CASE NO. 13-3230

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM DOUGLAS FULGHUM, et al., individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

EMBARQ CORPORATION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Kansas
The Honorable Eric F. Melgren
(D.C. No. 2-07-CV-2602-EFM)

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ORAL ARGUMENT IS REQUESTED

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SUMMARY OF ARGUMENT

I. The SPDs would be understood by employees to promise lifetime benefits that could not be changed after retirement. The first group of SPDs contained specific promises that benefits end on death. Defendants ignore both this Court's decisions recognizing this language as sufficient to indicate vested benefits and the canon under which these specific promises must control over vague RORs. The second group of SPDs had *no* RORs, and defendants admit that the company had to expressly reserve the power to amend/terminate benefits. Although they suggest the power resides in plan documents, the only ones in the record do not apply and defendants never cited them. The third and fourth groups of SPDs permit amendment/termination *only* in cases of "business necessity or financial hardship." A reasonable employee would understand this to refer to financial inability to continue benefits, an interpretation confirmed by tax law materials. Defendants never attempted to show these conditions were satisfied and did not dispute facts establishing the company's strong financial condition.

II. The BOFD claims were not time-barred. ERISA's "fraud or concealment" provision addresses violations that cannot be readily discovered and ensures that breaching fiduciaries do not escape liability. Defendants refuse to recognize that the provision stands apart from other limitations provisions and operates independently. Defendants also ignore the plain wording of the provision,

conflating "fraud or concealment" with "fraudulent concealment." They admit that if the provision read somewhat differently, the retirees would be correct. But their proposed formulation is indistinguishable from the actual text. Finally, defendants' supposed policy arguments ignore the fact that the same litigation issues would exist under their reading. They offer no justification for immunizing fiduciaries whose misrepresentations cannot be discovered.

III. Retirees adequately showed the disparate impact of the challenged actions. There is no one mandatory means of proving disparate impact, and defendants' examples from selection cases are inapposite. Defendants' argument that there can be no subgroup analysis under the ADEA has been rejected by the Supreme Court, has no support in the statutory language, and is effectively mooted by the fact that measuring adverse impact against those under 40 would produce greater impact and by the common recognition that these changes imposed a much greater burden on older retirees. This Court will be the first appellate court to decide the proper standard for proving benefits reduction disparate impact.

IV. Defendants have ignored most of retirees' arguments and authorities as to the invalidity of the EEOC's purported exemption of medical benefits for Medicare-eligible retirees. They also misconstrue the statute in suggesting that any cost saving is automatically an RFOA.

ARGUMENT

I. DISMISSAL OF BENEFIT CLAIMS CONTRAVENED THIS COURT'S ERISA DECISIONS.

A. This Court's Decisions Emphasize Strong Protections for Participants.

Defendants do not dispute that courts must "giv[e] the language [of the SPDs] its common and ordinary meaning as a reasonable person in the position of the [plan] participant." *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1996). Employees are not "required to adopt the skills of a lawyer." *Id.* at 1518. Like the court below, defendants belittle language specifically promising lifetime benefits, mistakenly focus on vague reservation ("ROR") clauses in isolation, and never consider ordinary meaning.

B. When Read from the Perspective of a Reasonable Participant, the SPDs Promise Lifetime Benefits.

1. SPDs 1-6, 18 and 24-32 State that Benefits End on Death

Defendants do not dispute the court's conclusion that the SPDs "contain the statement that the retirees' benefit coverage ends upon the retirees' death" and each "purports to promise lifetime benefits." Mem. 17, 26. Defendants instead argue these specific promises can be ignored. Both *DeBoard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228 (10th Cir. 2000), and *Aguilar v. Basin Resources, Inc.*, 47 F.App'x 872 (10th Cir. 2002) (unpublished), confirm that these SPDs promise lifetime benefits.

