion**.** B. Carpenter discussed with her husband his March 1996 group meeting with Groves and Gorney at the time the meeting took place, and reviewed his notes of the meeting at the time they were drafted. K. Carpenter only accepted retirement, and did not search for another position with the Company between March 1996 and January 1998, because Groves and Gorney assured him of lifetime retiree medical benefits.[360]

114. K. Carpenter attended a group meeting with HR rep Etzwiller on November, 5, 1997, in which in response to his question, Etzwiller told him that the retiree life insurance was for life and the amount of the benefits would remain the same. This meeting occurred nearly two months before K. Carpenter's retirement began, and he asked the question to be sure the benefits would

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[358] The deposition transcript of Plaintiff K. Carpenter is located at Doc. 340-9 p. 36 through Doc. 340-10 p. 13 (DEF APP 597-646). The deposition transcript of Plaintiff B. Carpenter is located at Doc. 340-8 p.27 through Doc. 340-9 p. 8 (DEF APP 530-569).

[359] K. Carpenter Tr. at 30:13-23; B. Carpenter Tr. at 56:3-8.

[360] B. Carpenter Tr. at 54:22-55:21, 98:18-99:4, 141:3-22. K. Carpenter Tr. at 31:2-18 ("what was said in that meeting made me feel that it was safe to go ahead and retire"), 54:22-55:21, 98:18-99:4, 104:6-16, 141:3-22, , K. Carpenter Aff. ¶¶ 1-2 & Ex. 1 (PL APP 269, 272).

remain because that was part of his retirement planning.[361]

115. K. Carpenter had drafted questions before the meeting and handwrote Etzwiller's answers confirming lifetime life insurance at $23,000. B. Carpenter reviewed those notes immediately after the meeting. Etzwiller also told Ken Carpenter that the annual compensation and benefits summary booklets do not apply to retirees.[362]

116. Had K. Carpenter been told of the ROR, he would have chosen the contingent annuity pension option to allow his wife to share some of his pension benefits should he predecease her. He and his wife Betty also would have been more prudent with their expenses during retirement, including, but not limited to, not purchasing a vacation home in 1998, or selling that home earlier, and avoiding necessary and discretionary expenditures associated with the home from 2002 through 2007.[363]

117. B. Carpenter never received an active employee or retiree SPD concerning medical or life insurance benefits, and never saw the alleged ROR.[364]

118. B. Carpenter understands the language: "the Company reserves the right to amend, discontinue or terminate the plan for reasons of business necessity or financial hardship," as meaning that the Company's right was limited to situations where the Company went "bankrupt".[365] B. Carpenter understands the language: "Sprint reserves the right to amend or terminate the health care options at any time" to mean that the Company can change or terminate options with the plan, but cannot terminate the plan outright.[366]

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[361] K. Carpenter Tr. at 25:25-26:2, 57:17-25, 60:1-16, 75:22-76:3.
[362] K. Carpenter Tr. at 72:8-73:2, 182:19-184:24. B. Carpenter Tr. at 59:1-9, B. Carpenter Aff. Ex. A (PL APP 268).
[363] K. Carpenter Tr. at 78:24-79:8, 161:16-162:2; K. Carpenter Aff. ¶¶ 3-8 (PL APP 269-270); B. Carpenter Aff. ¶¶ 7-10 (PL APP 264-268).
[364] B. Carpenter Tr. at 53:23-60:1, 85:15-19, 107:13-15, 128:3-13, (DEF APP 595); B. Carpenter Aff. ¶ 6 (PL APP 265).
[365] B. Carpenter Tr. at 140:8-25.
[366] B. Carpenter Tr. at 144:3-145:19.

P. PLAINTIFF TIMOTHY DILLON[367]

119. Dillon held many recruitment and retention discussions with his HR manager, John Blanchet ("Blanchet"), and with Stan Fisher ("Fisher"), Company president, on the topic of lifetime retiree benefits, in which both repeatedly told him the Company's retiree medical and life insurance were provided for the retiree's lifetime.[368]

120. In the Company's effort to recruit and retain employees, Dillon, sometimes along with Blanchet, would instruct prospective and current employees that the Company provided lifetime medical and life insurance. It was the role of managers to provide this information, thus vested retiree benefits was common knowledge among employees.[369]

121. Dillon also attended a presentation by the manger of HR in late 2001, who emphasized there was a new medical plan being implemented in 2002 and assured Dillon and other employees that if they retired before 2002, they would be grandfathered in under the existing medical plan, and that their retiree benefits would be lifetime.[370]

122. Dillon was told by HR rep Pastor before effectuating his retirement in 2003, that his retiree life insurance was a lifetime benefit and that his retiree medical benefits would continue until he reached age 65, and then the Company would provide supplemental medical coverage, including Rx coverage. HR rep Carol Moser told him the same in 2000 or 2001. [371]

123. Dillon had hand-wrote Pastor's confirmation, stating "for life of retiree, Tim."[372]

124. Had Dillon not been told that his retiree medical benefits and life insurance benefits were

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[367] The deposition transcript of Plaintiff Dillon is located at Doc. 340-11 p. 71 through Doc. 340-12 p. 38 (DEF APP 791-850).
[368] Dillon Tr. at 69:3-70:22, 74:10-75:18, 187:2-25, 191:5-192:8.
[369] Dillon Tr. at 58:9-59:1, 69:3-70:14, 85:16-85:25 ([W]hen we held employee meetings to encourage them and to reinforce the benefits… *we promoted to employees … the solid backing of a strong Company that's going to continue to provide you [retiree pension, medical and life insurance] benefits until you die.*
[370] Dillon Tr. at 81:25-82:14, 102:7-102:24, 108:24-110:23.
[371] Dillon Tr. at 80:5-81:25, 163:15-164:14, 228:7-14.
[372] Dillon Tr. at 169:24-170:8; Dillon Dep. Ex. 9 at Dillon000134 (PL APP 322).

lifetime if he chose to accept the retirement package before 2002, he would have continued working for the Company until sometime after the age of 65 (from 2002 through 2007 and beyond), and would have avoided discretionary expenditures such as a home in Florida and a new car.[373]

Q. PLAINTIFF ROBERT KING[374]

125. Shortly before he retired, King was told by HR manager Rose that his retiree medical and life insurance would remain the same for the rest of his retirement.[375]

126. King propounded written questions to HR rep Ladd in which Ladd stated that dental coverage is part of the retiree medical plan, and that King and his wife were entitled to continue that coverage for their "lifetime." King understood Ladd's response as confirming that the retiree medical plan, of which dental coverage was a part, was lifetime. King also asked Ladd the amount of life insurance and its duration. Ladd told King he would have $25,000 and did not state that benefit could be reduced or terminated.[376]

127. In 2006, King received an email from HR rep Lavender stating that his retiree life insurance would remain the same until his death, and that the premiums would "remain the same during [his] lifetime." [377]

128. There is nothing in SPD 1 under the heading "When Coverage Ends" (stating benefits end "when you die") that referred King to any other page of the booklet, and he did not read any alleged ROR language in the SPD before retiring.[378]

129. King understands the language: "the Company reserves the right to amend, discontinue or

[373] Dillon Tr. at 104:2-4, 184:11-185:14, Dillon Aff. ¶¶ 3-4 (PL APP 324).
[374] The deposition transcript of Plaintiff King is located at Doc. 340-22 p. 64 through Doc. 340-23 p. 1-28 (DEF APP 1721-1777).
[375] King Aff. ¶ 2 (PL EX 8), King Tr. at 45:16-46:21, (PL APP 520).
[376] King Tr. at 202:12-204:24, 206:8-21; DEF APP 1840-41.
[377] King Aff. ¶ 1, Ex. 1 (PL APP 521).
[378] King Tr. at 83:8-14, 212:18-213:19.

terminate the plan for reasons of business necessity or financial hardship," as meaning that the Company's alleged ROR was triggered only upon filing "for bankruptcy."[379]

130. King understands language indicating that the Company has the right to amend or terminate "healthcare options" as meaning that certain of the specific services or methods of providing benefits might change, but not that the plan itself may be terminated.[380]

131. Had he known of the ROR, King would have continued working for Embarq or obtained another position with another Company, and continued to work to this day. King also would not have selected a lifetime annuity for his pension, and would not have purchased a $99,000 motor home in 2003. Had Lavender not told him in 2006 his retiree life insurance would remain the same until his death, he would have been more prudent with his financial affairs between February 2006 and July 2007.[381]

R. PLAINTIFF WANDA SHIPLEY[382]

132. In Spring 999, Shipley was expressly told by HR employee Walters that if she accepted retirement, she would receive lifetime retiree medical and life insurance.[383]

133. In Spring 1999, Shipley's supervisors, Robert Street and Steve Brown reviewed the retirement package, including lifetime retiree medical and life insurance and told her it was a "good deal," and were "jealous" she could retire and they were not yet eligible.[384]

134. Shipley testified that in order for the Company to convey that it had the right to amend or terminate the retiree benefits, the Company should have told HR representatives about the

[379] King Tr. at 52:15 -53:9.
[380] King Tr. at 169:21-170:14, 217:2-13.
[381] King Tr. at 125:22-127:5, 207:23-208:9; King Aff. ¶¶ 1, 3-5 (PL EX 8).
[382] The deposition transcript of Plaintiff Shipley is located at Doc 340-24 p. 50 through Doc 340-25 p. 19 (DEF APP 1882-1931).
[383] Shipley Tr. at 8:25-9:16, 9:24-10:21, 11:11-16, 19:19-21.
[384] Shipley Tr. at 19:9-25, 107:8-23.

reservation of rights and presented the benefits with an explanation of the ROR.[385]

135. Had Shipley not been told that her retiree medical benefits and life insurance benefits were lifetime if she chose to retire, she would have continued working beyond 2001.[386]

