No. 13-3230

United States Court of Appeals
for the Tenth Circuit

WILLIAM DOUGLAS FULGHUM, et al.,

Plaintiffs-Appellants,

v.

EMBARQ CORPORATION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Kansas
Case No. 07-2602-EFM
Hon. Eric F. Melgren, Presiding

RESPONSE BRIEF OF DEFENDANTS-APPELLEES

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ORAL ARGUMENT IS REQUESTED

January 27, 2014

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

1. Defendant-Appellee Sprint Nextel Corporation ("Sprint") has changed its name to "Sprint Communications, Inc." and is a wholly-owned subsidiary of Sprint Corporation, a publicly-traded corporation (trading symbol S). More than 10% of Sprint Corporation's stock is owned by SoftBank Corp., also a publicly-traded corporation (trading symbol 9984 – Tokyo Stock Exchange).

2. Defendants-Appellees Carolina Telephone and Telegraph Company, LLC ("CT&T") and Embarq Mid-Atlantic Management Services Company are wholly-owned subsidiaries of Defendant-Appellee Embarq Corporation ("Embarq"), which is a wholly-owned subsidiary of CenturyLink, Inc. ("CenturyLink"), a publicly-traded corporation (trading symbol CTL). No publicly-held corporation owns 10% or more of the stock of CenturyLink.

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PRIOR OR RELATED APPEALS

Pursuant to 10th Cir. R. 28.2(C)(1), Defendants-Appellees state that there are no prior or related appeals.

INTRODUCTION

The following are among the circumstances that caused the district court to reject plaintiffs' contractual vesting, age discrimination, and BOFD[1] claims as a matter of law:

- Plaintiffs could only prevail on their contractual vesting claims if the SPDs in effect when they retired clearly and expressly stated that benefits *could not* be terminated, but those SPDs in fact clearly and expressly stated that benefits *could* be terminated.

- ERISA's statute of repose bars BOFD claims brought more than six years after the date of the last action constituting part of the breach, and plaintiffs base their claims on alleged misrepresentations and resulting retirements that occurred more than six years—and typically more than one, two, or three *decades*—before plaintiffs filed suit.

- Plaintiffs could only prevail on their age discrimination claims if they showed that the impact of defendants' benefit reductions fell more harshly on them than on a non-protected group, but plaintiffs only offered evidence comparing the impact of the benefit reductions on plaintiffs' *actual* selves and on *hypothetical younger versions* of themselves.

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[1] Defendants use plaintiffs' naming conventions.

Case law overwhelmingly supports the court's rejection of plaintiffs' claims. With respect to plaintiffs' contractual vesting claims, all seven courts of appeals to address the issue have held that welfare benefits are not vested where, as here, the pertinent SPDs unambiguously state that the benefits can be terminated. With respect to plaintiffs' BOFD claims, six out of seven courts of appeals have held that ERISA's six-year statute of repose is tolled only if the defendant engaged in conduct designed to conceal evidence of its breach, which indisputably did not happen here. And with respect to plaintiffs' age discrimination claims, not a single court—state or federal, trial or appellate—has allowed plaintiffs to prove "disparate impact" age discrimination by comparing the impact of defendants' allegedly discriminatory practice on their actual selves and on hypothetical younger versions of themselves.

STATEMENT OF ISSUES

1. Whether the court properly granted summary judgment to defendants on plaintiffs' contractual vesting claims, when the SPDs on which those claims were based (a) *did* contain ROR and/or termination provisions stating that the benefit plans *could* be terminated, and (b) *did not* contain provisions clearly and expressly stating that the benefit plans *could not* be terminated.

2. Whether the court abused its discretion in excluding purported "course-of-performance" evidence when construing unambiguous SPDs.

3. Whether the court abused its discretion in excluding a putative expert's opinion on a question of law, *viz.*, whether the SPDs are ambiguous.

4. Whether the court abused its discretion in denying plaintiffs' motion to reconsider its order granting summary judgment to defendants on numerous class members' contractual vesting claims, where that motion was based entirely on information plaintiffs possessed before, but did not present until after, that order was entered.

5. Whether the court properly granted summary judgment to defendants on plaintiffs' BOFD claims based on ERISA's six-year statute of repose, when defendants' alleged misrepresentations and plaintiffs' retirements occurred more than six years before plaintiffs filed suit.

6. Whether the court properly granted summary judgment to defendants on plaintiffs' age discrimination claims challenging the reduction of life insurance benefits, when (a) plaintiffs' sole evidence of age discrimination compared the impact of that benefits reduction on retirees' actual selves and hypothetical younger versions of themselves, and (b) defendants' unrebutted evidence showed that the benefits reduction was intended to reduce costs and align benefits more closely to other companies' benefits.

7. Whether the court properly dismissed, based on a regulation expressly permitting reduction of health benefits for Medicare-eligible retirees, plaintiffs' age discrimination claims challenging defendants' reduction of such benefits.

SUMMARY OF ARGUMENT

Contractual Vesting Claims. The court correctly held that plaintiffs' contractual vesting claims fail as a matter of law for two independent reasons. First, the 30 SPDs that allegedly created "vested" benefits include provisions—typically *multiple* provisions—unambiguously stating that the plans can be terminated. Seven courts of appeals have held that such SPDs do not create vested benefits, even if they also refer to alleged lifetime welfare benefits. No court has held to the contrary. Second, the court correctly held that the 30 SPDs do not contain the "clear and express" vesting language required by this Court (*Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996)). Indeed, five courts of appeals have held that one or more of plaintiffs' alleged vesting provisions do not establish vesting.

BOFD Claims. The court correctly held that because plaintiffs base their BOFD claims on alleged misrepresentations and resulting retirements that occurred more than six years before plaintiffs filed suit, those claims are barred by ERISA § 413(1)'s six-year statute of repose. It also correctly held, consistent with six of the seven courts of appeals to consider the issue, that the statute's "fraud or

concealment" exception applies only if the defendants took affirmative steps to hide their fiduciary breach, which indisputably did not happen here. Plaintiffs' proposed interpretation of the exception, which the Secretary of Labor ("Secretary") supports in his amicus brief ("Amicus Br."), is deficient for numerous reasons, including because it would eviscerate two-thirds of the statute.

Age Discrimination Claims. The court correctly held that plaintiffs' age discrimination claims regarding life insurance benefits fail as a matter of law for two independent reasons. First, no court has ever held that plaintiffs may establish a prima facie case of disparate impact age discrimination by showing that the impact of an employer's action on plaintiffs' actual selves is more severe than it would have been on hypothetical younger versions of themselves. Second, Embarq's decision to reduce retiree life insurance benefits was indisputably based on reasonable factors other than age. Courts in at least six other cases have held as a matter of law that reducing business expenses and cost-saving operational considerations are reasonable factors other than age. No court has held to the contrary. The court also properly dismissed plaintiffs' age discrimination claims regarding Embarq's reduction in health benefits for Medicare-eligible retirees because an EEOC regulation expressly provides that this does not violate the ADEA.

STANDARD OF REVIEW

Although plaintiffs correctly state that the district court's summary judgment and dismissal orders are reviewed *de novo*, its orders excluding extrinsic evidence, including the testimony of Gail Stygall, and declining to reconsider its summary judgment order are reviewed for abuse of discretion. *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 927 (10th Cir. 2004); *Van Skiver v. United States*, 952 F.2d 1241, 1242-43 (10th Cir. 1991); *see also Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1087 (10th Cir. 2000).

ARGUMENT

I. The Court Properly Granted Summary Judgment to Defendants on Plaintiffs' Contractual Vesting Claims.

Plaintiffs allege that the SPDs in effect when they retired gave them a contractual right to vested health and life insurance benefits. 2A941-43. After the court certified classes with respect to these claims (2A896), defendants moved for summary judgment on the claims of (a) the 17 named plaintiffs and 8,136 class members for vested health and life insurance benefits, (b) an additional 2,388 class members for vested health benefits (only), and (c) an additional 566 class members for vested life insurance benefits (only). *See* 19A9636 & n.5.

The court granted defendants' motions with respect to all class members and all but two plaintiffs. Mem. at 16-46. It found that the 30 pertinent SPDs fell into four groups[2] based on language similarities, as follows:

Group	Type	No. of SPDs	No. of Plaintiffs	No. of Class Members
1	health/life insurance	16	13	10,621
2	life insurance	3	10	2,205
3	health	4	2	772
4	life insurance	7	4	666

Id. at 17-20, 26-27, 34-35 & 41.

"ERISA regulates two types of benefit plans, pension benefit plans that create vested rights and welfare benefit plans that need not create vested rights." *Member Services Life Ins. Co. v. American Nat. Bank & Trust Co.*, 130 F.3d 950, 954 (10th Cir. 1997). Health and life insurance benefits are welfare benefits, *see* 29 U.S.C. § 1002(1), and the plans in this case are welfare benefit plans, *see* 2A932-33 ¶¶ 4, 12 & 16-17. Employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

Although "an employer and employee may contract for vested post-employment welfare benefits" (*Deboard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1240 (10th Cir. 2000)), "[c]ontractual vesting of a welfare benefit

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[2] The two SPDs comprising a fifth group of SPDs apply to just one plaintiff, as to whom the court denied defendants' motion. *See* Mem. at 16 & 44-46.

is an extra-ERISA commitment that *must be stated in clear and express language*.... [It] is a narrow doctrine." *Chiles*, 95 F.3d at 1513 (emphasis added; citation and quotation marks omitted).[3]

To decide contractual vesting claims, a district court must "examine the plan documents as a whole and, if unambiguous, construe them as a matter of law." *Id.* at 1511. Documents are ambiguous only if they are reasonably susceptible to more than one interpretation. *Hickman v. Gem Ins. Co.*, 299 F.3d 1208, 1212 (10th Cir. 2002). Summary judgment is appropriate where, as here, plaintiffs' claims turn on the language of unambiguous ERISA plan documents. *See Kerber v. Qwest Group Life Ins. Co.*, 647 F.3d 950, 959-62 (10th Cir. 2011) (affirming dismissal of claim alleging ERISA plan document barred reduction of life insurance benefits where document was unambiguous).