The SPDs on their face state that benefits end only upon death (or non-payment of any required premiums), which is universally understood to mean benefits for life. *DeBoard* construed "until the time of your death" as "clearly indicat[ing] an intent on the part of [the employer] to provide plaintiffs with lifetime health insurance benefits." 208 F.3d at 1233, 1238. Other SPD portions reinforce these lifetime promises. *See* Opening Br. 22 n.3.

Defendants maintain that *DeBoard*'s conclusion of a lifetime promise depended on absence of reservation language. (Resp. Br. 12) However, the Court stated that "the language of the letters" clearly indicated lifetime benefits and did not consider whether an ROR was present until four paragraphs later. 208 F.3d at 1238-39. As this sequence demonstrates, the threshold question is whether there is language indicating that lifetime benefits are promised.

Defendants also contend that *Aguilar* should be ignored because the labor agreement did not contain an ROR. (Resp. Br. 12) But the very first paragraph of the analysis noted there was a conflict between promises of lifetime benefits and provisions that the employer provided health benefits "during the term of the Wage Agreement." 47 F.App'x at 875. Use of the phrases "for life" and "until death" as in national coal agreements was "strong evidence" of intent to provide lifetime benefits. *Id*.

Defendants also commit a fundamental analytical error. The lifetime promises must be considered when interpreting these SPDs, whether or not reservation language also is present. At best for defendants, vague reservation language conflicts with specific and unqualified lifetime promises. Under the standard canon reiterated in *Chiles*, these specific promises control. *See also Mut. Life Ins. Co. v. Hill*, 193 U.S. 551, 558 (1904) ("where there are two clauses in any respect conflicting, that which is specifically directed to a particular matter controls in respect thereto over one which is general in its terms").[1] Even without this rule, ambiguity must be resolved in the retirees' favor. "Accuracy is not a lot to ask" and the statute and regulation require SPDs to specifically warn of the risk of losing benefits during retirement. *Chiles*, 95 F.3d at 1518.[2]

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[1] Defendants cite other provisions as sufficient to defeat claims. But these are generalized statements referring to multiple plans covering both active and retired employees and to changes in medical "coverages". 15A7339-40, 7343-45. Those provisions do not eliminate the conflict with, or overcome, specific lifetime promises. Unlike the reservation clause in *Chiles* which stated that vesting was limited to plan termination, 95 F.3d at 1512, these SPDs contain no such language to defeat the specific promises of benefits until death. *See also Reese v. CNH America LLC*, 574 F.3d 315, 324 (6th Cir. 2009) (changes in specific coverages commonplace).

[2] *Chiles* in 1996 quoted the regulation requiring SPDs to "include a statement 'clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide.'" *Chiles*, 95 F.3d at 1518, *quoting* 29 C.F.R. §2520.102-3(*l*). This language was promulgated in 1977. *See* 42 Fed. Reg. 14266 (March 15, 1977). [fn. continued]

Defendants also are incorrect in arguing that this case is controlled by two other decisions of this Court. (Resp. Br. 8, 11, 23) *Kerber v. Qwest Group Life Ins. Co.*, 647 F.3d 950 (10th Cir. 2011), is clearly inapposite. The *Kerber* plaintiffs agreed that "the Plan unambiguously reserved the right to amend the Plan at any time," did "not allege that the Plan created vested rights," and conceded that the company "could have completely terminated the life insurance benefits." *Id.* at 957, 959-60. Defendants likewise err in citing *Welch v. UNUM Life Ins. Co. of Am.*, 382 F.3d 1078 (10th Cir. 2004). (Resp. Br. 8, 11) In *Welch*, the plaintiff contended that an amendment terminated the disability plan and triggered a vesting provision. *Id.* at 1082-84. This Court ruled that the plan had not terminated and never reached the question whether the provision vested benefits. *Id.* at 1085.