136. In late 1999, after her last day at work, Shipley's supervisor asked if she would like to return. Shipley declined due to the promise of lifetime retiree medical and life insurance. If she was not promised lifetime benefits, she would have accepted and continued working beyond 2001. She also would have avoided discretionary expenditures and been more fiscally conservative during her retirement. [387]

S. PLAINTIFF CARL SOMDAHL[388]

137. Somdahl was told throughout his career that the retiree medical and life insurance were lifetime. He was told this by Ray Murray, District Manager of UT of the Northwest, and HR reps Sherry Chichester, Linda Smith and Margie Balough.[389]

138. The "When Coverage Ends" sections of SPD 3 indicated to Somdahl that he would have medical coverage and life insurance until death.[390]

139. Somdahl would have continued working at least through the 2002-04 time period had he known of the ROR. He also would have elected to receive his pension benefits not as a lifetime annuity, and avoided other discretionary expenditures.[391]

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[385] Shipley Tr. at 169:4-13.
[386] Shipley Tr. at 12:19-13:7, 141:10-14, 188:11-19; Shipley Aff. ¶¶ 4-5 (PL APP 597-598).
[387] Shipley Tr. at 23:20-24:16; Shipley Aff. ¶¶ 5-6 (PL APP 598).
[388] The deposition transcript of Plaintiff Somdahl is located at Doc 340-25 p. 67 through Doc. 340-26 p. 1-42 (DEF APP 1979-2032).
[389] Somdahl Tr. at 23:15-24:16, 42:2-25, 51:9-21, 74:11-76:1, 125:8-21, 190:10-191:16, 194:21-196:4.
[390] Somdahl Tr. at 194:7-12.
[391] Somdahl Tr. at 58:14-17, 59:18-25; Somdahl Aff. ¶¶2-3 (PL APP 599-600).

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Plaintiffs incorporate by reference page 49 of Pls. Mem. in Opp. to Def. Motion for Summary Judgment on Named Plaintiffs' First and Third Claims for Relief (Doc. 358).

II. THE RECORD ESTABLISHES THAT DEFENDANTS MISREPRESENTED THE RETIREE MEDICAL AND LIFE INSURANCE BENEFITS AS PERMANENT BENEFITS FOR LIFE.

Defendants' arguments rest on misstatements of both the facts of record and the law governing the BOFD claims.

Defendants misrepresented the retiree medical and life insurance benefits to each of the plaintiffs. (1) **Bullock** was promised lifetime benefits in conversations with CT&T Benefits Supervisor Gayle Phillips and in correspondence with both an HR representative and the Company's Corporate Benefits Manager Van Horn. SAF ¶¶ 84-85, 88-91. (2) **Clark** was given a checklist that promised lifetime medical and life insurance. SAF ¶¶ 34-37. (3) **McLaurin** was told by his Plant Manager that he would have lifetime medical and life insurance at no cost. SAF ¶ 45. (4) **Britt** received a checklist and was told by an "upper position" HR Rep that he would have medical benefits at no cost "as long as you and your wife lived," and would have $ 26,000 worth of life insurance for his entire life. SAF ¶¶ 39-41. (5) **Games** was told by an HR Rep that his medical benefits would last until he died. SAF ¶ 102. (6) **Barnes** was told by her manager, who relayed information from HR, that she needed to retire to secure life insurance benefits during retirement. SAF ¶¶ 105, 107, 109. (7) **Daniel** was told by HR personnel that medical and grandfathered life insurance were lifetime benefits and received a checklist and another document stating he would have life insurance for his "lifetime." SAF ¶ 71-72, 74. (8) **Fulghum** was told by HR Reps that his life insurance and medical benefits were lifetime benefits. SAF ¶¶ 77-79. (9) **Hollingsworth**

received the checklist and understood from both his supervisors and an HR representative 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. SAF ¶¶ 95-97. (10) **Dorman** understood from SPDs, HR personnel, and supervisors that the medical and grandfathered life insurance were lifetime benefits. SAF ¶¶ 49-51, 55. In Dorman's own managerial capacity, he described to approximately 1,500 employees that the medical and life insurance were lifetime benefits. SAF ¶ 54. At the time he retired, he also received the checklist. SAF ¶ 59. (11) **Joyner** was told by Phillips that his retiree medical and life insurance benefits would be provided throughout retirement, and he confirmed this understanding with CT&T's President. SAF ¶¶ 66, 68. (12 & 13) **Betty Carpenter and Kenneth Carpenter** both retired from the Company. Before their respective retirements, Kenneth was told by HR personnel that he would have retiree medical benefits for life and that retiree life insurance was for life and the amount of life insurance, $23,000, could not change during retirement. SAF ¶¶ 112-13, 114. Mr. Carpenter discussed these assurances of lifetime benefits with his wife Betty, and Betty reviewed contemporaneous handwritten notes stating the same. SAF ¶¶ 113, 115. (14) **Dillon** held many discussions with his HR Manager and with the Company president on the topic of lifetime retiree medical and life insurance benefits. SAF ¶ 119. Both men repeatedly told him the retiree benefits were provided for the retiree's lifetime. *Id*. Dillon also attended a presentation by the manager of HR in late 2001, who emphasized there was a new medical plan being implemented in 2002 and assured Dillon and other employees that if they retired before 2002, they would be grandfathered under the existing retiree medical plan, and that these retiree benefits were lifetime benefits. SAF ¶ 121. (15) Shortly before he retired, **King** was told by an HR manager that his retiree medical and life insurance benefits would remain the same for the rest of his retirement and another HR rep confirmed the

lifetime nature of his medical benefits in response to written questions by King. SAF ¶¶ 125-26. In addition, in a February 7, 2006 email, a third HR rep told King that his total retiree life insurance benefit of $25,000 would remain the same until his death. SAF ¶ 127. (16) **Shipley** was told at a group meeting conducted by an HR Coordinator that if she accepted an early retirement offer, she would receive lifetime medical and life insurance. SAF ¶ 132. (17) **Somdahl** was told by the District Manager of United Telephone of the Northwest and by three different HR reps that the retiree medical and life insurance benefits would be provided throughout his retirement. SAF ¶ 137.

Testimony from responsible benefits managers and retirees confirmed that the Company did not clearly warn employees about the potential for amendment or termination of the retiree plans during their retirements or the risk of losing promised benefits during retirement. *See, e.g.*, SAF ¶¶ 1, 6-7, 19-20, 23, 47, 61, 73, 80, 98, 116, 117, 124, 131, 136, 139.

Internal Company documents establish that management was aware that employees reasonably understood that they would receive lifetime benefits. *See* Doc. 358 at ¶¶ 94-101.

III. DEFENDANTS' ARGUMENTS HAVE BEEN REJECTED PREVIOUSLY AND ARE OTHERWISE CONTRARY TO THE BODY OF CASELAW ON ERISA'S STRICT FIDUCIARY DISCLOSURE DUTIES.

Many of defendants' arguments have been rejected in similar ERISA fiduciary breach cases. These arguments also ignore Tenth Circuit precedent as well as the large body of Third Circuit case law it has frequently followed. For example, in *Horn v. Cendant Operations, Inc.*, 69 Fed. App'x 421, 427-29 (10th Cir. 2003) (unpublished), the Tenth Circuit cited and followed five different decisions of the Third Circuit dealing with ERISA fiduciary breach claims.

ERISA does not permit employers and other plan fiduciaries to misrepresent plan terms, either affirmatively or by omission. Issuance of a summary plan description does not immunize fiduciary misrepresentations. In this case, moreover, the SPDs themselves are misleading.

Plaintiffs provide this overview before turning to defendants' specific arguments.

A. ERISA Prohibits Defendants' Fiduciary Misrepresentations.

Congress "invoked the common law of trusts to define the general scope of authority and responsibility of fiduciaries." *Horn v. Cendant Operations, Inc.*, 69 Fed. App'x 421, 427 (10th Cir. 2003) (unpublished). Thus, "ERISA prohibits material misrepresentations by fiduciaries" and "Many other circuits have . . . held that ERISA imposes a duty on plan fiduciaries not to affirmatively mislead plan participants." *Maez v. Mountain States Tel. & Tel. Co.*, 54 F.3d 1488, 1500 (10th Cir. 1995) (citing decisions of eight other circuits). Two months after *Maez*, the Third Circuit held that, "Our decisions . . . firmly establish that when a plan administrator affirmatively misrepresents the terms of a plan" it has breached its fiduciary duty to the participants and beneficiaries. *See In re Unisys Corp. Retiree Medical Benefits ERISA Litigation (Unisys II)*, 57 F.3d 1255, 1264 (3d Cir. 1995). Defendants do not acknowledge this landmark decision, or the fact that the Third Circuit so ruled despite its companion decision that SPDs had adequately preserved the Company's right to change or terminate benefits. *See In re Unisys Corp. Retiree Medical Benefits ERISA Litigation (Unisys I)*, 58 F.3d 896 (3d Cir. 1995).

A fiduciary's *failure to disclose* material benefits information is also actionable. "The duty to disclose material information is the core of a fiduciary's responsibility . . .." *Horn*, 69 Fed. App'x at 427-28 (*quoting Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990)); *see also Bixler v. Central Penn. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993). Defendants accordingly "had an affirmative duty to provide complete and

accurate [benefits] information," including information they "knew or should have known as a fiduciary which was material to [plaintiffs'] circumstances." *Horn*, 69 Fed. App'x at 428 (*citing Bixler*). This "entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." 12 F.3d at 1300; *see also Horn*, 69 Fed. App'x at 427 (*citing Restatement (Second) of Trusts* § 173, comment d).