Because "vested benefits are forever unalterable" (*Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 667 (6th Cir. 1998)), claims such as plaintiffs' fail as a matter of law where plan documents either: (1) *do* state that plaintiffs' welfare benefits can be terminated; or (2) *do not* state in "clear and express language" that those benefits are forever unalterable. The court correctly held that plaintiffs' claims fail for both reasons.

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[3] Plaintiffs' brief nowhere mentions the "clear and express language" standard that this Court has twice held governs contractual vesting claims. *See id.*; *Welch v. Unum Life Ins. Co.*, 382 F.3d 1078, 1086 (10th Cir. 2004).

A. Plaintiffs' Claims Fail Because the 30 SPDs Expressly State the Plans Can Be Terminated.

Of the 30 pertinent SPDs, *27* contain ROR provisions expressly stating that defendants reserved the right to amend or terminate benefits, and *14* contain provisions expressly stating that the plans or policies under which the benefits were provided could be terminated ("termination provisions"). *All* 30 SPDs contain at least one ROR or termination provision, *11* contain *both* ROR and termination provisions, *five* contain *two or more* termination provisions, and *13* contain *five or more* ROR provisions. *See* 3A1555-63 & 15A7331-33; 6A2724-26 ¶¶ 97, 100, 106 & 117-18 & 14A7205-06.[4] In particular:

- The 16 SPDs in **Group 1** contain an average of *five* ROR provisions stating that the company reserves the right to amend or terminate the plan at any time. *See* 3A1558-62 & 15A7331; 6A2724 ¶ 97, 6A2726 ¶¶ 117-18 & 14A7205-06.

- The three SPDs in **Group 2** all contain termination provisions stating that "[y]our insurance under the Group Policy will end on ... the date the Group

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[4] Nearly all facts described herein are set forth in the court's February 14, 2013 Order, and plaintiffs did not dispute them when they were presented in support of defendants' summary judgment motions. Moreover, the content of SPD provisions is beyond dispute. Plaintiffs' "Statement of Facts" nevertheless mischaracterizes the SPDs, based in part on Professor Gail Stygall's inadmissible "analysis" of their contents. *See* Br. at 8-10. For an accurate description of the SPDs, *see* Mem. at 16-44 and the description in the text above.

Policy terminates," and one contains an additional termination provision stating that "[t]he Group Policy is a contract between the Policyholder [CT&T] and Pilot Life which *** may be changed or terminated ... by those parties." Mem. at 26-28.

- The four SPDs in **Group 3** all contain ROR provisions stating that "the Company reserves the right to amend, discontinue or terminate the Plan for reasons of business necessity," as well as termination provisions stating that "your insurance ends when ... the group policy ceases" and that no benefits "will be paid under the plan ... after ... the Group Policy ceases." One also states that the "Group Policy is a contract between the Policyholder [CT&T] and Pilot Life" that "may be changed or terminated ... by one of these parties." *Id.* at 34-36.

- The seven SPDs in **Group 4** contain the same "business necessity" ROR provisions as the SPDs in Group 3, as well as termination provisions stating that "your insurance ends when ... the group policy ceases." *Id.* at 41-42.

To prevail on appeal, plaintiffs must convince this Court that the 30 SPDs, *all* of which expressly state that retiree benefits *can* be terminated, actually state in "clear and express language" that those benefits *cannot* be terminated. As the district court noted, the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have all held that welfare benefits are not vested where SPDs or plan documents unambiguously state that the benefits can be amended or terminated. *See id.* at 21-22 & nn.45 & 48. No court has held to the contrary.

This Court has not yet had occasion to adopt the rule followed by its seven sister Circuits. *See Chiles*, 95 F.3d at 1512. However, it has held in three cases that plaintiffs' welfare benefits could be reduced or eliminated where the SPD allegedly creating vested or irreducible benefits contained a ROR provision. *See id.* at 1513 n.3 ("Given the contingent and ambiguous nature of the Health Care Plan promise of disability benefits *and the reservation of the right to change or discontinue the plan*, we see no intent to vest an open-ended benefit.") (emphasis added); *Kerber*, 647 F.3d at 955 & 960 (rejecting retirees' argument that their life insurance benefits could not be reduced to $10,000 based on plan language stating that such benefits "shall not be reduced below" $20,000 or $30,000 for two retiree groups because, *inter alia*¸ the plan document "unambiguously reserves in Qwest the right to amend the Plan"); *Welch*, 382 F.3d at 1086 (holding that plaintiff's welfare benefits were not vested because, *inter alia*, "the plan specifically reserves UNUM's right to change the plan").

Although the "contractual vesting" section of plaintiffs' brief cites 16 Tenth Circuit cases—13 of which do not involve contractual vesting[5]—it mentions neither *Kerber* nor *Welch*. Plaintiffs instead rely heavily on this Court's decisions in *Deboard* and *Aguilar* (unpublished), neither of which resembles this case. As

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[5] The three exceptions are *Chiles*, *Deboard*, and *Aguilar v. Basin Resources. Inc.*, 47 F. App'x 872 (10th Cir. 2002) (unpublished).

plaintiffs themselves state, the letter at issue in *Deboard* (unlike the SPDs here) "did not include an ROR or other language indicating the employer could change the plan." Appellants' Opening Brief ("Br.") at 22; *see also* Mem. at 23-24 (distinguishing *Deboard*). *Aguilar* is likewise distinguishable, because the CBA in that case "did not contain a reservation of rights clause" and "was based on National Bituminous Coal Wage Agreements, the subject of numerous court cases with respect to whether the agreements guaranteed lifetime health benefits to retired coal managers." *Id.* at 24 n.56.

Plaintiffs also rely heavily on *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), and *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76 (2d Cir. 2001). The class members in *Jensen* retired between 1983 and March 1, 1989. *See* 38 F.3d at 949. Throughout virtually this entire time period, the SPDs included no ROR provisions; the first SPD to include such a provision went into effect only in the last two months of that multi-year period. *Id.* at 948-49; *Jensen v. SIPCO, Inc.*, 867 F. Supp. 1384, 1388 ¶ 23 (N.D. Iowa 1993), *aff'd*, 38 F.3d 945 (8th Cir. 1994). In light of these and other circumstances, sufficient ambiguity existed to warrant the admission of extrinsic evidence, which included unrebutted testimony from the company's president, benefits manager, and other senior officials that the omission of ROR provisions was deliberate, and that the company intended retiree benefits to be vested. 38 F.3d at 950-51. *Jensen* thus bears no resemblance to this case.

Devlin is distinguishable on both the law *and* the facts. As the court stated in *Devlin*, the "clear and express" standard for proving that welfare benefits are vested (which the Tenth Circuit adopted in *Chiles*) is considerably more stringent than the Second Circuit's standard, which requires only "language *capable of reasonably being interpreted* as creating a promise on the part of the employer to vest the recipient's benefits." 274 F.3d at 83 (emphasis in original). In addition, plaintiffs' vesting claims in *Devlin* were based on pre-1987 SPDs, which included *no* ROR provisions. *Id.* at 82 & 84-85.

Plaintiffs argue that because the three SPDs in Group 2 contain only termination (and not ROR) provisions, defendants "lacked *any* power to amend/terminate benefits" described in those SPDs. Br. at 14 (emphasis in original). Although ERISA requires employers to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan" (29 U.S.C. § 1102(b)(3)), plaintiffs inaccurately suggest that § 1102(b)(3) requires such language in SPDs rather than plan documents. *See Deboard*, 208 F.3d at 1239-40 (employers can amend or terminate welfare plans "assuming *the plan* provides for this right") and *Haviland v. Metropolitan Life Ins. Co.*, 730 F.3d 563, 571 (6th Cir. 2013) (employer "was not required to disclose *in its SPDs* that

the plan was subject to amendment or termination") (emphases added).[6] Plaintiffs made no showing that the *plan documents* associated with the three SPDs in Group 2 lacked adequate amendment procedures. Any such showing would have been irrelevant in any event, because the issue raised by defendants' motion and decided by the court concerned whether the SPDs created vested benefits, not whether the plan documents contained adequate amendment procedures.

In sum, because courts cannot write ROR and termination provisions out of SPDs, the district court properly rejected plaintiffs' vesting claims as a matter of law.

B. Plaintiffs' Claims Fail Because the 30 SPDs Do Not Clearly and Expressly State the Benefits Are Forever Unalterable.

In addition to *including* ROR and/or termination provisions, the 30 SPDs *do not include* "clear and express language" stating that plaintiffs' benefits are vested.

The alleged vesting language in the 16 SPDs in **Group 1** 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." Mem. at 17-20. As the court noted (*id.* at 24 & n.59), three Circuits have held that such language cannot reasonably be construed

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[6] ERISA § 102(b) lists the specific information that SPDs should contain. 29 U.S.C. § 1022(b). That list does not include plan amendment procedures. The Department of Labor regulations interpreting this provision, 29 C.F.R. § 2520.102-3, also did not include plan amendment procedures until 2001. *See* 16A8393-97, *citing* 65 Fed. Reg. 70226 (Nov. 21, 2000). All SPDs in Group 2 were issued before 2001. *See* 16A8394 & record citations therein.

to vest benefits. *See Bouboulis v. Transport Workers Union of Am.*, 442 F.3d 55, 61 (2d Cir. 2006) (provision stating that benefits could be terminated only upon "ceasing employment or death" "does not vest lifetime health benefits"); *Sengpiel*, 156 F.3d at 668 (provision stating that spouse would receive benefits after retiree dies "until death or remarriage" "falls far short of expressing a clear intent to render such benefits 'forever unalterable'"); *Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 501 F.3d 912, 918 (8th Cir. 2007) (provision stating that "[y]our personal coverage continues until your death" was "not explicit vesting language"). The alleged vesting language in these SPDs thus does not express a clear intent to render benefits forever unalterable—especially in light of the SPDs' average of *five* ROR provisions.