Defendants also cite other circuits' decisions for the proposition that "welfare benefits are not vested where SPDs or plan documents unambiguously state that the benefits can be amended or terminated" and that promising benefits "until death" is not sufficient. (Resp. Br. 10, 14-15). But this states a mere truism,

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Defendants do not acknowledge this passage in *Chiles* and mistakenly argue that the requirement to disclose possible benefit loss from amendment or termination first appeared in the 2001 amended regulation. (Resp. Br. 14 n.6) That regulation ensured disclosure of asset distribution procedures on termination of pension plans. The Department of Labor made clear that it carried over the 1977 requirement, quoted in *Chiles*, to disclose any circumstances which could result in benefit loss. 63 Fed. Reg. 48376, 48378 (Sept. 9, 1998); 65 Fed. Reg. 70226, 70229 (Nov. 21, 2000). The court did not reach this issue. Mem. 25 n.61.

since it assumes a determination of no ambiguity. Moreover, those decisions cannot supplant *DeBoard* and *Aguilar* and this Court's interpretive framework.

Defendants also do not acknowledge that four of the seven circuits defendants point to have ruled that lifetime benefit language creates a triable issue, despite the presence of a reservation or termination clause. *See Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 605-09 (7th Cir. 1993) (*en banc*) (lifetime benefits promises and duration clause create ambiguity and jury question); *Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 84-86 (2d Cir. 2001) ("such 'lifetime' language ... is sufficient to create a triable issue as to whether [employer] promised to vest retiree life insurance benefits"); *Stearns v. NCR Corp.*, 297 F.3d 706, 712 (8th Cir. 2002) (if ROR "conflicts with other plan provisions" extrinsic evidence examined), *citing Jensen v. SIPCO, Inc.*, 38 F.3d 945, 948-52 (8th Cir. 1994) (general ROR did not negate vesting language found in "Termination of Coverage" section); *Noe v. Polyone Corp.*, 520 F.3d 548, 558 (6th Cir. 2008) (pension linkage indicates vested medical benefits despite durational clause).

Although defendants say *Jensen* "bears no resemblance" to this case (Resp. Br. 12), *Chiles* quoted *Jensen* for the rule that general reservation clauses are not "facially unambiguous" because "they leave at least some doubt as to whether [the employer] intended to reserve the right to change or terminate benefits to already

retired pensioners, or only the right to make prospective changes for those covered by the Plan but not yet retired. *Jensen*, 38 F.3d at 950." 95 F.3d at 1512.

During the nearly 20 years since *Chiles*, this Court has repeatedly mandated protective rules for SPD interpretation. Yet defendants argue that a specific, express promise of lifetime benefits can be negated by a vague reservation of rights clause located in a different part of the document and never referenced.

These are lifetime promises under *DeBoard* and *Aguilar*. They are clear and express. That is not the only basis to show vesting. Retirees alternatively can show "an agreement *or other demonstration of employer intent* to have company-paid premiums vest under the plan" *or* that "a promise to provide vested benefits '[was] *incorporated, in some fashion*, into the formal written ERISA plan.'" *Chiles*, 95 F.3d at 1511 (emphasis added). Retirees did this. Opening Br. 10-11, 22 n.3, 35-36.

2. SPDs 7-9 Have No ROR

Defendants do not dispute the court's conclusion that SPDs 7-9 "do not contain an express reservation of rights provision." Mem. 26; *see also* 15A7347-48. Decisions of the Supreme Court and this Court hold that any right to amend or terminate must be expressly reserved. *See* Opening Br. 26-27. Defendants concede this. (Resp. Br. 13)

Because these SPDs contain no authorization for amendment or termination of the benefits and the plan (as opposed to changes in the insurance policies used to deliver the benefits), the company's actions cannot stand no matter how benefits promises are characterized. Defendants cannot rely on a right they did not reserve.