The duty of disclosure thus does not depend on a particular inquiry from the participant. *Horn*, 69 Fed. App'x at 428. In *Horn*, the Tenth Circuit followed *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities, Inc.*, 93 F.3d 1171, 1181 (3d Cir. 1996), which emphasized that the duty to disclose material information arises even in the absence of an inquiry.[392] *See also In re Sprint Corp. ERISA Litigation*, 388 F. Supp. 2d 1207, 1228 (D. Kan. 2004) (*quoting* Third Circuit decisions in *Glaziers* and *Jordan*); *Restatement (Second) of Trusts*, § 170(2) (trustee has "duty to the beneficiary to deal fairly with him and to communicate with him all material facts in connection with the transaction which the trustee knows or should know").

A violation also may be based on half-truths (statements which are true on their face, but misleading). Thus, for example, a statement about the cost of retiree benefits may not be literally false, but can be a misrepresentation because "it created the impression that retirees would enjoy these benefits for the remainder of their lifetimes without the possibility of change" and was "at best a half-truth because there was no mention of [the Company's] right to amend or terminate

[392] *Glaziers* quoted from the preeminent decision on fiduciary duties authored by then-Judge Cardozo, *Globe Woolen Co. v. Utica Gas and Electric Co.*, 224 N.Y. 483, 121 N.E. 378, 380 (N.Y. 1918), where the court observed, "A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word." 93 F.3d at 1180. ERISA is to be construed to avoid results that would "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989).

the plan at any point in the future." *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation (Unisys IV)*, 579 F. 3d 220, 232 (3d Cir. 2009).

B. The SPDs Contain Misrepresentations and Omissions.

If, contrary to plaintiffs' First and Third Claims, the SPDs ultimately were determined to not provide vested benefits, then they are misleading communications actionable under the fiduciary breach claim.

Defendants argue that the SPDs contain no misrepresentations, largely relying on their brief on the First and Third Claims. But the SPDs themselves are misleading due to their affirmative statements, such as text promising without qualification that benefits (a) will last until "you die" or the "date of your death" (SPDs 1-6), or (b) "will be" or "will continue" in the stated amounts (SPDs 7-16), or (c) will "remain at that figure for lifetime" (SPD 17). It is not necessary for a plaintiff to show statements using "the words 'guaranteed' or 'vested'" if other words "created the same impression." *Unisys IV*, 579 F.3d at 231. Moreover, given the context in which defendants' representatives described, and the named plaintiffs were induced to understand, the retiree medical and life insurance benefits as highly valuable and permanent benefits, even receipt of an SPD that was not misleading would not be sufficient to clearly disclose that these benefits were terminable. To conclude that the benefits were terminable during retirement, a reader would first have to conclude that the Company actually had been engaging in fraud by describing the retiree benefits as "lifetime" benefits or benefits that would end "when you die." Moreover, the reservation of rights clause is not prominently displayed or cross-referenced in the portions of the SPDs describing the benefits for the retirees, or is severely limited, or simply is not present at all. Even in this litigation, lawyers and the Court have been required to undertake extensive discovery and analysis to determine the legal consequences of

SPD language. There accordingly is no basis to impute to lay participants an understanding that their benefits could be terminated, especially when the Company made express assurances of lifetime benefits to them. "An SPD is intended to be a document easily interpreted by a layman; an employee should not be required to adopt the skills of a lawyer" in order to interpret it. *Chiles v. Ceridian Corp.*, 95 F. 3d 1505, 1517-18 (10th Cir. 1996).

Plaintiffs incorporate their Memorandum in Opposition to Defendants' Motion for Summary Judgment on Named Plaintiffs' First and Third Claims for Relief (Contractual Vesting Claims) (Doc. 358), for a complete description of the manner in which the SPDs presented plaintiffs' benefits as lifetime benefits.[393]

Defendants repeatedly cite *Kerber v. Qwest Group Life Ins. Co.*, 647 F.3d 950 (10th Cir. 2011). Def. Mem. at 45-48. But they neglect to acknowledge key points which readily distinguish that case. On their claim for benefits under the plan, the *Kerber* plaintiffs 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." *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 similar language in *Chiles*, in which the Court ruled that where a plan states an exception to a reservation clause no other exception can be implied. The benefits claim in *Kerber* therefore met the same fate as it did in *Chiles*. *Id.* at 961.

[393] As stated in detail in Doc. 358, the structure of the SPDs also misled the retirees. The SPDs lacked headings and references to alleged reservation of rights ("ROR") language. But the SPDs did include headings labeled "When Coverage Ends" which expressly stated that coverage ends "when you die." As a result, plaintiffs were led to review the specific latter language but not defendants' alleged ROR. *See, e.g.*, SUF ¶¶ 89, 275, 290. *See also* SAF ¶ 16 (Benefits Manager Hux testified that "When Coverage Ends" language is a promise of lifetime benefits); SAF ¶¶ 26, 28, 33 (HR representative Phillips, during her 30-year career with the Company, always understood retirees would have lifetime retiree medical and life insurance benefits.)

On the fiduciary breach claim in *Kerber*, defendants likewise neglect to point out key facts which also negate its applicability here. First, the fiduciary breach theory of liability was self-defeating. The plaintiffs admitted that the Company had adequately reserved the right to terminate the benefits altogether and only claimed that the benefits could not be reduced below a minimum amount so long as no termination had occurred. *Id.* at 971. The Tenth Circuit understandably viewed the fiduciary breach claim with considerable skepticism: "We fail to see how misrepresentations regarding Qwest's ability to decrease life insurance coverage would effect a reasonable employee's retirement decision, where Qwest admittedly retains the right to terminate life insurance coverage." *Id*.

Not only was the overall premise for fiduciary liability unsound, but the communications cited in *Kerber* also fell well short of being actionable misrepresentations. Unlike plaintiffs here, the plaintiffs did not assert that the SPD was a misrepresentation, *id*. at 968 n. 2, and pointed to just three particular communications. The first was an "Insurance Plan Description" which summarized the retiree life insurance provided to employees who accepted a retirement package, the first page of which contained a reservation clause in bold type. The coverage provision only stated that, per the benefit formula described, the amount of coverage would be reduced each year beginning at age 66 to an amount that was not below 50% at age 70. *Id*. at 969. Contrary to defendants' argument (Def. Mem. at 46), the document contained no statements about the duration of the benefits being until "you die" or "your death" or for "lifetime," as is the case here. The second cited misrepresentation was a videotaped conference in which a Human Resource Director specifically confirmed that the reservation of rights "g[a]ve the Company the ability to modify the plans" in the future. The Tenth Circuit agreed that the tape "clearly indicated that Qwest retained the right to alter or terminate the Life Benefit" and was

"completely accurate." *Id.* at 969-70. The third communication was a series of annual Confirmation Statements sent during 2001-2004, which "included a statement noting that Qwest reserved the right to amend or terminate Plan benefits." Although these documents contained a misrepresentation that there was no right to amend or terminate benefits of employees who retired before 1992, the court ruled that it was not material as to those retirees because the statements were not issued until at least ten years after they had retired and "could not have informed Plaintiffs' retirement decisions in any way." The plaintiffs had not alleged reliance on these statements in any event. *Id*. at 970-71. Given the plaintiffs' self-defeating theory of liability and the specific, readily distinguishable nature of the three communications cited, *Kerber* does not support defendants' arguments here and does not make plaintiffs' claims "futile." Def. Mem. at 43.

C. Distribution of An SPD Does Not Satisfy Fiduciary Disclosure Duties.

Defendants also argue that the existence of the assertedly "clear" SPDs forecloses any claim that the Company did not meet its disclosure obligations. Def. Mem. at 44-45. Defendants' arguments are incorrect. First, as a matter of fact, the SPDs are not "clear and unambiguous," because they promise lifetime benefits and constitute misleading communications. Defendants also are incorrect on the law. Issuance of an assertedly "clear" SPD is *not* sufficient to discharge fiduciary disclosure obligations. In one of its 1995 decisions in *Unisys*, the Third Circuit ruled that the SPD was unambiguous and did not vest medical benefits. *Unisys I*, 58 F.3d 896 (3d Cir. 1995). But in its companion decision on the retirees' fiduciary breach claims, the court also ruled that employer satisfaction of the obligation to distribute a plan SPD does not foreclose a claim for breach of the fiduciary duty "to communicate candidly" if the employer or plan administrator "simultaneously or subsequently

makes material misrepresentations to those whom the duty of loyalty and prudence are owed." *Unisys II*, 57 F.3d at 1264. As summarized in a later appeal, distribution of "the SPD did not as a matter of law satisfy Unisys' fiduciary responsibility." *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation (Unisys III)*, 242 F. 3d 497, 508 (3d Cir. 2001). "The existence of the SPD is irrelevant" where the Company knows or should know that employees are about to rely on their misunderstanding of guaranteed benefits. 242 F. 3d at 509. A duty "to advise affirmatively of the reservation of rights clause might have arisen even in the absence of beneficiary-specific information concerning [employee] confusion or mistake" if "a reasonable fiduciary would have done more than simply rely on its SPD." *Id.* Citation of the reservation of rights clause "is unavailing because [the Company] did not present this information when it was counseling its employees on their retirement decisions." *Unisys IV*, 579 F. 3d at 232.