The alleged vesting language in the three SPDs in **Group 2** states that the life insurance provided during the first five years following retirement "will be" the amount provided immediately before retirement, and thereafter "will automatically reduce to" the greater of 50% of that amount or $1,500. *See* Mem. at 26-27. The alleged vesting language in the seven SPDs in **Group 4** similarly states only that life insurance benefits "will be reduced" to specified amounts under specified circumstances. *See id.* at 41-42. As the court stated, the obvious purpose of those provisions is to describe the *amount* of retirees' benefits—which is why they say nothing about the *duration* of those benefits, much less state that the

benefits will be forever unalterable. *See id.* at 43-44. The alleged vesting language in the four SPDs in **Group 3** states that health benefits "currently offered to active employees will continue after retirement" and that "you will be insured for the same benefits currently offered to regular employees." *Id.* at 34-35. As the court stated, this language "is simply explaining the type of benefits available to retirees after their retirement," and "does not state, nor imply, that benefits are forever unalterable once an individual retires." *Id.* at 38. As the court also stated, "[t]he Tenth Circuit, and several other circuits, have addressed similar language and have determined that the language is not indicative of vested benefits." *Id.* at 37-38 (discussing *Deboard*, 208 F.3d at 1242 and *Sengpiel*, 156 F.3d at 668). *See also Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co.*, 188 F.3d 130, 141 (3rd Cir. 1999) (a "plain reading of the phrases, 'will continue' and 'shall remain,' certainly does not *unambiguously* indicate that the benefits will continue *ad infinitum*" or "clearly and expressly indicate vesting") (emphasis in original); *Jones v. American Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1070-71 (11th Cir. 2004) (provision stating that employees "will continue to be covered after they ... retire for the full amount of insurance in effect immediately before retirement" held insufficient to establish vesting).

To support their contention that *SPD* language in this *Tenth Circuit* case creates vested benefits, plaintiffs cite three *Sixth Circuit* cases construing *CBA* language—*Noe v. Polyone Corp.*, 520 F.3d 548 (6th Cir. 2008); *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064 (6th Cir. 2008); and *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006). Br. at 21-22, 27-28 & 30. But under Sixth Circuit precedent (as distinguished from Tenth Circuit precedent; *see Chiles*), "[a] court may find vested rights under a CBA *even if the intent to vest has not been explicitly set out in the agreement*." *Noe*, 520 F.3d at 552 (emphasis added; citation and quotation marks omitted). Moreover, the Sixth Circuit acknowledges that "beginning with *Yard-Man* this court has approached the vesting issue differently than have many of our sister circuits." *Id.* at 564, *citing UAW v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983).

Plaintiffs assert that the phrase "for reasons of business necessity or financial hardship" in ROR provisions in the SPDs in **Groups 3 and 4** means that "amendment or termination could occur only if the company is in bankruptcy or other severe financial position." Br. at 31-32. In support of this assertion, plaintiffs state, without any record citation, that "[t]his language derives from an IRS regulation, Treas. Reg. § 1.401-1(b)(2)." Br. at 31. Plaintiffs cannot support this factual statement because they did not make this argument to the district court. *See* 15A7401-02. As a result, plaintiffs have not preserved this argument for appeal.

See Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 720 (10th Cir. 1993) (arguments must be made first to district court so that opposing party may offer all the evidence they believe is relevant to the issues). Moreover, Treas. Reg. § 1.401-1(b)(2) concerns pension and other *non*-welfare plans.

The Tenth Circuit rejected in *Chiles* essentially the same argument plaintiffs make here. The ROR provision in *Chiles* stated that the defendant reserved the right to terminate its welfare benefits plan only "if necessary," and plaintiffs argued that this phrase could reasonably be read to mean "that the plans can only be amended if necessary to [defendants'] fiscal survival." 95 F.3d at 1513. In rejecting this argument, the Tenth Circuit held that the phrase "if necessary" "cannot be read to limit the reserved right in any significant manner." *Id.* at 1513-14. *Accord Musto v. American General Corp.*, 861 F.2d 897, 906 n.5 (6th Cir. 1988) (holding that language reserving the right to amend or terminate a welfare plan "if it becomes necessary" "did not materially affect the company's expressly reserved right to amend the policy" and did not mean changes were allowable only "to avoid bankruptcy or some comparable threat to the financial base of the entire corporation"). As the court noted (*see* Mem. at 40), there is no material difference between a statement that a business will take action if "necessary" (*Chiles* and

Musto) and a statement that a business will take action where there is a "business necessity" (this case).[7]

Because the term "business necessity" applies to both amendments and terminations, under plaintiffs' interpretation even minor plan amendments (*e.g.*, increasing medical co-pays) would be barred unless the company was in or near bankruptcy. For example, under the first plan amendment allegedly barred by this language, retirees eligible for Medicare Part D coverage began receiving an allegedly "inferior" prescription drug annual subsidy of $500 effective January 1, 2006. *See* 2A940. Sprint made this change because on that date Medicare began covering most prescription drug costs Sprint had been covering. *See* 5A2132-34. Absent the amendment, Sprint would have wasted millions of dollars on benefits retirees no longer needed. Plaintiffs nevertheless insist this amendment was impermissible because Sprint was not in or near bankruptcy.

Examination of the SPDs in **Groups 3 and 4** "as a whole," as this Court requires (*Chiles*, 95 F.3d at 1511), reveals that those SPDs (1) *do* contain (in addition to the "business necessity" ROR provisions) unqualified termination provisions, and (2) *do not* contain clear and express language stating that benefits

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[7] This Court also held in *Chiles* that "even if Control Data/Ceridian could not change its plans without a showing of necessity, it satisfied this requirement in its letter explaining the change in benefits." 95 F.3d at 1514 n.5. Here too, defendants satisfied any "business necessity" requirement for the reasons articulated in their letters to retirees. *See* 5A2132-34 & 5A2140-42.

are forever unalterable. *See* Mem. at 34-44. The court's conclusion that these SPDs cannot reasonably be construed to create vested benefits is thus unassailable.

In sum, to adopt the interpretation of the 30 SPDs espoused by plaintiffs, this Court would have to *both*: (1) read *into* the SPDs something that is *not* there (a promise to provide vested benefits); and (2) read *out of* the SPDs something that *is* there (multiple provisions stating benefits can be terminated). Doing this would contradict well-established principles of contract interpretation, as well as the holdings of seven other courts of appeals. It would also undermine the long-term interests of employees. Employees benefit if companies can amend welfare plans, because "[i]f employers were locked into the plans they initially offered, they would err initially on the side of omission." *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997) (citation and quotation marks omitted). The court's judgment rejecting plaintiffs' contractual vesting claims should be affirmed.

II. The Court Did Not Abuse Its Discretion in Excluding Plaintiffs' Purported "Course-of-Performance" Evidence.

Plaintiffs next argue that the court "erred in believing it was barred from considering retirees' course-of-performance evidence," and cite several non-ERISA cases for the proposition that extrinsic evidence is admissible to determine whether a contract involves a latent ambiguity. Br. at 34. Plaintiffs did not argue below that the SPDs involved latent ambiguity; indeed, the word "latent"

appeared nowhere in their brief. They are accordingly barred from making this argument now. *Lyons*, 994 F.2d at 720. The argument is without merit in any event, because the 30 SPDs are (as the court found) not ambiguous in *any* way regarding whether benefits can be amended or terminated, and extrinsic evidence is inadmissible to interpret unambiguous language in ERISA documents. *See Kerber v. Qwest Pension Plan*, 572 F.3d 1135, 1149-50 (10th Cir. 2009) (finding that district court "properly refused to consider the extrinsic evidence offered by plaintiffs" when plaintiffs "failed to identify any ambiguities in the Plan"). And because the SPDs were unambiguous, plaintiffs' repeated argument that ambiguities must be resolved in their favor (Br. at 18, 23 & 29) is irrelevant.

Moreover, plaintiffs' alleged "course-of-performance" evidence is no such thing. Course-of-performance evidence is considered reliable evidence of the meaning of ambiguous agreements precisely "because the credibility of such evidence *is not a function of the self-serving testimony of a party to the contract*." *Mathews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998) (emphasis added). But here, the "evidence that contradicts [Defendants'] interpretation is the self-serving statements of [Plaintiffs and class members] ... offered to establish their subjective belief that benefits vested." *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 568 (7th Cir. 1995); *see, e.g.*, 15A7360-69 ¶¶ 63-93. For example, the evidence includes testimony of class member and former HR representative Gayle

Phillips that she never *orally* told employees that the company was reserving the right to terminate their benefits. 15A7360-61 ¶ 63 & 15A7591. But the only *documented* communications Phillips had with employees *said exactly that. See* 9A4452-53 & 18A9196-97. Plaintiffs' purported "course-of-performance" evidence "is the very sort of subjective and self-serving extrinsic evidence that cannot be used to create ambiguity." *Murphy*, 61 F.3d at 568.[8]

III. The Court Did Not Abuse Its Discretion in Excluding Gail Stygall's Opinions.

Two well-established principles show the district court did not abuse its discretion in excluding Gail Stygall's opinions that the SPDs are ambiguous: (1) a witness cannot be allowed to give an opinion on a question of law (*Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988)); and (2) the presence of ambiguity in a contract term must be determined as a matter of law (*Hickman*, 299 F.3d at 1212; *accord Kerber v. Qwest Group Life Ins. Plan*, 656 F. Supp. 2d 1279, 1288 (D. Colo. 2009) ("Whether ERISA plan language is ambiguous is a question of law") (citation and quotation marks omitted), *aff'd*, 647 F.3d 950 (10th Cir. 2011)). Because a witness cannot be allowed to give an opinion on a question of law, and because whether ERISA plan language is ambiguous is a question of law, the court would have abused its discretion had it *not* excluded Stygall's opinions.

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[8] Defendants strongly dispute plaintiffs' "course-of-performance" evidence. *Cf.* Br. at 10-11 *with* 18A9372-75 & 18A9380-89.