Defendants' only argument in support of a reserved power is their vague assertion that it is found in "plan documents." (Resp. Br. 13-14) But defendants produced no plan documents that apply. The right to amend or terminate had to be stated in the SPDs, which function as plan documents by default.[3]

Moreover, defendants never made any argument based on plan documents. Although their exhibits included two purported plan documents, defendants' factual statement did not describe them and their argument did not cite them. 3A1552-1566. Even after retirees argued that SPDs 7-9 contained no provision reserving a right to amend or terminate (15A7345-49, 7395-97), defendants' reply did not cite plan documents or any other source. 16A8403-04.

It is not surprising that defendants never cited the two purported plan documents. They are inapplicable. One is entitled "United Telecom Retiree Medical Plan" with a stated effective date of January 1, 1990. 4A2084-2107. The

[3] Pension and savings plans are subject to complex tax law requirements and memorialized in formal plan documents. In contrast, medical and life insurance benefits usually are not defined in plan documents due to frequent changes in insurers and covered providers and procedures, and regional and local variations. So it is not surprising that there are no formal plan documents here. The SPDs and any related CBAs instead function as the plan documents.

other is entitled "Embarq Retiree Medical Plan" dated as of Embarq's 2006 spin-off date. 4A2108-2131. Neither document applies because SPDs 7-9 describe *life insurance* benefits not covered by the two medical plan documents. Second, neither document is signed and there is no evidence that either was adopted.

Defendants cite various miscellaneous "termination provisions" governing the commercial relationship between the employer and its insurance carrier. But these do not control benefit rights. *DeBoard,* 208 F.3d at 1240-41 & n.6; *Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 308 (7th Cir. 1996); *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 250-51 (6th Cir. 1996). The SPDs themselves distinguish the plan from the life insurance policies and refer to changes in policies and carriers as having no impact on promised benefits. 15A7346-49.

3. SPDs 10-12 and 19 Limit Amendment/Termination to Cases of "Business Necessity or Financial Hardship"

Defendants fail to show that, as a matter of law, employees would understand that language limiting benefits amendment/termination to "reasons of business necessity or financial hardship" would allow the company to terminate benefits at any time or for any reason. To the contrary, use of the particular, stringent standard "business necessity or financial hardship" compels the conclusion that termination is not authorized when the company simply makes a voluntary business choice.

The retirees argued below that the text of these RORs meant they could be invoked only in cases of financial hardship. The retirees also showed that the benefits represented a minute portion of operating expenses which the company could easily afford. *See* 15A7358-59, 7401-02. Defendants did not demonstrate necessity or financial hardship of any kind and did not dispute the facts disproving those conditions. 16A8377-78.

Defendants also are mistaken in contending that the retirees are citing a Treasury Regulation and Revenue Rulings to make a factual argument about the historical origin of the ROR phraseology. (Resp. Br. 17-18). Rather, these tax law parallels are cited as additional legal authority confirming that "business necessity or financial hardship" is reasonably understood to refer to adverse financial circumstances – just as the words state. The relevant question here is how the term is understood by a reasonable participant. At a minimum, competing reasonable readings are presented and the SPDs must be construed in the retirees' favor.

4. SPDs 13-15 and 20-23 Limit Amendment/Termination to Cases of Business Necessity or Financial Hardship

Defendants' arguments regarding are unpersuasive for the reasons stated in Subsection 3.

C. The Court Erred in Excluding Evidence.

Retirees correctly argued that under *Chiles* and *Jensen* they were entitled to present evidence constituting "other demonstration of employer intent" or

relinquishment of any supposed power to amend or terminate. 15A7393-95, 7385-86. By permitting *other* demonstration of employer intent, *Chiles* incorporated the concept of latent ambiguity, *i.e.*, that other circumstances demonstrate lifetime benefits. Opening Br. 34. Despite this authority, the court ruled that no evidence was admissible under any circumstances.