Defendants also fail to recognize that plaintiffs' claims for benefits (First and Third Claims) and for violation of ERISA's strict fiduciary disclosure duties (Second Claim) involve different elements, defendants, and analytical frameworks. *See Unisys II*, 57 F.3d at 1265 & n. 14 ("the retirees here do not argue that [the] misrepresentations modified their retiree medical benefit plans. . . . This [fiduciary breach] claim is distinct from a claim for benefits under the terms of the plan because it requires different proof . . . "); *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 78 (3d Cir. 2001) (noting that relief from breach of fiduciary duty comes from fiduciaries themselves and is not a benefit from the plan).[394] Therefore, an employer cannot find refuge in the SPD. "Having made such representations, a Company cannot insulate itself from liability by including unequivocal statements retaining the right to terminate plans at any time in

[394] Defendants acknowledge that many of their arguments rely on inapposite decisions dealing with ERISA estoppel claims. *See* Def. Mem. at 56-57, 66-67 (Doc. 339). Those claims seek to estop a benefit plan from taking a position contrary to communications and thereby "modify unambiguous written plan documents." *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 n. 13 (10th Cir. 1996). *See also* text at pages 82-84 below.

the SPDs." *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 492 (3d Cir. 2000), *citing Unisys II*, 57 F.3d at 1264. In *Harte v. Bethlehem Steel Corp.* the Third Circuit reiterated that technical compliance with statutory disclosure document rules does not foreclose fiduciary liability. "[T]he fiduciary duty to disclose and explain is not achieved solely by technical compliance with the statutory notice requirements." 214 F.3d at 451 n. 6, *citing Unisys II*, 57 F.3d at 1264.

Defendants also did not comply with recommended practice in their presentation of benefits. By 1985 if not earlier, it was accepted practice to clearly and repeatedly warn employees that benefits could be terminated: "Management should have its exit interview personnel adopt a simple mantra, to be repeated religiously and without deviation: Retiree welfare benefits are subject to change or termination." *In Re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, No. MDL 969, 1994 WL 284079 * 27 (E.D. Pa. June 25, 1994), *quoting* E. Van Olson, *Nonpension Retiree Benefits: Are They For Life? Management Guidelines to the Issue*, 36 Lab. L.J. 402, 407 (1985) (recommended practice that "all employer communications with respect to [the] plan need to be coordinated so that warning of potential changes or termination of benefits is clearly conveyed in each and every communication").

The record also shows that the Company was aware that employees had been led to believe they had vested benefits. Sprint benefits staff prepared a presentation for the August 2000 Employee Benefits Committee Meeting stating 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) (Doc. 358-23). 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 executives including I. Benjamin Watson, Senior Vice President for Human Resources, who stated that

"**Sprint probably can't take away benefits from current retirees**." (Pl. Ex. 23 at 22-23) (emphasis added) (Doc. 358-24). 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).

In addition, in July 2007, just before Embarq announced it was terminating the retiree medical plan and reducing the retiree life insurance, its HR staff created a question and answer memorandum to assist representatives in answering questions about the forthcoming changes. One question asked: "I have a letter that states that I will receive medical and life insurance benefits for life." Pl. Ex. 29 at attachment page 2 (Doc. 358-30). The suggested response prepared by the Company did not dispute that the employees received correspondence including lifetime assurances and simply asked the retiree to submit a copy and wait for a response. *Id.*

Defendants do not acknowledge these facts in asserting that there was no Company awareness of the retirees' understanding that they had lifetime benefits. Def. Mem. at 60 n. 24.

The evidence thus establishes the Company's "knowledge of confusion so pervasive that a reasonable fiduciary would have done more than simply rely on its SPD" and thus had "a duty to advise affirmatively of the reservation of rights clause . . . even in the absence of beneficiary-specific information concerning confusion or mistake." *Unisys III*, 242 F.3d at 509. Accordingly, even if – and contrary to the record – the SPDs could be deemed clear and unambiguous on the possibility of amendment or termination of benefits during retirement, the SPDs would not foreclose plaintiffs' claims.

Moreover, the evidence recited for these named plaintiffs (*See* Plaintiffs' Response to Defendants' Statement of Facts and Plaintiffs' Statement of Additional Undisputed Facts) shows

that the understanding of secure benefits was fostered by the Company's own communications. Employee reliance therefore was both foreseeable and *intended* by the Company. In its September 2009 affirmance of a post-trial judgment for the "Burroughs" retirees, the Third Circuit emphasized the "significant temporal aspect" of Company misrepresentations made while "specifically counseling [plaintiffs] about retiree benefits, at a time when [they] were making retirement decisions." *Unisys IV*, 579 F.3d at 231-32. Accordingly, the Company's arguments that it included a reservation clause in the SPD and other documents "is unavailing because [it] did not present this information when it was counseling its employees on their retirement decisions." 579 F.3d at 232.

Defendants' cited decisions do not upset this analysis. Defendants first seize on a single paragraph in *Robinson v. Sheet Metal Workers' Nat'l Pension Fund*, 441 F. Supp. 2d 405 (D. Conn. 2006), for the proposition that a claim cannot be based on misleading documents. Def. Mem. at 51. However, *Robinson* acknowledged that the determination whether a communication constitutes a material misrepresentation requires "taking account of all the circumstances." *Id*. at 434. The record did not show widespread misleading communications, or "any indication that Defendants knew that Plan beneficiaries were selecting the [disability benefit program] under the mistaken assumption that its benefits were vested," thus distinguishing the *Unisys* line of precedent and the facts of this case. *Id.* at 435.[395]

Defendants cite *Sprague v. General Motors Corp.*, 133 F. 3d 388, 405 (6th Cir. 1998) (en banc), but it is contrary to Tenth Circuit precedent. For example, the Sixth Circuit stated that "there can be no fiduciary duty to disclose the *possibility* of a future change in benefits" and

[395] Defendants also seize on a single sentence in *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994), to the effect that non-disclosure in an SPD of the right to amend or terminate is not a material misrepresentation, based on the court's reading of Department of Labor regulations. Def. Mem. at 51. *Jensen* concluded that the retirees had vested medical benefits under the terms of the plan, but the court did not affirm liability on the breach of fiduciary duty claim. On this specific issue, the decision is contrary to the weight of subsequent authority.

cited the *Restatement (Second) of Trusts* for the proposition that a trustee ordinarily has no duty to furnish information in the absence of a request. These points conflict with Tenth Circuit law, *see Horn*, which followed *Bixler*, *Unisys*, *Glaziers* and similar Third Circuit precedent. *Sprague* also is factually dissimilar, and the court took pains to point out that it would be a different case if the record showed – as it does here – that any plaintiff had "received a misleading answer, or [that the employer had] on its own initiative provided misleading information about the future of the plan." *Sprague*, 133 F. 3d at 406. In a more recent decision, the Sixth Circuit rejected arguments based on the SPDs: "*Sprague* does not stand for the proposition that a reservation of rights provision insulates an employer from liability when the employer disseminates materially false or misleading information on its own initiative about the future benefits of a plan." *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 455 (6th Cir. 2002).

In defendants' other cases (Def. Mem. at 54-55) there were no misrepresentations. *See Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 233-34 (1st Cir. 2006) (not "enough evidence to create a misrepresentation case" where plaintiffs only claimed that Company did not disclose fact that dental benefits could be amended or terminated; no evidence of Company statements about benefits); *Kamler v. H/N Telecommunications Services, Inc.*, 305 F.3d 672, 676 (7th Cir. 2002) (plaintiff failed to enroll in medical plan, despite receiving fax asking him to fill out enrollment forms and discussing enrollment with supervisor).

Defendants also quote from *Sullivan v. CUNA Mut. Ins. Society*, 649 F.3d 553, 557-58 (7th Cir. 2011), but fail to recognize that the discussion relates to claims for vested benefits under a plan, not fiduciary breach claims. Moreover, Judge Easterbrook's quoted ruminations about the best way to design forms responded to an argument based on an election form. In that

case, the "retirees [did] not say that they were misled by the election forms." *Id.* at 558. In this case, in contrast, plaintiffs cite documents that contained misleading statements.[396]

D. The Company Made Written Misrepresentations That Are Actionable.

There is no doubt that the misrepresentations to plaintiffs about these benefits are material. "A fiduciary's misrepresentation or failure to disclose is material 'if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed . . . decision.'" *Horn*, 69 Fed. App'x at 428 (*quoting Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1015-16 (3d Cir. 1997)). As a general matter, "Any provision of a plan subject to ERISA that establishes a benefit is a material term of the plan." *Curcio v. John Hancock Mutual Ins. Co.*, 33 F.3d 226, 237 (3d Cir. 1994). "Our decisions . . . firmly establish that when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty." *Unisys II*, 57 F.3d at 1264. Thus, for example, "the cost and duration of retiree medical benefits is a significant factor to an employee who is contemplating whether retirement is feasible at the time." *Unisys IV*, 579 F.3d at 232 (quoting trial findings).

Defendants argue that announcements of employees' last chance to retire under the then-operative "Flexcare" retiree medical benefits and retiree life insurance benefits cannot constitute material misrepresentations. Def. Mem. at 49-50. In describing these documents, defendants fail to acknowledge that at this time the Company expressly told employees that in order to retain the current benefits under which the Company contributed a certain percentage of the cost of coverage, they were required to retire and begin receiving pension benefits before January 1,

[396] Defendants quote *Sullivan* a second time and once again fail to acknowledge the context of the quoted language. Def. Mem. at 62, *quoting Sullivan*, 649 F.3d at 557-58. The court noted that a summary plan description may not contain all relevant information from a plan so there are "gaps in a summary plan description," but these gaps "cannot override the terms of a plan." As stated in the text, *Sullivan* concerned plan-based claims for vested benefits, not fiduciary breach claims.

2002. *See, e.g.*, SAF ¶ 90-91 (HR representative Rezayazdi informed Bullock of requirement to waive five weeks of accrued vacation to retain current retiree benefits throughout retirement, and Bullock's vacation waiver form stating "25 Days Vacation waived to enable me to receive the 2001 benefit package"); SAF ¶ 96 (HR informed employees of need to retire by end of 2001 to keep current benefits); SAF ¶ 11 (Benefits Manager Hux testimony that HR personnel instructed employees that if they retired by December 31, 2001 they would retain retiree medical and life insurance for rest of their lives).