Stygall's opinions are not merely legal opinions; they are *erroneous* legal opinions. Although Stygall opines that the SPDs' ROR provisions are ambiguous (3A1377-78 ¶¶ 7-8), most of them state unequivocally that "the company reserves the right to amend or terminate the plan at any time" (Mem. at 17). This Court has held substantially identical ROR provisions to be *un*ambiguous. *Kerber*, 647 F.3d at 969-70. Similarly, as discussed above, Stygall's opinion that including both ROR provisions and alleged promissory language in the same SPD "produces ambiguity" (Br. at 9) contradicts the holdings of seven courts of appeals. Because non-lawyer Stygall seeks to opine on legal issues that courts have addressed in dozens of decisions, cross-examination on those issues would involve the spectacle of a non-lawyer "expert" being asked to explain why her opinions differ from binding judicial pronouncements on the same subjects.

As the district court noted, "there are numerous court decisions regarding contractual vesting claims," and "[i]n every one of those decisions the court makes the determination as to whether or not the language in the contract is ambiguous—the court does not rely on an expert's opinion for this conclusion." Mem. at 16. At least 30 such decisions exist. *See* 16A8388-89 nn.5-6. By contrast, plaintiffs have not cited a single case in which a court has admitted expert testimony to help it make this determination. Indeed, the only other court to address whether Stygall herself could testify for this purpose barred her from doing so. *See Goldinger v.*

Datex-Ohmeda Cash Balance Plan, No. CV-07-2081 (W.D. Wash. Nov. 24, 2009) (Supplemental Appendix at 9) (barring Stygall from opining that laypersons reading an SPD would understand their benefits were vested, because courts "routinely must decide how laypeople would interpret contractual terms" and "interpretation of the SPD in this case is a question of law, and one for which expert testimony is neither necessary nor appropriate"). *Accord Halbach v. Great-West Life & Annuity Ins. Co.*, No. 4:05CV02399, 2007 WL 2108454, *3-4 (E.D. Mo. Jul. 18, 2007) (expert testimony regarding "whether the terms of the plan allowed certain welfare benefits to become vested" and regarding the "meaning of the reservation of rights language" in the plan held inadmissible). Although plaintiffs cite cases for the proposition that "[e]xpert testimony on how readers understand language is permitted" (*see* Br. at 38), those cases merely hold that experts may opine about terms' *specialized* meanings. ERISA documents must be interpreted in accordance with their *ordinary* meaning (*Blair v. Metropolitan Life Ins. Co.*, 974 F.2d 1219, 1221 (10th Cir. 1992)), and Stygall opines that such common terms as "may," "change," "suspend," "end," "discontinue" and "terminate" create ambiguity. *See* 3A1342-44. Her opinions are inadmissible.

IV. The Court Did Not Abuse Its Discretion in Refusing To Reconsider Its Order Granting Summary Judgment to Defendants on Thousands of Class Members' Contractual Vesting Claims.

After the court entered its summary judgment order, plaintiffs filed a motion asking the court to reconsider that order with respect to thousands of class members' contractual vesting claims. 19A9475-80. To support that motion, plaintiffs presented for the first time evidence they possessed and could have included in their original summary judgment briefing. *See* 19A9490-9535 & 19A9605 ¶ 3. After pointing out that motions for reconsideration must be "based on (1) an intervening change in controlling law, (2) the availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice," the court denied plaintiffs' motion because it was based on none of these things. 19A9640. This was not an abuse of discretion.

Defendants' "Statement of Undisputed Material Facts" stated that: (1) the 30 SPDs were in effect when specified class members retired; and (2) "the class members contend [that] the SPDs in effect when they retired govern their claims for vested benefits." 6A2721 n.2; 6A2721-26 ¶¶ 82-94, 96, 99, 105 & 109-16; 6A2730-31; 6A2749-3075. Plaintiffs did not dispute these averments, and they presented no evidence that any class members' claims were based on SPDs or CBAs beyond the SPDs identified by defendants. *See* 14A7204-07.

Plaintiffs now argue that defendants "did not satisfy their Rule 56 burden" because they failed to prove that every possible document which class members might *later* allege gave rise to vested benefits did *not* give rise to such benefits. Br. at 39. Plaintiffs misapprehend Rule 56's burdens:

> If ... the moving party does not bear the burden of persuasion at trial, *it need not negate the nonmovant's claim*. Such a movant may make its prima facie demonstration by pointing out to the court a lack of evidence on an essential element of the nonmovant's claim. [¶] If the movant meets this initial burden, *the burden then shifts to the nonmovant to set forth specific facts from which a rational trier of fact could find for the nonmovant.*

Libertarian Party of New Mexico v. Herrera, 506 F.3d 1303, 1309 (10th Cir. 2007) (emphasis added; citations and quotation marks omitted). As discussed above, defendants established "a lack of evidence on an essential element of plaintiffs' claims" by pointing out that none of the 30 SPDs contained express vesting language. The burden then shifted to plaintiffs to set forth specific facts from which the court could find in their favor, including the existence of other SPDs allegedly containing such language. Plaintiffs elected not to present such evidence, but instead rested on their legal argument that the 30 SPDs contained the requisite vesting language.

After the court rejected this argument, plaintiffs filed a motion to reconsider supported by nine CBAs, *all* of which they had before defendants filed their motion, and *none* of which they submitted in opposition to that motion. *See*

19A9481-535 & 19A9605 ¶ 3; *see also* 19A9593-94. Plaintiffs also submitted a declaration stating that after the court issued its order, they reviewed a database they received months before defendants' motion was filed ("Defendants' Mapping"), compared Defendants' Mapping with class member information accompanying defendants' motion, and determined that many class members were "mapped" to SPDs or CBAs not identified in that motion. 19A9490-96 ¶¶ 4-14. Plaintiffs could have submitted this same declaration in their original response to defendants' motion.

A motion to reconsider cannot "advance arguments that could have been raised in prior briefing" or present "facts which were available at the time of the original motion." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). The court accordingly did not abuse its discretion in denying plaintiffs' motion to reconsider.[9]

V. The Court Properly Granted Summary Judgment to Defendants on Plaintiffs' BOFD Claims.

Plaintiffs' BOFD claims allege that defendants breached their fiduciary duties by misrepresenting that retiree benefits were vested, and by failing to disclose that those benefits could change. 2A944. The court denied plaintiffs'

[9] Plaintiffs also waived any CBA-based vesting claims by stating in the Pretrial Order that their vesting claims were based exclusively on SPDs and that CBAs constituted mere extrinsic evidence. *See* 2A941-44 & 19A9600; *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002) ("claims . . . not included in the pretrial order are waived").

motion to certify a class with respect to these claims, which meant they were asserted solely by the 17 named plaintiffs. 2A897-99. In response to defendants' motion for summary judgment, the court held that 15 of those plaintiffs' claims were barred under § 413(1), which requires that such claims be brought within six years after "the date of the last action which constituted a part of the breach or violation." Mem. at 57-58.

Neither plaintiffs nor the Secretary dispute the court's conclusion that § 413(1) is a statute of repose (*id.* at 52), presumably because every court to address the issue has so held. *See Ranke v. Sanofi–Synthelabo Inc.*, 436 F.3d 197, 205 (3d Cir. 2006); *David v. Alphin*, 704 F.3d 327, 339 (4th Cir. 2013); *Radford v. Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998). Plaintiffs also do not dispute the court's finding that they claim they retired in reliance on defendants' alleged misrepresentations more than six years before filing suit. *See* Mem. at 57-58. Plaintiffs nevertheless argue that the court erred in holding their BOFD claims time-barred because the statute of repose: (1) did not begin to run until defendants reduced or terminated their benefits; (2) did not begin to run until certain alleged post-retirement acts of reliance took place; (3) was tolled under the "equitable tolling" doctrine; and (4) was tolled under the statute's "fraud or

concealment" exception.[10] The Secretary adopts only the last of these arguments, and none of them has merit.

A. The Statute of Repose Began To Run Before Defendants Reduced Plaintiffs' Benefits.

Plaintiffs assert that the dates of their retirement and of defendants' alleged misrepresentations are irrelevant to the timeliness of their claims, because the statute of repose did not begin to run until *non*-fiduciary defendants (*i.e.*, plaintiffs' former employers) made *non*-fiduciary decisions (*i.e.*, to cut plan benefits) years or decades after plaintiffs retired. According to plaintiffs, these non-fiduciary acts triggered the statute of repose because they caused the harm (benefit reductions) about which plaintiffs complain. Br. at 49. Plaintiffs do not cite a single case holding that the statute is not triggered until plaintiffs are harmed, and courts that have considered plaintiffs' argument have rejected it. *See In re Unisys Corp. Ret. Med. Benefit ERISA Litig.*, 242 F.3d 497, 505-06 (3d Cir. 2001) (rejecting retirees' argument that they were not harmed, and that § 413(1)'s statute of repose was not triggered, until their former employer reduced benefits); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1169 (D.C. Cir. 1994) (*see* Mem. at 56-57); *see also Ziegler v.*

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[10] Plaintiffs also argue that the court erred in finding they did not adequately plead or present evidence supporting the "fraud or concealment" exception as plaintiffs interpret it. Br. at 47-49. Defendants discuss below the implications on remand if this Court were to adopt that interpretation.

Connecticut Gen. Life Ins. Co., 916 F.2d 548, 550-51 (9th Cir. 1990) (same with respect to § 413(2); *see* Mem. at 56).

Plaintiffs argue that the statute of repose was not triggered until they were harmed because "actual harm" is an element of a BOFD violation. Br. at 49. However, the Tenth Circuit and five other Circuits have held that statutes of repose may expire before any harm has occurred, and indeed before any claim has accrued. *See Schneider v. Caterpillar, Inc.*, 301 F. App'x 755, 757 n.3 (10th Cir. 2008) (unpublished) ("Unlike a statute of limitations, a statute of repose may bar a claim before the injury occurs."); *David*, 704 F.3d at 339 (4th Cir.) (§ 413's "limitations period begins running when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted") (citation and quotation marks omitted); *P. Stolz Family Partnership L.P. v. Daum*, 355 F.3d 92, 103 (2d Cir. 2004); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 199 (3d Cir. 2007); *Beard v. J.I. Case Co.*, 823 F.2d 1095, 1097 n.1 (7th Cir. 1987); *McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008). The case upon which plaintiffs rely, *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997), is distinguishable because it concerns a statute of limitation rather than repose.