Defendants' assertion that extrinsic evidence cannot be considered because "the 30 SPDs are (as the court found) not ambiguous in any way" (Resp. Br. 21) ignores the record and caselaw for the reasons stated above. Reasonable employees would understand the SPDs to provide lifetime benefits.

Defendants also are incorrect in arguing that the retirees' evidence is only self-serving testimony. In fact, most extrinsic evidence is found in defendants' own documents and conduct – the company's continuous, decades-long grandfathering of 170 legacy plans; its analysis finding SPDs were insufficient to preserve a right to amend or terminate; its executives' conclusions that it had an "obligation" to retirees and could not take benefits away from them; and its written and oral statements promising lifetime benefits over the course of many years and locations. Opening Br. 9-11, 35-36. Defendants cannot disparage this as unreliable "subjective and self-serving extrinsic evidence." Resp. Br. 21-22.

D. The Court Erred in Excluding the Evidence from Expert Stygall Finding That Participants Can Reasonably Understand the SPDs to Promise Lifetime Benefits.

Like the district court, defendants erroneously conclude that an issue of law (whether an SPD is ambiguous) cannot involve subsidiary fact issues. (Resp. Br. 22) But Fed.R.Evid. 704(a), its Advisory Committee Note, and Tenth Circuit caselaw reject this position. What a reasonable participant would understand an SPD to provide is a central factual issue. Under the liberal standard for assessing materiality, Professor Stygall's testimony was admissible. Opening Br. 37-38.

Although defendants argue that such testimony is offered infrequently in ERISA benefit cases, that is a result of litigant choice, presumably based on budget. The evidence rules do not condition admissibility on frequency of use. Similarly, the Stygall testimony is not made inadmissible here because a trial judge in a different circuit once excluded her testimony in a one-paragraph ruling in an unreported decision, citing as its only support one of his prior, inapposite decisions under state law. *See Goldinger v. Datex-Ohmeda Cash Balance Plan*, No. C07-2081RAJ, Mem. at 9 (W.D.Wash. Nov. 24, 2009) (Def. Suppl. App'x 009), *citing Liberty Mut. Fire Ins. Co. v. Costco Wholesale Corp.*, No. C07-1499RAJ, 2009 U.S. Dist. LEXIS 41500, *8-9 (W.D.Wash. April 30, 2009) ("policy interpretation in Washington is a purely legal question"). Among decisions available online, there is contrary authority allowing the same type of testimony by Stygall's

colleague, James Stratman, concerning how participants understand ERISA disclosure documents. *See Engers v. AT&T*, No. 98-3660, 2006 U.S. Dist. LEXIS 23028, *12-14 (D.N.J. April 17, 2006) (rejecting argument that testimony "inadmissible legal opinion"), *aff'g*, 2005 U.S. Dist. LEXIS 41693, *9-10 (D.N.J. Aug. 10, 2005) ("analysis on understandability could assist the trier of fact. It may help illustrate how an unsophisticated reader would understand the document").[4] A court may receive evidence "regarding interpretation of the plan." *Hall v. UNUM Life Ins. Co.*, 300 F.3d 1197, 1203 (10th Cir. 2002). *See also* Opening Br. 38-39.

Finally, defendants pretend that Stygall's testimony would only address supposedly "unambiguous" RORs (Resp. Br. 24). In fact her analysis takes into account all relevant SPD provisions. As defendants concede, SPDs must be read as a whole, construing specific promises of lifetime benefits and vague reservation language as employees would.

[4] Defendants also cite *Halbach v. Great-West Life & Annuity Ins. Co.*, No. 4:05CV02399, 2007 WL 2108454, *3-4 (E.D.Mo. July 18, 2007), which granted a motion to strike defense expert testimony about *specialized* "common usage and purpose within the employee benefits community" for RORs. The court ruled that "it would be unfair to allow an expert to testify to the meaning of these terms, when they were written to be understood by the plan beneficiary who is by definition a layperson." *Halbach* is the exact opposite of this case.