Second, the documents themselves made clear to employees that this was the last chance to secure the current retiree benefits throughout retirement. *See, e.g.*, Bullock Ex. 23 (DEF APP 430) ("Important News For Everyone!" brochure, stating that if the employee did not retire before 2002, retiree life insurance benefits will be reduced for retirements occurring during two subsequent years and then abolished altogether and (in a highlighted box) "If your last day worked is in 2001, Sprint pays for your retiree medical option the same way it has in the past"); Bullock Ex. 22 (DEF APP 428) ("Retirement and Your Future with Sprint" letter from E. J. Holland, Jr. explaining what the employees' benefits in retirement will be "If you retire in 2001" and "If you retire in 2002 or later," and "2002 Retiree Medical Financial Support Comparison" showing higher Company contribution for retiree medical coverage under Existing Funding Method than new post-2001 "SHARE Account").[397]

Defendants' attacks on other documents are similarly unsuccessful. *See* SUF ¶ 175 (document explaining level of life insurance for first five years and level thereafter, characterizing this benefit as "grandfathered," and Bullock understanding that term

[397] Defendants cite controverted facts alleging that Bullock and Hollingsworth's notes on a slide presentation indicate they were told that retiring before 2002 did not guarantee the existing retiree benefits. Def. Mem. at 50. However, Bullock testified that her note referred to the possibility of phasing out the new SHARE plan, not the current retiree benefits for which she was retiring. SUF ¶ 112. Hollingsworth testified that his wife took those notes and he did not see the notes or discuss the presentation with her before he retired. SUF ¶ 132.

"grandfathered" consistent with common usage: "you're grandfathered in, you keep it"); SAF ¶¶ 8-9 (Benefits Manager Hux testified that checklist promised lifetime retiree medical and life insurance); SUF ¶¶ 135, 203, 234, 235, 249 (descriptions of why it is reasonable to understand checklist as representing lifetime retiree medical and life insurance benefits); SAF ¶ 24 (HR representative Phillips testified checklists distributed to managers to explain benefits, to employees and at group retirement planning sessions. Expectation was for employees to rely on checklist); SAF ¶¶ 14-15, 17-18 (Benefits Manager Hux testified that alleged ROR language in Explanation of Benefits documents and other letters "ambiguous" on right to amend or terminate retiree insurance); SUF ¶ 201 (letter does not discuss Daniel's retiree medical and life insurance benefits); DEF APP 172 (workplace posting announcing last chance to retire under current retiree medical and life insurance plan); DEF APP 762 (the Pension/Retiree Benefits Document received by Daniels with explicit lifetime promise: "Life Insurance: $228,000 first 5 years, $114,000 (after 5 years for lifetime))."

E. The Company Made Oral Misrepresentations That Are Actionable.

Defendants contend that a fiduciary breach claim cannot be based on oral statements. Def. Mem. at 56-57. But defendants' argument on this point relies on ERISA estoppel decisions, not fiduciary breach decisions. For the reasons stated at page 75 above, estoppel is a distinct basis for liability under which the terms of the plan are actually modified. Defendants' use of estoppel case law is error.

The rules governing estoppel claims always have been strict due to concern for the plans' financial health. Since estoppel claims attempt to override plan terms, a plaintiff must show that "the terms of a plan are ambiguous" and that the communication "constituted an interpretation of that ambiguity." *Averhart v. US West Mgmt. Pension Plan*, 46 F.3d 1480, 1485-87 (10th Cir.

1994); *accord*: *Miller v. Coastal Corp.*, 978 F.2d 622, 624-25 (10th Cir. 1992) (rejecting promissory estoppel claims to modify plan terms based on written communications; no "extraordinary circumstances" shown); *Straub v. Western Union Telegraph Co.*, 851 F.2d 1262, 1265-66 (10th Cir. 1988) (rejecting promissory estoppel claims to modify plan terms based on oral statements). Unlike estoppel claims, fiduciary breach claims attach liability to the fiduciary, usually the employer, and plan terms are not altered. *See Unisys II*, 57 F.3d at 1265 & n. 14 (quoted on page 75 above); *Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 78 (3d Cir. 2001) (quoted on page 75 above).

Defendants also overstate the holding in *Ladouceur v. Credit Lyonnais*, 584 F.3d 510 (2d Cir. 2009), in which the plaintiff employees alleged a solely oral promise to alter the recognized contrary terms of a pension plan (as with an estoppel claim) so that they would receive benefit accruals based on their service date with a predecessor. The court did not announce a general rule barring claims based on oral misrepresentations, but a limited one tailored to the precise claim under review. Acknowledging that the Second Circuit had never held that fiduciary breach claims required a writing, the court stated that "no such categorical requirement is needed to decide this case" and ruled only that "a party alleging a breach of fiduciary duty *on the basis of a statement purporting to alter the terms of an ERISA benefit plan* must point to a written document containing the alleged statement." 584 F.3d at 513 (emphasis in original).

Frahm v. The Equitable Life Assurance Society of the United States, 137 F.3d 955, 960 (7th Cir. 1998), likewise does not bar claims based on oral statements. In the paragraph immediately preceding defendants' quote, the court stated that, "We need not decide whether (and, if so, how) § 1104(a)(1)(B) bears on oral advice, because, whatever this section does, it does not create a standard of absolute liability." *Id.* The court ruled that there could be no

fiduciary breach claim unless the Company "set out to deceive or disadvantage plan participants." *Id*. This standard is peculiar to the Seventh Circuit and contrary to Tenth Circuit law.

Examining the pertinent cases on fiduciary breach which defendants ignore, in the Tenth Circuit it is clear that a disclosure claim can be based on a failure to disclose material information. *See Horn*. That being so, there is no basis for defendants to conclude that an affirmative oral misstatement by a fiduciary would not also be actionable.

Defendants now lament that there was little they could do to protect themselves from these claims. Def. Mem. at 59. But, in fact, the Company could and should have complied with its ERISA fiduciary duties in the first place – by drafting clear documents, effectively communicating with employees at the time of retirement (as recommended in the 1985 article quoted on page 76 above), and refraining from making misleading statements to employees.

Defendants next cite a number of decisions for the proposition that "all of the oral statements" cited by named plaintiffs were "accurate statements regarding the benefits that existed at the time of each plaintiff's retirement and the Company's then-existing intention to continue providing such benefits." Def. Mem. at 60-61. But the same argument was made and rejected by the Third Circuit in *Unisys II*, 57 F.3d at 1265 n. 15. The same result follows in the Tenth Circuit under the strict disclosure duties enunciated in *Horn*. Indeed, the Seventh Circuit called this argument – that the reservation clause was not material because the Company was not considering any changes at the time the plan was being described to employees – "simply jaw-dropping." *Sullivan v. CUNA Mut. Ins. Society*, 649 F.3d 553, 564 n. 2 (7th Cir. 2011).[398]

[398] Defendants also fail to disclose that the cases they cite (Def. Mem. at 60) have not been followed in their own circuits. The Third Circuit rejected defendants' argument based on an over-reading of *Leuthner v. Blue Cross and Blue Shield of Northeastern Pennsylvania*, 454 F.3d 120 (3d Cir. 2006). *See Unisys IV*, 579 F.3d at 230-32. The district court decision in *Byrnes v. Empire Blue Cross and Blue Shield*, No. 98 CIV 8520, 2000 WL 1538605

Defendants also err in contending that the misrepresentations can be ignored because the recipients either did not have, did not review, or did not understand the SPD. As stated at pages 74-78 above, a fiduciary cannot insulate itself from liability on this basis.

F. Post-Retirement Misrepresentations Are Actionable.

Defendants next assert that several plaintiffs cite post-retirement misrepresentations which are not actionable. This is contrary to the law.

The Third Circuit has specifically ruled that fiduciary breach claims can be based on personal decision-making that does not relate to the retirement decision itself. "[W]e decline the [Company's] invitation to adopt an across the board prohibition of relief based on reasonable reliance in contexts other than retirement decisions" and "reject the District Court's view that *Unisys II* . . . limits recovery . . . to claims based on voluntary decisions to retire." *Unisys III*, 242 F.3d at 507-08. The court also ruled that plaintiffs could establish claims based on the fact that "they relied to their detriment in making other decisions after those dates [on which they retired]." *Id.* at 506-07. The Third Circuit in 2009 reiterated that, "Notably, detrimental reliance is not limited to the retirement decision alone; rather, it may encompass decisions to decline other employment opportunities, to forego the opportunity to purchase supplemental health insurance, or other important financial decisions pertaining to retirement." *Unisys IV*, 579 F.3d

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(S.D.N.Y. Oct. 18, 2000), was reversed in *Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 84-86, 87-89 (2d Cir. 2001) ("Such 'lifetime' language . . . is sufficient to create a triable issue as to whether Empire promised to vest retiree life insurance benefits at the stated level"; fiduciary breach claim viable because, per *Unisys*, Company made "communications which promised lifetime benefits but failed to note that Empire could reduce or terminate these benefits at any time."). *Armbruster v. K-H Corp.*, 206 F. Supp. 2d 870 (E.D. Mich. 2002), is contrary to the Sixth Circuit's decision a few months later in *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 453-55 (6th Cir. 2002), which reversed a summary judgment and rejected the district court's conclusion that statements that "benefits would continue 'for life' were true under the plan as it existed at that time." In defendants' remaining decision, the Seventh Circuit acknowledged that its ruling in *Frahm* that fiduciary disclosure violations require intent to "disadvantage or deceive" employees and that "negligence in fulfilling that [disclosure] duty is not actionable," was contrary to the weight of the precedent and "demonstrates a narrower interpretation of *Varity* than exists in other circuits." *Vallone v. CNA Financial Corp.*, 375 F.3d 623, 642 (7th Cir. 2004).

at 229. These rulings make abundant sense, given that misrepresentations about benefits can play an important role in many aspects of household decision-making, as plaintiffs establish.