Plaintiffs' insistence that the statute of repose on claims for *fiduciary breaches* is not triggered until a *non-fiduciary act* occurs—*i.e.*, the reduction of

plan benefits—is especially untenable. Because plan sponsors who alter plan provisions are not acting as fiduciaries (*Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 445 (1999)), an employer's termination of benefits is not an element of plaintiffs' BOFD claim or the "last action which constituted a breach" under § 413(1). Mem. at 55-56; *accord Unisys*, 242 F.3d at 505-06. In sum, the statute of repose began to run before plaintiffs' benefits were reduced.

B. The Statute of Repose Began To Run Before Plaintiffs' Alleged Post-Retirement Acts of Reliance.

Plaintiffs' next argument is anomalous: After asserting that they "need not prove detrimental reliance to establish their claims" (17A8578), plaintiffs argue that the statute of repose was not triggered until their last act of detrimental reliance. Plaintiffs devote but one paragraph to this argument. *See* Br. at 49-50. That paragraph does not identify the date of a single alleged act of post-retirement reliance, and cites just one allegedly supporting case (the Third Circuit's decision in *Unisys*), followed immediately by a concession that the Third Circuit later declared in *Ranke*, 436 F.3d at 203, that *Unisys* "did not hold that plaintiffs may 'reset the clock' by later detrimental reliances occurring after their claims first accrued." The portion of *Unisys* upon which plaintiffs rely is irrelevant in any event, because the parties in that case "regarded the date of the last relevant misrepresentations and the date of detrimental reliance as being the same date and the only issue briefed is whether that date or the date of the denial of free health

care coverage is the legally relevant date." *Unisys*, 242 F.3d at 506 n.8. Where, as here and in *Ranke*, plaintiffs assert that they retired based on pre-retirement misrepresentations, subsequent purported detrimental reliance does not "reset the clock." Mem. at 58.

C. The Equitable Tolling Doctrine Does Not Apply to § 413(1)'s Statute of Repose.

Plaintiffs also argue that the equitable tolling doctrine postpones the running of § 413(1)'s statute of repose. Br. at 44-47. Plaintiffs do not cite a single case holding that this, or *any*, statute of repose is subject to equitable tolling.[11] Moreover, courts have consistently held that statutes of repose are *not* subject to equitable tolling. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 363 (1991) (§ 9(e) of the Securities Exchange Act of 1934 creates a period of repose not subject to equitable tolling); *Amoco Production Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996) ("equitable tolling is not appropriate against a statute of repose"); *McCann v. Hy-Vee, Inc.*, 663 F.3d 926, 930 (7th Cir. 2011); *Unisys*, 242 F.3d at 503; *Radford*, 151 F.3d at 400.

Equitable tolling would be especially inappropriate here, because § 413 includes a legislatively created exception to its repose and limitation periods stating that "in the case of fraud or concealment, such action may be commenced

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[11] Although plaintiffs discuss *Caputo* at length in this section of their brief (*see id*. at 45-46), that case does not so much as mention equitable tolling.

not later than six years after the date of discovery of such breach or violation." "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (citation and quotation marks omitted); *see also Daum*, 355 F.3d at 102-03 (in statutes of repose "the legislative bar to subsequent action is absolute, subject to *legislatively created* exceptions ... set forth in the statute of repose," but not to equitable tolling) (emphasis added; citation and quotation marks omitted). In sum, equitable tolling does not apply to § 413(1)'s statute of repose.

D. The "Fraud or Concealment" Exception Does Not Apply to Plaintiffs' BOFD Claims.

Plaintiffs' sole argument supported by the Secretary is that § 413's "fraud or concealment" exception applies whenever a plaintiff's underlying BOFD claim involves fraud or concealment. No deference should be afforded the Secretary's position on this statutory interpretation issue, because "it appears the agency's position has not been subject to any sort of public scrutiny," the "agency's interpretation is not one adopted contemporaneously with the passage" of § 413 four decades ago, and the agency's position is "directly contrary" to virtually all judicial decisions addressing the issue. *See Shikles v. Sprint/United Management Co.*, 426 F.3d 1304, 1316 (10th Cir. 2005) (taking above factors into account in

refusing to grant deference to, and rejecting, proposed statutory interpretation in agency's amicus brief).

Even when a federal agency argues for a particular interpretation of one of its own regulations (as opposed to a statute), this Court has refused to defer where the agency's current position is inconsistent with its prior position on the same issue. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1140 (10th Cir. 2013) (deference is proper only if the agency's interpretation of its own regulation has the "power to persuade" based on, *inter alia*, its "consistency with earlier and later pronouncements"). Although the Secretary's current amicus brief rejects the overwhelmingly favored judicial view that the "fraud or concealment" exception requires "steps taken by wrongdoing fiduciaries *to cover their tracks*" (*Radiology Ctr. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1220 (7th Cir. 1990)) (emphasis added), the Secretary previously took the position in multiple lawsuits that under that exception "any ERISA plaintiff (including the Secretary) may timely file suit ... six years after the plaintiff discovers a violation *covered up by fraud or concealment*." *See, e.g., Chao v. Bolling*, 1:03-cv-00613, 2003 WL 25683265 (S.D. Ohio Nov. 20, 2003); *Chao v. Georgia Plumbers Trade Ass'n for Continuing Educ., Inc.*, No. 308-cv-00013, 2008 WL 7052520 (N.D. Ga. May 20, 2008) (emphasis added). No deference should be accorded to an agency that waits

four decades after a statute's enactment before filing an amicus brief that repudiates its own previous interpretation of the statute.

Plaintiffs do not dispute the court's finding that "there is no evidence that Defendants actively concealed their alleged breach of fiduciary duty." Mem. at 54. As the court pointed out, instead of "disput[ing] the proposition," plaintiffs relied exclusively on the legal argument that "Defendants' underlying misrepresentations were the 'fraudulent' acts'" required under the "fraud or concealment" exception. *Id.* The court rejected this argument, holding instead that the exception applies only if there is "evidence that Defendants actively concealed their alleged breach of fiduciary duty" (*id.*), which does not exist here. The court was correct in so holding.

As the court, the Secretary, and plaintiffs have all pointed out (*id.* at 53-54 & n.121; Amicus Br. at 22-23 & n.7; 17A8582-83 & n.407), the district court's holding is supported by the First, Third, Seventh, Eighth, Ninth, and D.C. Circuits. *See J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1255 (1st Cir. 1996); *Ranke*, 436 F.3d at 204; *Radiology Ctr.*, 919 F.2d at 1220; *Schaefer v. Arkansas Med. Soc'y*, 853 F.2d 1487, 1491-92 (8th Cir. 1988); *Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1401-02 (9th Cir. 1995); *Larson*, 21 F.3d at 1174. Only the Second Circuit has held that the "fraud or concealment" exception applies whenever the underlying fiduciary breach involves

fraud or concealment. *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 190 (2d Cir. 2001). The Second Circuit concedes the statute is ambiguous on this point. *Id.* at 184 & 188. And in fact, "fraud or concealment" can reasonably be construed to refer to either (1) any "breach or violation" that involves fraud or concealment, or (2) any fraud or concealment by which a defendant's "breach or violation" is later hidden from plaintiffs. *See Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001) (statute is ambiguous if it is capable of being understood in two or more possible senses or ways).

Most courts have found that § 413's limited legislative history does not clarify this ambiguity,[12] which is presumably why neither plaintiffs nor the Secretary refer to it. But "the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question." *United States v. Bornstein*, 423 U.S. 303, 310 (1976). Fortunately, the language Congress adopted, when viewed in light of the statute's evident legislative purpose, confirms the accuracy of the district court's, and the prevailing, interpretation.

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[12] *See Larson*, 21 F.3d at 1171; *J. Geils Band*, 76 F.3d at 1255 n.12; *Radiology Ctr.*, 919 F.2d at 1221. Although the Second Circuit purported to find useful legislative history, *see Caputo*, 267 F.3d at 190, the Seventh Circuit considered the same legislative history and found it unenlightening, *see Radiology Ctr.*, 919 F.2d at 1221.

When interpreting a statutory term, a court must "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995). Ignoring this canon of statutory construction, the Secretary devotes virtually his entire amicus brief to an exegesis of the words "fraud," "or" and "concealment," individually and in combination, without once addressing the fact that these words appear in an exception to statutes of repose and limitations. As the Second Circuit stated in *Pettus v. Morgenthau*, 554 F.3d 293, 297 (2d Cir. 2009), regarding a different statute:

> The amicus essentially is asking us to construe the exception clause *verbatim ac litteratim*, ignoring the exception's place in the overall statutory framework. But when construing the plain text of a statutory enactment, we do not construe each phrase literally or in isolation. Rather, we attempt to ascertain how a reasonable reader would understand the statutory text, considered as a whole.

The Secretary has good reason to avoid discussing the implications of his proposed interpretation, because it would largely eviscerate two-thirds of the statute it purports to construe. Specifically, it would largely render § 413(1)'s statute of repose and § 413(2)'s statute of limitations dead letters, because the exception would effectively swallow those provisions.

The Court need not look beyond this case to understand the violence that plaintiffs' interpretation of the exception would do to § 413's main purpose, which is the establishment of statutes of repose and limitations of specific and reasonable durations (six and three years, respectively). For example, three plaintiffs base

their claims in part on alleged oral statements regarding the "lifetime" nature of retiree benefits that: (1) an unidentified HR employee made to Plaintiff Britt *22 years* before this suit was filed (17A8827-29 ¶¶ 6-11); (2) plant manager Donald Clark made to Plaintiff McLaurin *19 years* before this suit was filed (8A3985 & 17A8519 ¶ 261); and (3) benefits manager Gayle Phillips made to Plaintiff Bullock during a two-minute conversation in a stairwell on an unspecified date between *17 and 27 years* before this suit was filed (8A3955 & 17A8490 ¶ 94). Under plaintiffs' interpretation of the "fraud or concealment" exception, each of these alleged oral misrepresentations would render § 413's six-year statute of repose and three-year statute of limitations inoperative, and allow plaintiffs to bring their BOFD claims between *22 and 32 years* after the statements allegedly were made—*i.e.*, in 2012, which is six years after plaintiffs claim to have discovered, by virtue of their employers' 2006 reduction of prescription drug benefits, that the duration of their benefits had been misrepresented.