E. The Court Erred in Dismissing the Claims of Class Members Defendants Identified as Having Claims Based on Either the Same SPD and CBA Language Which Was Sufficient to Preclude Summary Judgment or on SPDs and CBAs Defendants Did Not Address in Their Motion.

The summary judgment against selected class members was improper for the reasons stated in Subsections B-D above. The court also committed procedural error in ordering summary judgment against class members defendants identified as having claims based on either (a) the same SPD/CBA language precluding summary judgment against Britt, or (b) SPDs and CBAs defendants made no effort to address and on which they did not satisfy their Rule 56 burden. This error is subject to plenary review. Contrary to defendants' premise (Resp. Br. 25), the error is not the court's later summary denial of the retirees' motion for reconsideration. July 16, 2013 Mem. 6, *denying* 19A9475-9535.

1. The Ruling Denying Summary Judgment Against Plaintiff Britt Due to the Terms of SPDs 7 and 10 and the Related CBA Applied to Class Members Whose Claims Arose Under The Same SPDs and CBA.

Defendants do not contest these points. *See* Opening Br. 39-40.

2. Defendants Admitted that Other SPDs and CBAs Applied to Numerous Class Members Whose Claims Were Dismissed, But Their Motion Made No Effort to Place These Documents in Issue and to Carry Their Rule 56 Burden. The Court Erred in Dismissing the Claims of these Class Members.

The court erred by issuing an overbroad dismissal, sweeping in all portions of claims to medical or life insurance benefits by thousands of class members even

though defendants never pointed to, or sought a ruling on the sufficiency of, numerous documents defendants' Mapping admitted to be sources of their claims. As defendants confirm (Resp. Br. 25), their motion was limited. It asserted only that (a) the class members retired while the listed SPDs "w[ere] in effect" and (b) the SPDs either were the same as or "contain[ed] provisions substantially identical to" provisions of SPDs for representative plaintiffs. 6A2721-26.

After the court granted summary judgment without limiting it to claims based on the identified SPDs, the retirees' reconsideration motion pointed out this error and included a sampling from defendants' Mapping to show the order's overbreadth.[5] Although defendants did not make the Mapping part of the record due to its size and privacy concerns, they made repeated references to it. The retirees' references to the Mapping also were proper.

Defendants cite *Libertarian Party of New Mexico v. Herrera*, 506 F.3d 1303, 1309 (10th Cir. 2007), which restates the general rule that summary judgment movants who do not have the burden of proof are not obligated to "negate" or

[5] For example, defendants' Mapping identified SPDs and CBAs their limited motion never addressed. Although defendants argue CBAs could not be considered (Resp. Br. 27 n.9), their Mapping stated CBAs *must* be considered, they presented argument on representative plaintiffs' CBAs, and the court based its rulings on CBAs. Moreover, CBAs are plan documents and their terms became part of the SPDs by incorporation. For example, SPD 7 refers to the CBA as one of the "plan documents." 4A1856. *See Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.*, 491 F.3d 1180, 1193-94 (10th Cir. 2007) (review plan document and CBA to determine ambiguity); 29 U.S.C. §1024(b)(2); 11 *Williston on Contracts* §30:25 (4th ed. 2012).

disprove the claim that is the subject of the motion. But Rule 56 *did* require defendants to give notice that they were placing in issue the sufficiency of all documents listed in the Mapping for those class members. Instead, they only sought a ruling that the identified SPDs were the same or substantially the same as those for representative plaintiffs, which was the only proposition asserted in their motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Murray v. City of Tahlequah*, 312 F.3d 1196, 1199 (10th Cir. 2002).

II. THE COURT ERRED IN RULING THAT FIDUCIARY MISREPRESENTATION CLAIMS WERE TIME-BARRED. THE RETIREES WERE NOT REQUIRED TO SHOW "ACTIVE CONCEALMENT" AND THE CLAIMS DID NOT ACCRUE UNTIL THE RETIREES SUFFERED ACTUAL HARM AND DISCOVERED ACTIONABLE MISREPRESENTATIONS.