Defendants do not acknowledge this directly pertinent precedent but instead strain to find support in other cases. Def. Mem. at 63-64. In *Kerber*, 647 F.3d at 971, the court ruled that misrepresentations about benefits received more than 10 years after retirement were not material, but the plaintiffs did not claim any types of reliance at all and the court had no occasion to consider other possible bases for materiality. So the limited reference to retirement does not constitute a ruling on other possible contexts for reliance. Defendants also overstate the ruling in *Nydes v. Equitable Resources, Inc.*, 33 Fed. App'x 598, 600 (3d Cir. 2002) (unpublished), where an employee claimed he lost the opportunity to continue employment and qualify for a new pension arrangement. Because "the final date of his separation was not negotiable," any misrepresentation could not have affected his eligibility for the arrangement. The court did not discuss its prior precedent rejecting the argument that the law limits fiduciary liability "to claims based on voluntary decisions to retire." *Unisys III*, 242 F.3d at 508. The same precedent shows that defendants cannot defeat the claims of the Carpenters and Joyner based on the fact that their job positions were eliminated. Def. Mem. at 64.

G. The Misrepresentations Were Made By Fiduciaries.

Defendants contend that certain plaintiffs have cited statements that were not made by fiduciaries. Def. Mem. at 64-66.

Plaintiffs establish that the misrepresentations were made by fiduciaries. This element is readily satisfied with respect to both the Company's SPDs and other mass communications and the Company's failures to disclose material information, given that the fiduciary duty to disclose complete and non-misleading information was continuously borne by the Company in its

capacity as plan administrator. *Horn*, 69 Fed. App'x at 427 ("Cendant, through its Employee Benefits Committee, was the plan administrator. Thus, it was a fiduciary, owing obligations to plan participants.").[399] Under Tenth Circuit law, moreover, a Company cannot shield itself from fiduciary liability by hiding behind staff who may or may not possess the information that must be disclosed. *See id.* (Company spoke through its HR employees "and it acted as a fiduciary when it conveyed incomplete information about the [plan]"). An employer's fiduciary disclosure "obligations cannot be circumvented by building a 'Chinese Wall' around those employees on whom plan participants reasonably rely for important information and guidance . . . ." *Id.* (*quoting Fischer v. Phila. Elec. Co.*, 994 F. 2d 130, 135 (3d Cir. 1993)).

Defendants' managers and supervisors were instructed by the Company to provide benefits information to employees, and employees accordingly viewed managers as acting with apparent, if not actual, authority to disseminate benefits information. Managers and supervisors testified that they provided benefits information to employees as part of their duties. *See, e.g.*, SAF ¶¶ 51-54 (Dorman informed at least 1,500 employees about their benefits, always telling them their retiree medical and life insurance were for life); SAF ¶ 120 (per Dillon, managers had role of providing information about active and retiree benefits; he told employees that retiree medical and life coverage was for lifetime).

Barnes testified that she understood her manager was authorized to answer questions based on statements that the manager was the resource for benefits information. SAF ¶ 105. Similarly, Clark testified that his plant's Chief Operator was authorized to speak about Company benefits. SAF ¶ 34. Defendants assert that Joyner's discussion with the *president* of the

[399] The SPDs presented by defendants in their motion for summary judgment on the First and Third Claims show that the Company was the plan administrator. *See* Def. Exs. A-1 at EQ_FUL 0145; A-2 at EQ_FUL 0197-98; A-4 at EQ_FUL 0254-55; A-5 at EQ_FUL 0370-71; A-7 at EQ_FUL 051549; A-8 at EQ_FUL 01281; A-9 at EQ_FUL 039151; A-10 at EQ_FUL 201626; A-11 at EQ_FUL 01186; A-12 at EQ_FUL 051664; A-13 at EQ_FUL 202404; A-14 at EQ_FUL 203513; A-15 at EQ_FUL 01199; A-16 at Bullock0158, 0164, 0169.

Company about retiree benefits, in which Joyner told the president that he was retiring because he had lifetime retiree benefits but the president did not express any correction or disagreement, is not actionable as a fiduciary disclosure violation. SAF ¶ 68.[400] If anyone represents a Company, a reasonable employee would expect it to be the president.

While it is true that some plaintiffs could not identify staff members by name, they provided evidence of the surrounding circumstances for these interactions which is a sufficient basis to conclude that these staff (including supervisors who were held out as being authorized sources of benefits information) were acting with apparent if not actual authority. *See Taylor v. Peoples Natural Gas Co.*, 49 F. 3d 982, 988-89 (3d Cir. 1995).[401]

Plaintiff Betty Carpenter also can invoke evidence of benefits-related communications that were made to her husband, plaintiff Kenneth Carpenter, and then repeated to her. The maker of a misrepresentation is liable to secondary recipients where its repetition is foreseeable. Defendants cannot avoid liability for a misrepresentation simply because the injured recipient did not receive it directly from the Company where it was foreseeable that the misrepresentation would be circulated in this way among employees. *See, e.g., Restatement (Second) of Torts* § 533. Similarly, the Supreme Court in *CIGNA Corp. v. Amara,* -- U.S. -- , 131 S.Ct. 1866, 1881 (2011), ruled that the "harm" element does not always require proof of personal "detrimental reliance" and can be satisfied even if the particular plaintiffs did not see the SPD or other communication, "for they may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful."

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[400] Contrary to defendants' argument (Def. Mem. at 65), Hollingsworth testified that his wife provided him the checklist, received by all retirement-eligible employees, containing lifetime promises of retiree medical and life insurance, not that she made oral misrepresentations. SUF ¶ 134.

[401] HR representative Phillips testified that she could have been the "upper level" HR representative who provided Britt with representations of lifetime retiree medical and life insurance benefits. SAF ¶ 39.

Defendants cite only one decision in support of their argument on fiduciary status, but it is readily distinguishable. Def. Mem. at 66, *citing Kannapien v. Quaker Oats Co.*, 507 F.3d 629, 639-40 (7th Cir. 2007) (isolated, honest mistake in reporting credited years of service not actionable as fiduciary breach under idiosyncratic Seventh Circuit precedent holding that benefits staff do not have fiduciary status). *Contra: Horn.*

H. Plaintiffs Reasonably Relied on The Misrepresentations.

Defendants assert that plaintiffs' reliance on the misrepresentations cannot be reasonable due to the existence of SPDs and other documents reserving the right to amend or terminate. As shown in Sections III (B) and (C) above, this argument has been rejected by the courts.

Defendants also cite a number of decisions on estoppel claims, which are inapposite for the reasons stated on pages 75 and 82-84 above. *See Crosby v. Rohm & Haas Co.*, 480 F.3d 423, 431 (6th Cir. 2007); *Mello v. Sara Lee Corp.*, 431 F.3d 440, 447-48 (5th Cir. 2005); *Livick v. The Gillette Co.*, 524 F.3d 24, 31 (1st Cir. 2008); *Woods v. Nat'l Medical Care, Inc.*, 25 Fed. App'x 767, 772 (10th Cir. 2001) (unpublished) (promissory estoppel under Massachusetts law). Defendants also cite *Unisys I*, 58 F.3d at 907, but neglect to acknowledge that the Third Circuit made clear that the rules for plan-altering claims do not apply to the fiduciary breach claims it simultaneously upheld in *Unisys II*, 57 F.3d at 1264-65 & n. 13.[402]

IV. THERE ARE TRIABLE ISSUES REGARDING PLAINTIFFS' HARM.

Plaintiffs present sufficient evidence for the remaining element of their claims – harm.

The Supreme Court's May 2011 decision in *CIGNA Corp. v. Amara*, -- U.S. -- , 131 S.Ct. 1866 (2011), established new law on claims for relief under ERISA Section 502(a)(3), 29 U.S.C.

[402] Defendants also cite *Watson v. Consolidated Edison Pension & Benefits Plan*, 374 Fed. App'x 159, 162-63 (2d Cir. 2010), but it likewise is not pertinent because the plaintiffs could only cite "vague oral statements" and "meager deposition testimony." The court also treated the fiduciary breach claims as equivalent to estoppel claims under which "the oral representations should be given effect as modifying the terms of their plan."

§ 1132(a)(3), including these BOFD claims. But defendants cite *Amara* only once, in a footnote. As if that were not bad enough, they dismiss entire sections of the Supreme Court's 6-3 decision as "dicta." *See* Def. Mem. at 43 n. 20. Defendants acknowledge that the Tenth Circuit did not treat *Amara* as dicta in *Tomlinson v. El Paso Corp.*, 653 F.3d 1281, 1295 (10th Cir. 2011), but likewise mischaracterize *Tomlinson*'s discussion of *Amara* as "unnecessary to resolve the issue" and thus as dicta as well. Def. Mem. at 43 n. 20. One of the questions on which *certiorari* was granted in *Amara* was "whether a showing of 'likely harm' is sufficient to entitle plan participants to recover benefits based on faulty disclosures." 131 S.Ct. at 1876. The second half of the *Amara* opinion resolves this question and is not "dicta."

Before *Amara*, lower courts understood previous Supreme Court decisions dealing with the forms of "appropriate equitable relief" under ERISA Section 502(a)(3) to narrowly limit relief to remedies such as injunction and restitution, even in cases against a fiduciary. *Amara* makes clear that these prior decisions concerned defendants that were not fiduciaries. Under trust law, relief against a breaching fiduciary could only be obtained in a court of equity. Accordingly, all forms of equitable relief available against a fiduciary by definition are "equitable" remedies available under ERISA. 131 S.Ct. at 1878-80.