Congress enacted § 413(1)'s six-year statute of repose for good reasons. As this Court stated in *Hartford v. Gibbons & Reed Co.*, 617 F.2d 567, 569 (10th Cir. 1980):

> Statutes of repose serve several well defined purposes. First, by requiring litigation to be commenced within a prescribed period of time the reliability and availability of evidence is assured. Second, both defendants and the courts, are protected from the burdens necessarily entailed in protracted controversies of unknown potential liability.

Plaintiffs' interpretation of the "fraud or concealment" exception would defeat these "well defined purposes." Regarding "the reliability and availability of evidence," the court could not evaluate first-hand the credibility of Britt's testimony regarding oral statements allegedly made to him 22 years before he filed suit, because Britt died recently. *See* 19A9660. Nor could defendants present rebuttal testimony, because the person who allegedly made the statements is unknown, and he could not possibly recall a now-almost-three-decades-old alleged conversation even if he could be identified and were available to testify.

Plaintiffs' interpretation would also expose both defendants and the court to "protracted controversies of unknown potential liability." Here, for example, plaintiffs contend that if they can prove fiduciaries' agents told them—even one, two, three, or more *decades* before filing suit—that retiree benefits were "lifetime" benefits, defendants must provide them with benefits that can *never* be reduced or terminated. 2A974-75. Moreover, *920* additional retirees assert the same BOFD claims in another currently-stayed case. *See* Mem. at 48 n.109.

In sum, even though Congress determined that "when six years has passed after a breach ... the value of repose will trump other interests, such as a plaintiff's right to seek a remedy" (*Larson*, 21 F.3d at 1172), plaintiffs' interpretation of the statute would give defendants no repose at all. *Cf. Rotella v. Wood*, 528 U.S. 549, 554 (2000) (disapproving a rule that "might have extended the limitations period to

many decades" because such a rule was "beyond any limit that Congress could have contemplated" and "would have thwarted the basic objective of repose underlying the very notion of a limitations period").

Plaintiffs' proposed interpretation would also swallow § 413(2)'s statute of limitations, which requires that claims be brought within "three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation." Assume that a plaintiff obtained "actual knowledge" of a fiduciary breach involving fraud 2¾ years after the breach, but postpones bringing suit for 5¾ more years. Under plaintiffs' interpretation, the suit would be timely, even though it is brought *8½ years* after the breach occurs, because the exception would allow suit to be brought "not later than six years after the date of discovery of such breach."

Plaintiffs may argue that defendants exaggerate the impact of plaintiffs' interpretation, because only some BOFD claims involve "fraud or concealment." But plaintiffs and the Secretary construe that phrase to include mere nondisclosures of information. *See* Br. at 43 ("Failures to Disclose Information Constitute Fraud or Concealment"); Amicus Br. at 19 ("the fiduciary has the duty to disclose those material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection") (citation and quotation marks omitted). The duties of ERISA fiduciaries include "the proper management,

administration, and investment of plan assets" and "the avoidance of conflicts of interest." *Mertens v. Hewitt Associates*, 508 U.S. 248, 251-52 (1993) (citation and quotation marks omitted). Although claims alleging breach of these duties appear not to involve "fraud or concealment," they *do* involve "fraud or concealment" as defined by plaintiffs, because mismanagement of assets and/or conflicts of interest are "material facts, known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection" (Amicus Br. at 19). As a result, under plaintiffs' interpretation any beneficiary whose claim might otherwise be time-barred can avoid this result by alleging the fiduciary failed to disclose the facts constituting its breach.

As discussed above, six courts of appeals and the district court below interpret the "fraud or concealment" exception in a manner that does not nullify two-thirds of § 413. There are multiple reasons to believe Congress intended this prevailing interpretation, rather than plaintiffs' interpretation. First, had Congress intended plaintiffs' interpretation, it could have easily stated that "in the case of *a breach or violation involving* fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation." The simple addition of the five italicized words would have made clear that "fraud or concealment" refers to any "breach or violation" involving fraud or concealment. Instead, Congress' decision to use the unadorned phrase "fraud or

concealment" once, and the completely distinct phrase "breach or violation" four times, in § 413 strongly indicates that the "breach or violation" is distinct from the "fraud or concealment."

Second, the prevailing interpretation properly gives independent meaning to the terms "fraud" and "concealment," because under it an ERISA fiduciary "can delay a wronged beneficiary's discovery of his claim either by misrepresenting the significance of facts the beneficiary is aware of (fraud) or by hiding facts so that the beneficiary never becomes aware of them (concealment)." *Radiology Ctr.*, 919 F.2d at 1220.

Third, the prevailing interpretation of "fraud or concealment" "harmonizes the phrase's meaning with the widely known doctrine of fraud*ulent* concealment, which tolls the running of a statute of limitations when the defendant has prevented the plaintiff's timely discovery of the wrong she has suffered." *Id.* (emphasis in original).[13]

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[13] Section 413 is hardly alone in combining a statute of repose with a statutory "fraudulent concealment" exception. *See*, *e.g.*, 40 Pa. Stat. Ann. § 1303.513(d) (statute of repose for wrongful death actions does not apply in event of "affirmative misrepresentation or fraudulent concealment of the cause of death"); Miss. Code Ann. § 15-1-36(2)(b) (statute of repose for medical malpractice actions does not apply if cause of action is fraudulently concealed from victim); Utah Code Ann. § 78B-3-404(2)(b) (same); Vt. Stat. Ann. § 521 (same); Ark. Code Ann. § 16-56-112(d) (statutes of repose for construction or design defect claims do not apply "in the event of fraudulent concealment of the deficiency").

Finally, the prevailing interpretation satisfies the interpretive principle that in "construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision." *C.I.R. v. Clark*, 489 U.S. 726, 739 (1989). Unlike plaintiffs' interpretation, the prevailing interpretation does not "distort [the statute's] text by converting the exception into the rule." *TRW Inc.*, 534 U.S. at 28-29. To the contrary, it satisfies the requirement "to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citation and quotation marks omitted).

Three additional arguments advanced by plaintiffs and the Secretary warrant mention. First, plaintiffs argue that *Gabelli v. SEC*, 133 S. Ct. 1216 (2013)—a case the Secretary does not even mention—supports their interpretation. Br. at 46-47. *Gabelli* construed, not *ERISA's* statute of *repose*, but a *non-ERISA* statute of *limitations*. *See* 133 S. Ct. at 1220 (28 U.S.C. § 2462 bars governmental actions to enforce penalties "unless commenced within five years from the date *when the claim first accrued*") (emphasis added). The Supreme Court *refused* to do in *Gabelli* what plaintiffs ask this Court to do here, *i.e.*, graft a discovery rule onto the statute. *Id.* at 1224. Plaintiffs nevertheless cite *dicta* discussing the discovery rule's

applicability to statutes of *limitations*—not *repose*—that (unlike § 413) begin to run when a claim has "accrued." *Id.* at 1221. *Gabelli* is simply irrelevant.

Second, the Secretary argues for plaintiffs' interpretation because ERISA is a "remedial statute" enacted to protect the "interests of participants in employee benefit plans and their beneficiaries." Amicus Br. at 8. Although this canon of statutory interpretation "appears to assume a unidirectional [*i.e.*, 'remedial'] statutory purpose," statutes "necessarily reflect a legislative balancing of competing purposes." *East Bay Mun. Util. Dist. v. U.S. Dep't of Commerce*, 142 F.3d 479, 484 (D.C. Cir. 1998). ERISA, for example, reflects "competing congressional purposes"—not merely "Congress' desire to offer employees enhanced protection for their benefits," but also "its desire not to create a system" under which, *inter alia*, "litigation expenses[] unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Competing purposes are a particular hallmark of statutes of repose and limitations, as the discussion above makes clear. In short, "vague notions of a statute's 'basic purpose'… are inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens*, 508 U.S. at 261 (emphasis in original).

Third, the Secretary repeatedly argues that "self-concealment" and "self-concealing" frauds qualify as "fraud or concealment," without ever identifying

what these terms mean, beyond contrasting them with "active concealment." Amicus Br. at 6-7, 15, 17-18 & 25-26. But as Judge Posner stated in *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078 (7th Cir. 1992):

> [T]he distinction between "self-concealing acts" and "active concealment"... is unhelpful. "Active concealment" is redundant; concealment is not a passive state. "Self-concealing" sounds good, but what does it mean?

Id. at 1103 (Posner, J., concurring). Judge Posner's point is aptly illustrated by *Venture Global Eng'g, LLC v. Satyam Computer Services, Ltd.*, 730 F.3d 580, 586-87 (6th Cir. 2013), which held that the defendant engaged in "self-concealing" fraud by falsifying its financial statements to reflect fictitious revenue, creating thousands of false work orders and bank statements, and grossly inflating the number of its trained employees. How this fraud differs from non-self-concealing fraud is difficult to discern. Indeed, frauds that are self-revealing rather than self-concealing hardly qualify as fraud. Insensible labels like "self-concealing" do not enhance courts' ability to interpret ambiguous statutes.

Finally, it bears noting that application of plaintiffs' interpretation of the "fraud or concealment" exception would *not* by itself mean plaintiffs' claims are timely. Because those claims are time-barred under § 413(1), plaintiffs must prove the claims fall within the exception. *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 675 (8th Cir. 2009) (party claiming benefit of exception to statute of limitations bears burden of showing he is entitled to it); *Harris v. Koenig*, 815 F. Supp. 2d 12,

20 (D.D.C. 2011) ("Plaintiffs bear the burden of proving 'fraud or concealment' under 29 U.S.C. § 1113"). Plaintiffs and the Secretary concede that to fall within the exception, plaintiffs had to bring suit within six years after they discovered "or reasonably should have discovered" defendants' violation "in the exercise of reasonable diligence." Br. at 43; Amicus Br. at 21; *accord J. Geils Band*, 76 F.3d at 1252.