Defendants do not dispute that ERISA enacts a discovery rule for "cases of fraud or concealment."

A. The Ruling Commits Fundamental Error in Applying the ERISA Provision for "Fraud or Concealment".

The "fraud or concealment" provision addresses violations that cannot be readily discovered and ensures that breaching fiduciaries do not escape liability. Defendants fail to recognize that the provision stands apart from the preceding clauses of 29 U.S.C. §1113 and operates independently. The erroneous premise throughout defendants' arguments is that the provision is subordinate to the statute

of repose in §1113(1). (Resp. Br. 32, 37) However, *Nat'l Credit Union Admin. Board v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1266 (10th Cir. 2013), a decision defendants never acknowledge, confirms that statutes of repose can be supplanted by other statutory language.

Defendants also ignore the text. The word "or" means that the phrases are disjunctive. *See, e.g., Direct Mktg. Ass'n v. Brohl*, 735 F.3d 904, 912 (10th Cir. 2013). Defendants improperly convert "or" to "and" and limit the provision to cases involving separate acts of "fraudulent concealment." (Resp. Br. 42). Defendants urge the Court to join them in misreading the statute and ignoring its common law origins. But the fact that some other circuits conflated "fraud or concealment" with "fraudulent concealment" does not require the Court to perpetuate this error.[6]

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[6] The chain of error beginning with *Schaefer v. Arkansas Medical Society*, 853 F.2d 1487, 1491-92 (8th Cir. 1988), is recounted in Amicus Br. 24 and the retirees' brief below (17A8582-83 & n.407). Defendants' cases mistakenly imported the "trick or contrivance" requirement without considering the fiduciary rule this Court recognized in *Amen v. Black*, 234 F.2d 12, 26 (10th Cir. 1956), and *Bryan v. United States*, 99 F.2d 549, 553 (10th Cir. 1938).

Even under that erroneous approach, courts recognize that "fraud or concealment" includes self-concealing misrepresentations as occurred here. *See J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1253 n.9 (1st Cir. 1996); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172-73 & n.15 (D.C. Cir. 1994); *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1094-95 (7th Cir. 1992).

Defendants engage in nonsensical hair-splitting. They agree that plaintiffs would be correct if the provision stated, "in the case of *a breach or violation involving* fraud or concealment." (Resp. Br. 41; emphasis in original). They do not explain why the same is not true under the actual text. The only difference is defendants' addition of "a breach or violation involving." That phrase is unnecessary because "*such* breach or violation" appears at the end rather than the beginning. Nor is there any risk that the correct interpretation will "eviscerate" (Resp. Br. 37) the other clauses. They will continue to operate in most cases. Most fiduciaries do not make misrepresentations and fraud or concealment is *not* present. Defendants also deride the Secretary of Labor's analysis but never show that it is wrong.[7]

Defendants rely on invalid policy justifications. To be sure, ERISA grants repose to fiduciaries who deserve it. But there is no evidence that Congress meant to immunize fiduciaries whose misrepresentations evade discovery by participants. Benefit plans by their nature promise long payment streams and present risk of delayed harm. Under defendants' approach, participants would lose judicial remedies where the defendant bides its time and allows six years to elapse.

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[7] Defendants even stoop to cite two district court motions by the Secretary to strike laches defenses which in passing included a one-sentence summary of §1113, which was not in issue. (Resp. Br. 34) These filings did not address, much less set forth the Secretary's considered views on, the questions here.

Defendants also complain that they are being forced to defend claims based on misrepresentations they made years earlier. But the same possibility exists under their reading. They do not explain why claims should be allowed when a fiduciary "covers up" a discoverable misrepresentation but barred when the misrepresentation itself cannot be discovered.