The Supreme Court then reviewed the forms of relief that could be available to the *Amara* plaintiffs and the required elements. It confirmed that "affirmative and negative injunctions obviously fall within this category" of available equitable remedies. *Id.* at 1879. The Court noted that "Any other relief ordered by the District Court resembles forms of traditional equitable relief" – (a) "reformation of the terms of the plan, in order to remedy the false or misleading information CIGNA provided;" (b) equitable estoppel, "to place the person entitled to its benefit in the same position he would have been in had the representation been true;" and (c)

"monetary 'compensation' for a loss resulting from a trustee's breach of duty" also known as a "surcharge." *Id.* at 1879-80. The Court next discussed the showing required for each form of relief, to answer the question on which review was granted (quoted above). The Court noted that the ERISA statute did not address these elements, so they "must come from the law of equity."

The Supreme Court ruled that there is no general requirement for a plaintiff to prove "detrimental reliance" in order to obtain relief for a fiduciary violation. Rather, the elements required depend on the form of remedy that is being sought. "Looking to the law of equity, there is no general principle that 'detrimental reliance' must be proved before a remedy is decreed. To the extent any such requirement arises, it is because the specific remedy being contemplated imposes such a requirement." 131 S.Ct. at 1881.[403]

Turning to the specific remedies that might apply, the Court ruled that the remedy of equitable estoppel required a showing of "detrimental reliance" but that none of the other remedies did. Moreover, "Information-related circumstances, violations and injuries are potentially too various in nature to insist that harm must always meet that more vigorous 'detrimental harm' standard when equity imposed no such strict requirement." *Id.* at 1881. The Court also ruled that the surcharge remedy requires "a showing of actual harm" that "may sometimes consist of detrimental reliance, but it might also come from the loss of a right protected by ERISA or its trust law antecedents." *Id.*

In *Tomlinson* the Tenth Circuit explained *Amara* in the course of discussing the plaintiffs' claim that an SPD did not adequately disclose the "wear-away" features of a "cash balance" pension plan and thus violated the ERISA provision governing SPDs:

[403] As this quote shows, the required elements depend on "the specific remedy being contemplated." Defendants misread *Amara* in asserting that it "did not eliminate the reliance element for claims such as those presented by Plaintiffs here." Def. Mem. at 43 n. 20. *Amara* holds that the reliance requirement only applies to the specific remedy of estoppel, not to "claims" of fiduciary breach generally.

> The Supreme Court recently rejected *Chiles*' reliance requirement. **In *Amara*, the Court emphasized that the need to show reliance depends on the remedy sought.** 131 S. Ct. at 1881. A reliance requirement arises only "because the specific remedy being contemplated imposes such a requirement." *Id.* . . . Even when a showing of reliance is required, reliance need not turn on reading the SPD. For example, if the claim stems from
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> > the loss of a right protected by ERISA . . . it is not difficult to imagine how the failure to provide proper summary information . . . injured employees if they did not themselves act in reliance on summary documents – which they might not themselves have seen – for they may have thought fellow employees, or informal workplace discussion, would have let them know if, say, plan changes would likely prove harmful. We doubt that Congress would have wanted to bar those employees from relief.
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> *Id.* Thus, for the injunctive relief sought by the plaintiffs, it would be sufficient to show harm caused by El Paso's breach of ERISA § 102, 29 U.S.C. § 1022.

Tomlinson v. El Paso Corp., 653 F.3d 1281, 1295 (10th Cir. 2011) (emphasis added).[404]

Under *Amara*, plaintiffs can pursue multiple forms of relief for the fiduciary disclosure violations, including reformation, injunctions compelling performance of the reformed plan, surcharge including "make-whole relief" for the violation, 131 S.Ct. at 1880, and equitable estoppel. Only the estoppel remedy requires a showing of "detrimental reliance."

Plaintiffs need not prove detrimental reliance to establish their claims and secure relief. In any event, plaintiffs present sufficient evidence of detrimental reliance. Plaintiffs Clark, Britt, McLaurin, Dorman, Joyner, Daniel, Fulghum, Bullock, Hollingsworth, Games, Barnes, Kenneth Carpenter, Dillon, King, Shipley and Somdahl all retired based on promises of lifetime retiree medical and retiree life insurance benefits.[405]

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[404] The SPD-related claim in *Tomlinson* ultimately failed due to Tenth Circuit precedent that cash balance "wear-aways need not be explicitly disclosed in the SPD" and the lack of evidence that the SPD "failed to explain the manner of conversion to cash balance accounts." 653 F.3d at 1295-96.

[405] *See* SUF ¶¶ 147, 194, 236, 250, 276, 289; SAF ¶¶ 38, 43, 47, 62, 72, 75, 80, 91, 99, 104, 111, 113, 124, 131, 135, 139.

Each named plaintiff also established other forms of detrimental reliance.[406]

V. PLAINTIFFS' CLAIMS ARE NOT TIME-BARRED

Plaintiffs' claims are not time-barred under the ERISA statute of limitations governing fiduciary breach claims, 29 U.S.C § 1113. This section tolls the running of the statute "in the case of fraud or concealment" until "six years after the date of discovery of such breach or violation." Under the law, a fiduciary misrepresentation constitutes this "fraud or concealment." Defendants do not acknowledge or address this provision of Section 1113 and present no basis for summary judgment on the limitations issue.

A. Under the Common Law of Trusts, A Fiduciary's Misrepresentation or Failure to Disclose Material Information Constitutes Fraud or Concealment Tolling the Statute of Limitations.

ERISA looks to the common law of trusts for many key provisions. *See, e.g., Amara; Horn*. ERISA is to be construed to avoid results that would "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989). "Fraud or concealment" has a particular meaning under the law of trusts and it is established in this case.

Congress is presumed to know existing law when it legislates, and when it makes use of terms with an established meaning it is presumed to adopt that meaning. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 331 (1981). At the time of ERISA's 1974 enactment, it was well established in this Circuit and elsewhere that when a fiduciary affirmatively misrepresented or failed to disclose information, the statute did not begin to run until the beneficiary discovered the wrong. The underlying conduct was treated as fraud or concealment. In *Amen v. Black*, 234 F.2d 12, 26

[406] *See* Clark SAF ¶ 38; Britt SAF ¶ 44; McLaurin SAF ¶ 48; Dorman SAF ¶¶ 63-64; Joyner SAF ¶¶ 69-70; Daniel SAF ¶ 76; Fulghum SAF ¶¶ 81-82; Bullock SAF ¶ 92; Hollingsworth SAF ¶¶ 99-100; Games SAF ¶ 104; Barnes SAF ¶ 111; Kenneth Carpenter SAF ¶ 116; Betty Carpenter SAF ¶ 116; Dillon SAF ¶ 124; King SAF ¶ 131; Shipley SAF ¶ 136; Somdahl SAF ¶ 139.

(10th Cir. 1956), the Tenth Circuit summarized this doctrine in ruling that, "the law does not require one to suspect his fiduciary. Surely no one would contend that the . . . statute of limitations was intended to impose upon the defrauded party the burden of discovering a fraud perpetrated by one standing in a position of trust." In *Sprint Communications Co. v. AT&T*, 76 F.3d 1221, 1226 (D.C. Cir. 1996), the court held that "where the relationship between the parties gives rise to a duty to reveal, nondisclosure of known facts, **without artifice or design to bar access to the information**, is 'fraudulent concealment.'" (emphasis added).

These decisions are consistent with many federal and state decisions holding, both before and after ERISA's enactment, that a fiduciary's misrepresentation or failure to provide information tolls the statute of limitations. *See, e.g., Janigan v. Taylor*, 344 F.2d 781 (1st Cir 1965); *Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978); *Baskin v. Hawley*, 807 F.2d 1120, 1131-32 (2d Cir. 1986). Numerous decisions hold that misrepresentation or silence by a fiduciary is equivalent to fraud. *See, e.g. Amen v. Merced County Title Company*, 375 P.2d 33, 36 (Cal. 1962) (fiduciary relationship obviates necessity of pleading fraud; manifestly unjust to bar by limitations when claim resulted from fiduciary breach); *Sinclair v. Manufacturers Nat'l Bank of Detroit*, 223 N.W.2d 60, 61-62 (Mich. App. 1974) (plaintiff overcomes statute of limitations where co-executor fails to make fiduciary disclosures; conduct is fraud); *Murphy v. Country House Inc.*, 240 N.W.2d 507, 511-12 (Minn. 1976) (silence by fiduciary, even without affirmative misrepresentation or active concealment, constitutes fraud); *Boston Safe Deposit and Trust v. Seifert*, 1996 Mass. Super. LEXIS 682, *18, *32 (Super. Ct. Mass. February 17, 1996) (discovery rule applied to claim for breach of fiduciary duty to disclose because "a fiduciary's silence is equivalent to a stranger's lie").

B. Under the Doctrine of Equitable Tolling, the Statute Is Tolled Until Discovery of A Misrepresentation.

Congress also is presumed to have been aware of the doctrine of equitable tolling, under which the statute will not begin to run in the case of *either* underlying fraud *or* acts to conceal wrongdoing until the plaintiff discovers the wrong. This doctrine was so well established that the Supreme Court declared in 1874, exactly 100 years before ERISA's enactment, that "the weight of judicial authority . . . is in favor of the application of the rule to suits at law as well as in equity." *Bailey v. Glover*, 88 U.S. 342, 21 Wall. 342, 349 (1874).

Equitable tolling due to "fraud or concealment" is straightforward. It encompasses both the doctrine of "fraudulent concealment" *and* the doctrine of "inherent fraud." In the former case, the plaintiff's ignorance of underlying fraud results from the defendant's affirmative acts to conceal pertinent facts. But the statute is also tolled in the latter case, where the underlying wrong conceals itself:

> We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, **though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party**.