It is undisputed that before they retired, *ten* of the 15 plaintiffs received a total of *33* SPDs and other documents containing a total of *67* ROR provisions *expressly stating that their medical and life insurance benefits could be amended or terminated*. Upon learning that Plaintiffs Games, Hollingsworth and Bullock were considering early retirement, Sprint sent them documents stating that "Sprint reserves the right to amend or terminate the Sprint Retiree Benefits Program at any time." Upon learning that Plaintiffs Fulghum, Shipley, and Daniel were approaching their retirement dates, Sprint likewise sent them letters describing retiree health and life insurance benefits and stating that "the Company reserves the right to amend, discontinue, or terminate these benefits." Four of these six plaintiffs (Games, Bullock, Fulghum and Shipley), as well as Plaintiffs Dorman, King, Somdahl and Joyner, indisputably received SPDs before they retired containing *between four and six* ROR provisions. 18A9401-02; *see also* 18A9379-83. These plaintiffs' claims are time-barred even under plaintiffs' own

interpretation of the "fraud or concealment" exception, because (1) defendants' alleged breach consisted of "making misrepresentations that [plaintiffs] were entitled to lifetime benefits" (Mem. at 53); and (2) undisputed facts show these plaintiffs should have discovered before they retired that these representations did not accurately characterize the benefits.[14]

VI. The Court Properly Granted Summary Judgment to Defendants on Plaintiffs' Age Discrimination Claims Regarding Life Insurance Benefits.

Plaintiffs allege that Embarq's reduction or termination of retiree life insurance benefits constituted "disparate impact" age discrimination. 2A944-45. The court certified this ADEA claim as a collective action, and certified three state-wide classes with respect to plaintiffs' corresponding state law claims. 2A897-900. Because plaintiffs contend that their corresponding state law claims are identical to their ADEA claim (Br. at 59 n.11), if their ADEA claim fails, so do the others.

Plaintiffs' age discrimination claims regarding life insurance benefits arose from benefit reductions in which all retirees, *regardless of age*, had their life insurance benefits reduced to either $10,000 (for non-VEBA retirees) or $0 (for VEBA retirees, who remained entitled to separate death benefits). 6A2648 ¶ 9 &

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[14] Defendants contend that all remaining plaintiffs also received SPDs and other documents before they retired containing ROR provisions, but plaintiffs dispute these contentions.

16A8169; 6A2650 ¶ 17 & 16A8170-71. According to plaintiffs, these benefit reductions "disparately impacted retirees based on age because the premiums plaintiffs and the Class would have to pay to replace the reduced or terminated life insurance benefits are significantly greater than they are for those who are ten years younger." 2A945.

To prove disparate impact, plaintiffs' expert compared the impact of Embarq's benefit reduction on: (1) persons in the protected group (*i.e.*, the more than 8,000 ADEA plaintiffs); and (2) hypothetical younger versions of those same persons. *See* 5A2394. Plaintiffs presented no evidence that any plaintiff actually purchased replacement life insurance. 6A2652 ¶ 27 & 16A8171. Plaintiffs' claim thus rested, not merely on a comparison of the impact of Embarq's action on *hypothetical* versus *actual* versions of plaintiffs, but on *hypothetical* rather than *actual* purchases of replacement life insurance. The court properly rejected this claim as a matter of law because: (1) plaintiffs failed to establish a prima facie case of disparate impact age discrimination; and (2) defendants' decision to reduce the benefits was based on reasonable factors other than age, which is a complete defense to ADEA claims.

A. Plaintiffs Failed To Establish a Prima Facie Case of Disparate Impact Age Discrimination.

The court held that plaintiffs failed to establish a prima facie case because they presented "no relevant statistical evidence that the impact" of Embarq's

reduction in life insurance benefits "fell more harshly on the protected group than a non-protected group." Mem. at 65. Instead, as the court found, plaintiffs' evidence merely "compare[d] *their actual selves with younger versions of themselves.*" *Id.* at 64 (emphasis added). This Court has repeatedly held that statistical evidence in disparate impact cases must identify appropriate "comparables." *See Pippin v. Burlington Resources Oil & Gas Co.*, 440 F.3d 1186, 1201 (10th Cir. 2006); *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1196 (10th Cir. 2006); *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1243 (10th Cir. 1991). As the district court noted (Mem. at 64), no court has ever held that a plaintiff may prove disparate impact age discrimination by comparing the impact of an employer's action on plaintiffs' *actual* selves and on *hypothetical younger versions* of themselves. Because plaintiffs' comparator group consists of hypothetical younger versions of themselves, the disparate impact is by definition hypothetical. Because the disparate impact is hypothetical, so too is any age discrimination.

Plaintiffs' statistical evidence was also deficient because it sought to show that an alleged discriminatory policy "fell more harshly on the protected group than a non-protected group" by comparing the impact of that policy on actual individuals within the protected group "to hypothetical individuals *within the same protected group.*" Mem. at 65 (emphasis in original). Disparate impact claims "involve employment practices that are facially neutral in their treatment of

different groups but that in fact *fall more harshly on one group than another*." *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (emphasis added). "Every court of appeals decision addressing this issue has concluded that it is improper to distinguish between subgroups of employees over the age of 40 and that a disparate impact analysis must compare employees aged 40 and over with those 39 and younger." *Rudwall v. Blackrock, Inc.*, No. C09-5176, 2011 U.S. Dist. LEXIS 19147, at *38 (N.D. Cal. Feb. 25, 2011). The Second, Sixth and Eighth Circuits have all so held. *See Lowe v. Commack Union Free School Dist.*, 886 F.2d 1364, 1371 (2d Cir. 1989); *Smith v. Tenn. Valley Auth.*, 924 F.2d 1059, 1991 WL 11271, *4 (6th Cir. Feb. 4, 1991); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 950-51 (8th Cir. 1999). No court of appeals has held to the contrary.

A final problem with plaintiffs' statistical evidence is that it merely establishes something that is indisputable—namely, that life insurance costs more for older persons than younger persons. But as the district court stated, "the mere fact that life insurance premiums increase with age does not demonstrate that Defendants' decision to reduce life insurance benefits was discrimination against the protected group on the basis of age." Mem. at 65. Were the law otherwise, any company's reduction of life insurance benefits provided to retirees (or for that matter, to employees) would constitute a *per se* violation of the ADEA, even if

those benefits are unvested under ERISA, because premiums for such insurance increase with age. The ADEA should not be construed in a manner that would turn any employer's exercise of its right under ERISA to reduce or eliminate unvested welfare benefits into a *per se* ADEA violation.

B. Defendants' Decision To Reduce Life Insurance Benefits Was Based on Reasonable Factors Other than Age.

The district court also properly granted summary judgment to defendants based on the RFOA defense. The ADEA provides that "it shall not be unlawful for an employer ... to take action otherwise prohibited under subsection[] (a) ... where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). As the district court stated, defendants presented substantial evidence, which "Plaintiffs fail[ed] to controvert," that they (1) "needed to reduce costs to remain competitive and maintain profitability," and (2) "wanted to align themselves more closely to other companies' retiree life insurance benefit options." Mem. at 69; *see* 6A2648-50 ¶¶ 10-18 & 16A8169-71. The court correctly held that defendants' "decision to reduce costs and align their benefits more closely to other companies' benefits is a reasonable factor other than age." Mem. at 69.

The leading Tenth Circuit case regarding the RFOA defense is *Pippin*, *supra*, which the district court discussed at length (Mem. at 68-69), and which plaintiffs nowhere mention. As the court stated, *Pippin* upheld summary judgment for defendant based on the RFOA defense, and its "reasoning that corporate

restructuring in a reduction-in-force case is a reasonable factor other than age suggests that it would similarly find cost-saving considerations reasonable." *Id.* at 69.

The district court also relied on "numerous cases in which courts have granted summary judgment because they have found that reducing business expenses and cost-saving operational considerations were reasonable factors other than age." *Id.* & n.170 (citing six such cases). Although plaintiffs assert that these cases "involve highly distinguishable facts or are *dictum*" (Br. at 65), summary judgment in four of the cases was explicitly based on the RFOA defense,[15] and all six cases involve comparable facts and expressly state that cost-saving considerations are reasonable factors other than age. *See* Mem. at 69 n.170. By contrast, plaintiffs do not cite a single case stating, even in *dictum*, that such considerations are *not* reasonable factors other than age.

Plaintiffs argue that to establish the RFOA defense defendants had to satisfy 29 C.F.R. § 1625.10(a), which allows reductions in employee benefit plans where justified by "significant cost considerations." Br. at 63. But as the court found,

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[15] *See Aldridge v. City of Memphis*, 404 F. App'x 29, 41 (6th Cir. 2010); *Allen v. Sears Roebuck & Co.*, 803 F. Supp. 2d 690, 698 (E.D. Mich. 2011); *Doyle v. City of Medford*, No. 1:06-CV-03058-PA, 2011 WL 4894077 at *4 (D. Or. Oct. 11, 2011), *aff'd*, 512 F. App'x 680 (9th Cir. 2013); *Walker v. City of Cabot, Arkansas*, No. 4:08-CV-00139, 2008 WL 4816617, at *4 (E.D. Ark. Nov. 4, 2008).

"[t]his regulation … is inapplicable to Defendants' RFOA defense" because by its express terms it concerns the equal cost/equal benefit rule, not the RFOA defense. Mem. at 66-67. Here as in the court below, "[p]laintiffs do not direct the Court to any authority that provides that employers must produce evidence that its decision is justified by 'significant cost considerations' when demonstrating the RFOA defense." *Id.* at 67.

Plaintiffs' reliance on 29 C.F.R. § 1625.7 is also unwarranted. Embarq reduced life insurance benefits in January 2008, and § 1625.7 did not become effective until *more than four years later*, on April 30, 2012. Moreover, notwithstanding plaintiffs' suggestion that § 1625.7 could be "controlling" (Br. at 65), the EEOC has stated that it sets forth mere "considerations" that "are not required elements or duties." 77 Fed. Reg. 19080, 19081 & 19085 (March 30, 2012) (to be codified at 29 C.F.R. pt. 1625).