Id. at 348 (emphasis added; citations omitted). This rule follows from the principle that statutes of limitations are meant to prevent frauds, not to aid their perpetration:

> To hold that by concealing a fraud, **or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it**, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Id. at 349 (emphasis added). This rule applies "when the fraud has been concealed, or is of such character as to conceal itself." *Id.* at 349-50. In *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), the Court noted that this equitable tolling "is read into every federal statute of limitations." *Id.* at

397. "When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." *Id.* at 395.

This doctrine of equitable tolling is synonymous with "fraud or concealment." The cases expressly refer to it as such. For example, *Sheet Metal Workers Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1279 (3d Cir. 1991), explained that "fraud or concealment" encompassed two separate concepts. Under the "inherent fraud doctrine," underlying deceit "without more, will toll the statute of limitations until such time as the fraud has been revealed or should have been revealed." *Id.* at 1280 (*citing Holmberg*, 327 U.S. at 397). Inherent fraud "can include unintentional and intentional deception, as well as any misrepresentation of a material fact." *Id.* at 1280 n. 7. *See also Briley v. State of California*, 564 F.2d 849, 855 (9th Cir. 1977) ("The established rule . . . is that, where a plaintiff has been injured by fraud or concealment and remains in ignorance of it without any fault or want of diligence on his part, the statutory period does not begin to run until discovery of the injury.") (*citing Holmberg*).

The Second Circuit has confirmed that this trust law concept of fraud or concealment is embodied in Section 1113, as shown by ERISA's drafting history. *Caputo v. Pfizer*, 267 F.3d 181, 189-90 (2d Cir. 2001). The decision notes that several circuits have reached the conclusion that, contrary to the law of trusts and cases such as *Bailey*, ERISA's "fraud or concealment" provision instead refers only to "fraudulent concealment" and requires some affirmative act of concealment. The Second Circuit noted that these decisions trace back to a "footnote in a district court opinion that cites no legal support for the proposition." 267 F.3d at 189 & n. 2.[407]

[407] Defendants cite *Larson v. Northrop Corp.*, 21 F.3d 1164 (D.C. Cir. 1994), one of the line of cases which incorrectly equated "fraud or concealment" with "fraudulent concealment" based on an erroneous reading of *Wood v. Carpenter*, 101 U.S. 135, 11 Otto 135 (1879), as a statement of general federal law. *Wood*, which was decided just five years after the Court's unequivocal explanation of equitable tolling in *Bailey*, concerned a narrow question

In *Unisys III*, the panel divided 2-1 on this question, with the late Judge Mansmann issuing a concurring opinion which reviewed the above-cited trust law authorities and concluded that ERISA did not require affirmative acts of concealment in order for the statute to be tolled. *Unisys III*, 242 F.3d at 513-16 (Mansmann, J., concurring).

C. Plaintiffs' Claims Require Proof of Harm and Thus Did Not Accrue Until Defendants Reduced or Terminated Benefits.

The retirees' claims are also timely under the six-year statute provided in Section 1113. It begins to run from "the date of the last action which constituted **a part of** the breach or violation." 29 U.S.C. § 1113(1)(A) (emphasis added). Under *Amara*, an element of the claim is

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under an Indiana statute providing for tolling only in cases of *concealment*, i.e. "If any person liable to an action shall conceal the fact from the person entitled thereto." 101 U.S. at 138. The Court reviewed Indiana decisions holding that "the concealment under [the Indiana statute], which will avoid the statute, must go beyond mere silence" or "must be the result of positive acts." 101 U.S. at 142, *citing Boyd v. Boyd*, 27 Ind. 429 (1867), and *Stanley v. Stanton*, 36 Ind. 445 (1871). Based on this "survey of the authorities," the Court summarized the principles applicable to the case *under Indiana law*, stating that "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." 101 U.S. at 143.

Soon after *Wood*, the Court made its limited nature clear, expressly distinguishing it as based on Indiana law and noting that it did not refer to *Bailey* and could not "be held to overrule or modify it." *Rosenthal v. Walker*, 111 U.S. 185, 190-91 (1884). According to that decision, *Bailey* "has been often cited by this court, but has never been doubted or qualified." *Bailey* and subsequent Supreme Court decisions reconfirming the federal doctrine of equitable tolling show that there is no requirement of "special circumstances or acts . . . to conceal" the underlying wrong. Given the absence of any reference to *Wood*, or "trick or contrivance," in any subsequent Supreme Court decision discussing equitable tolling, it is clear that *Wood* did not modify or qualify the federal rule of equitable tolling set out in *Bailey*.

Wood was mistakenly imported into ERISA jurisprudence in apparent unawareness of these points. The case was initially cited as an amplification of general federal doctrine by the D. C. Circuit in a civil rights case, *Hobson v. Wilson*, 737 F.2d 1, 33-35 (D.C. Cir. 1984), where the court had no hesitation in concluding that the statute was tolled. *Hobson* was followed in an ERISA investment loss case, *Foltz v. U.S. News & World Report, Inc.*, 663 F. Supp. 1494, 1537 (D.D.C. 1987), where the court concluded there was no underlying fraud or fraudulent concealment. The Eighth Circuit relied on these two decisions in *Schaefer v. Arkansas Medical Society*, 853 F.2d 1487, 1491-92 (8th Cir. 1988), holding that section 413 "incorporates the fraudulent concealment doctrine" and requires proof that "defendants engaged in a course of conduct designed to conceal evidence." *Schaefer* was followed in *The Radiology Center, S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1220 (7th Cir. 1990), for the mistaken conclusion that "fraud or concealment" was equivalent to fraudulent concealment. Two years later, the Seventh Circuit qualified *Radiology Center* in *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1095 & n. 18 (7th Cir. 1992), explaining that the language of section 413, as well as *Bailey*, required the conclusion that the section encompassed self-concealing acts as well as fraudulent concealment. However, the court went on to declare, again on the mistaken authority of *Wood*, that there must also be "some trick or contrivance" even in the underlying, self-concealing fraud. Finally, in *Larson v. Northrop Corporation*, 21 F.3d 1164, 1172-73 (D.C. Cir. 1994), the court surveyed this line, including especially *Martin*, and likewise held that there must be "some trick or contrivance." This was error, as the "fraud or concealment" provision adopted by Congress requires no "trick or contrivance," particularly inasmuch as a fiduciary relationship is involved.

"actual harm." 131 S.Ct. at 1881. In this case the "last action which constituted a part of the breach" can occur no earlier than the date each plaintiff first suffered actual harm. This harm did not occur, and no claim arose, until the Company acted contrary to its representations and terminated the prescription drug plan effective January 1, 2006. Construing limitations under ERISA's multiemployer provisions, the Supreme Court ruled that in the absence of contrary Congressional direction, a statute of limitations will not begin to run "until the plaintiff can file suit and obtain relief." *See Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) ("the standard rule that the limitations period commences when the plaintiff has 'a complete and present cause of action'").

D. Plaintiffs' Claims Are Timely.

Defendants are mistaken in arguing that plaintiffs' claims are time-barred. First, given the misrepresentation-based nature of these claims, "fraud or concealment" tolling is applicable under ERISA. Defendants present no argument or evidence that plaintiffs did not timely file their claims once they discovered the fiduciary violations.

Second, even without tolling for fraud or concealment, each plaintiff has identified action (or forbearance to act) during the six years preceding suit which brings their claims within the six-year statute.[408]

[408] *See* Clark SAF ¶ 38 (did not seek other life insurance, discretionary expenditures); Britt SAF ¶44 (discretionary expenditures); McLaurin SAF ¶ 48 (established and renovated a bed and breakfast business); Dorman SAF ¶ 64 (discretionary expenditures); Joyner SAF ¶¶ 69-70 (discretionary expenditures); Daniel SAF ¶ 76 (discretionary expenditures); Fulghum SAF ¶ 82 (discretionary expenditures and gifts to son); Bullock SAF ¶ 92 (discretionary expenditures; began Social Security at age 62 and suffered early age penalty); Hollingsworth SAF ¶¶ 99-100 (did not seek other life insurance or full time employment); Games SAF ¶ 104 (did not seek employment after retirement, discretionary expenditures); Barnes SAF ¶ 111 (would have continued working full time beyond 2003); Kenneth Carpenter SAF ¶ 116 (discretionary expenditures); Betty Carpenter SAF ¶¶ 116 (same); Dillon SAF ¶ 124 (discretionary expenditures); King SAF ¶ 131 (would have continued working, discretionary expenditures); Shipley SAF ¶ 136 (would have sought employment, discretionary expenditures); Somdahl SAF ¶ 139 (discretionary expenditures).

Under the law, acts of reliance can continue past retirement and form a basis for accrual of the claim of fiduciary breach. *See* pages 85-86 above. The Third Circuit's later decision in *Ranke v. Sanofi-Synthelabo, Inc.*, 436 F.3d 197, 201-03 (3d Cir. 2006), confirmed that *Unisys III* established that plaintiffs could have viable claims "if they relied to their detriment in making non-retirement-related decisions within the six-year limitations period." However, two members of the *Ranke* panel proceeded to assume circumstances for this ruling which do not appear in *Unisys III* and are otherwise incorrect. Moreover, the panel majority in *Ranke* could not, and did not purport to, overrule the prior *Unisys III* precedent, which held that the only retirees who were time-barred were those "who assert claims based *solely* on retirement decisions made more than six years before suit." 242 F.3d at 507 (emphasis added).

Finally, under settled rules of claim accrual there can be no accrual until actual harm has been suffered. No harm was suffered by any retiree until January 1, 2006 and plaintiffs sued less than two years later.

CONCLUSION

For all of the reasons stated, and based on the entire record of this case compiled to date, plaintiffs respectfully request that defendants' motion for summary judgment be denied.

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Respectfully submitted,

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