Finally, plaintiffs' assertion that "defendants' desire to mimic some other companies' benefits structures" "does not meet any definition of 'reasonable'" (Br. at 66) ignores the Supreme Court's interpretation of "reasonable." In *Smith v. City of Jackson*, 544 U.S. 228, 241-42 (2005), an employer adjusted employee compensation to align it with compensation provided by similarly situated entities. The Supreme Court stated: "[W]e hold that the City's decision to grant a larger raise to lower echelon employees *for the purpose of bringing salaries in line with*

that of surrounding police forces was a decision based on a 'reasonable facto[r] other than age'…." *Id.* at 242 (emphasis added). If bringing *salaries* in line with those offered by similar entities is a RFOA, bringing *benefits* in line is also a RFOA. For all these reasons, the court properly rejected plaintiffs' age discrimination claims regarding life insurance.

VII. The Court Properly Dismissed Plaintiffs' Age Discrimination Claims Regarding Health Benefits.

The district court dismissed plaintiffs' claims alleging that defendants' reduction of health benefits provided to Medicare-eligible retirees violated the ADEA on the ground that a federal regulation expressly permitted those reductions. 2A646-52. These claims share the same factual predicate as plaintiffs' "life insurance" age discrimination claims—that defendants' reduction in health benefits disparately impacted retirees based on age because replacement health insurance costs more for older than younger retirees. *See* 1A448. Thus, even if the court erred in dismissing plaintiffs' age discrimination claims regarding health benefits based on 29 C.F.R. § 1625.32(b) ("Rule 1625.32"), the claims would still fail as a matter of law for the reasons set forth above.

Rule 1625.32 exempts employers' reduction of health benefits for Medicare-eligible retirees from the ADEA's anti-discrimination prohibitions, and went into effect six days before Embarq reduced health benefits for Medicare-eligible retirees. Plaintiffs do not dispute that Rule 1625.32 authorized Embarq's actions if

the rule is valid and was in effect when those actions were taken. Plaintiffs' five purported arguments for reversal boil down to two: (1) Rule 1625.32 is invalid; and (2) even if the rule is valid, the court improperly gave it retroactive effect. Neither argument has merit.

A. Rule 1625.32 Is Valid.

The only court to consider the validity of Rule 1625.32 has upheld its validity, with the support of an astounding array of both labor and industrial organizations. *See AARP v. EEOC*, 489 F.3d 558, 562-65 & n.9 (3d Cir. 2007). Like plaintiffs here, the plaintiffs in *AARP* argued that Rule 1625.32 is invalid because the EEOC exceeded its authority in issuing it. *Id.* at 562. In response, the Third Circuit noted that "Section 9 of ADEA expressly authorizes the EEOC to 'establish such reasonable exemptions to and from any or all provisions of [the Act] as it may find necessary and proper in the public interest.'" *Id.* at 563, *quoting* 29 U.S.C. § 628. The Third Circuit correctly held that this provision "clearly and unambiguously" authorized the EEOC to issue rules that "allow limited practices not otherwise permitted under the statute, so long as they are 'reasonable' and 'necessary and proper in the public interest.'" *Id.*

The court then addressed whether the limited exemption created by Rule 1625.32 was "reasonable" and "necessary and proper in the public interest." It noted the EEOC had found that: (1) "[r]ather than maintaining retiree benefits at

pre-Medicare eligibility levels for all retirees in order to avoid discrimination under the ADEA, some employers chose to reduce all retiree health benefits to a lower level" or eliminate them altogether; and (2) the proposed exemption would "permit employers to offer retiree benefits to the greatest extent possible." *Id.* at 564 (citation and quotation marks omitted). The court concluded that the exemption created by Rule 1625.32 was a "reasonable, necessary and proper exercise of [the EEOC's] section 9 authority, as over time it will likely benefit all retirees." *Id.* at 565. Plaintiffs' one-sentence, unsubstantiated challenge to these findings—that "[t]his is a social-welfare rationale unrelated to the ADEA's purposes" (Br. at 56)—essentially argues that ensuring health benefits are provided "to the greatest extent possible" to "all retirees" (who by definition are over age 40) is unrelated to the ADEA's purposes. The EEOC rejected this very argument, finding instead that without the rule "many employers would reduce the overall level of health benefits they offer to retirees or cease providing such benefits altogether," which would be "inconsistent with the Act's primary purpose of protecting older workers." Br. Addendum B79-80.

According to plaintiffs, *Lee v. Gallup Auto Sales, Inc.*, 135 F.3d 1359 (10th Cir. Feb. 9, 1998), shows that this Court is not as willing as the Third Circuit to approve regulatory exemptions to statutory requirements. Br. at 57. But as the district court noted (*see* 2A650), *Lee* is plainly distinguishable from this case. *Lee*

construed a statute (49 U.S.C. § 32705) that at the time gave the Department of Transportation ("DOT") no authority whatever to create regulatory exemptions from statutory requirements, whereas the ADEA expressly authorized the EEOC to create reasonable exemptions from statutory requirements. *See Lee*, 135 F.3d at 1360-62; 29 U.S.C. § 628. Only *after* this Court decided *Lee* did Congress amend the statute to give DOT authority to make exemptions. *See* 49 U.S.C. § 32705(a)(4&5) (added to statute by Pub.L. 105-178, § 7105 on June 9, 1998). *See also Beam v. Domani Motor Cars, Inc.*, 922 F. Supp. 2d 1338, 1343 (S.D. Fla. 2013) (in 1998 Congress "responded" to *Lee* and similar decisions by amending the statute).

Plaintiffs also argue that the district court "misconstrued OWBPA" by failing to recognize that: (1) OWBPA's modification of Section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2)(B), effectively codified Rule 1625.10; and (2) that rule contradicts, and therefore invalidates, Rule 1625.32(b). Br. at 53-55. The court correctly found that "[t]his argument, to say the least, is stretched too far" on both points. 2A648. First, as the court noted, "Section 4(f)(2) of the ADEA does not expressly incorporate the language of Rule 1625.10," but instead simply refers to that rule to "demonstrate[] the cost analysis which is permissible under the law." 2A648-49. Second, "Rule 1625.32 does not necessarily contradict Rule 1625.10(e)," because the former rule "applies to *retiree* health benefits" while the

latter rule "applies to current employees who are eligible to receive Medicare." 2A649 (emphasis in original).

Finally, in amending the ADEA through the OWBPA, Congress could have, but did not, amend ADEA § 9 to limit the EEOC's authority to "establish such reasonable exemptions to and from *any or all* provisions of this chapter as it may find necessary and proper in the public interest" (emphasis added). It is thus clear that Congress did not intend the OWBPA to interfere with the EEOC's authority to exempt "any or all" practices that would be "otherwise prohibited" by the ADEA.

B. The Court Did Not Give Retroactive Effect to Rule 1625.32.

Plaintiffs also argue that even if Rule 1625.32 is valid, it does not apply here because Embarq announced its decision to reduce health benefits five months before the rule's December 26, 2007 effective date. Br. at 57. The court rejected this argument because, as plaintiffs themselves alleged (*see* 1A301-02 ¶ 30), Embarq did not actually reduce those benefits until January 1, 2008, six days *after* the rule's effective date. *See* 2A651.

Although plaintiffs assert that the court erred in holding that "any violation occurred when the benefit changes took effect" (Br. at 57), plaintiffs' amended complaint asserted that any ADEA violation occurred exactly when the court said it did, *i.e.*, when Embarq "terminated plaintiffs' rights to ... medical insurance coverage, and prescription drug subsidies." 1A334 ¶ 143. Because Embarq did not

"terminate[] plaintiffs' rights" to health benefits until the Plan amendment so providing became effective, and because that amendment did not become effective until after Rule 1625.32's effective date, plaintiffs' retroactivity argument fails.

Although plaintiffs cite three cases to support their argument that "age discrimination occurred when Embarq approved and announced the change" (*see* Br. at 57-58), those cases have nothing to do with the issue before this Court, *i.e.*, whether a regulation applies to alleged discriminatory conduct announced before, but implemented after, the regulation's effective date. They instead concern an entirely unrelated issue—namely, whether plaintiffs timely filed claims alleging civil rights violations. *See Delaware State College v. Ricks*, 449 U.S. 250, 252-56 (1980); *Chardon v. Fernandez*, 454 U.S. 6, 7-8 (1981); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628-32 (2007). Moreover, plaintiffs' argument that application of the exemption "destroyed pre-existing obligations to the retirees" (Br. at 58) ignores the fact that "[e]mployers are not legally obligated to provide retiree health benefits" (*id.*, Addendum B69).

Finally, plaintiffs' retroactivity argument is refuted by the appendix to Rule 1625.32, which states that the exemption applies to existing as well as newly created employee benefit plans. *See* 2A651; Br. Addendum B101 Q6. Embarq did exactly what the EEOC said was permissible, *i.e.*, it applied the exemption beginning on a date *following* the rule's effective date to *existing* employee benefit

plans. Plaintiffs' age discrimination claims regarding health benefits were properly dismissed.

CONCLUSION

For the reasons set forth above, the district court's judgment in defendants' favor should be affirmed in its entirety.

STATEMENT REGARDING ORAL ARGUMENT

Defendants request oral argument to explain further as necessary how legal authority overwhelmingly supports the district court's rulings on appeal.

DATED: January 27, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,967 words, including headings, footnotes, and quotations, and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word 2010 software.

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Dated: January 27, 2014.

By: /s/Christopher J. Koenigs
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CERTIFICATE REGARDING PRIVACY REDACTIONS

I hereby certify that all required privacy redactions required by 10th Cir. R. 25.5 have been made in this brief.

Dated: January 27, 2014.

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CERTIFICATE REGARDING HARD COPIES SUBMITTED TO THE COURT

I hereby certify that the hard paper copies of this brief which are being submitted to the Court are exact copies of the PDF version of this brief which was filed electronically via the Court's ECF system.

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By: /s/ Denise S. Davis
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Dated: January 27, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 27, 2014, she caused the foregoing **RESPONSE BRIEF OF DEFENDANTS-APPELLEES** to be served via the Court's ECF system and also by placing copies in the United States mail, postage prepaid, to the following:

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