Moreover, this litigation is not unexpected for defendants. The company concluded in 2000-2001 that it had an "obligation" to maintain retirees' benefits and that RORs in the SPDs were not clear. When it terminated benefits in 2007, it acknowledged it had made lifetime promises. Opening Br. 26, 32, 35-36; 15A7369-71, 16A8042-43. The claims also are supported by company documents and do not depend solely on retiree testimony. 17A8487-8551. The claims were brought in 2007, the year following the drug benefit termination, not in 2012 as defendants incorrectly assert (Resp. Br. 38).

Finally, defendants attempt to argue the merits. (Resp. Br. 46-47) They made these arguments below but the court allowed claims to proceed where there was no limitations issue. Mem. 51, 58. *See also In re Unisys Corp. Retiree Medical Benefits ERISA Litigation (Unisys IV)*, 579 F. 3d 220, 232 (3d Cir. 2009) (fiduciary breach where lifetime representations made without reference to ROR); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 455 (6th Cir. 2002) (same).

Defendants do not dispute that Fed.R.Civ.P. 9(b) was inapplicable and did not support dismissal. Opening Br. 47-49.

B. The Court Erred in Ruling that BOFD Claims Accrued and the Statute Began Running at Retirement. These Claims Require Proof of Harm and Did Not Accrue Until Defendants Reduced or Terminated Benefits.

CIGNA Corp. v. Amara, U.S. , 131 S.Ct. 1866, 1881-82 (2011), holds that "actual harm must be shown" as part of the violation. Defendants never acknowledge *Amara.* Nor do they acknowledge that §1113(1) only begins to run after "the last action" constituting part of the breach and requires all claim elements to be present.

It may be generally true that statutes of repose can run before harm is suffered. But §1113(1) does not begin to run until the *last* action. Under *Amara* that is "actual harm." This makes sense. There would have been no harm and no violation if the company had conformed to its representations and not terminated benefits. None of defendants' cases (Resp. Br. 30) involves ERISA or takes into account *Amara* and the unique language of §1113(1).

Defendants also err in asserting that benefits termination cannot be the "last action" because the company acted as plan sponsor. (Resp. Br. 31) This ignores the fact that misrepresentations were not complete until benefits were terminated and harm occurred. Defendants also ignore that the employer both made the misrepresentations and later terminated the promised benefits. The party is the

same. Moreover, neither ERISA nor the law generally requires that the misrepresenter also be the party that ultimately causes harm. *See, e.g. Restatement (Second) of Torts*, § 533, cmt. c (plaintiff "induced to enter into a transaction with a third person").

III. DISMISSAL OF THE AGE CLAIMS SHOULD BE REVERSED.

A. Plaintiffs Adequately Proved Disparate Impact as to Both Claims.

None of defendants' arguments on disparate impact are sound.

1. Revocation of Medical Benefits for Medicare-Eligible Retirees

Defendants mischaracterize the retirees' disparate-impact showing concerning benefit termination for Medicare-eligible retirees as being based merely on the fact that replacement medical insurance costs more for older retirees. (Resp. Br. 54) This is incorrect. Defendants' change made a 100% correlation between age and benefits revocation – retirees under 65 kept them and older retirees lost them. Defendants' action perfectly showed age-based disparate impact.

2. Defendants Ignore Plaintiffs' Authorities.

Defendants argue that there can be no disparate-impact unless the comparisons are between those 40 and older and those 39 and younger. (Resp. Br. 49-50) This ignores the Supreme Court decision holding that ADEA bars such a requirement and prohibits discrimination within the protected group. *O'Connor v.*

Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996) ("The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out *because of his age*.") (emphasis in original). *O'Connor* involved disparate-treatment but was based on the statutory text and the same language governs disparate-impact claims. Defendants ignored the retirees' argument and authorities (Opening Br. 60-61).

Defendants' new authorities are unreported and unpersuasive. *Smith v. TVA*, 924 F.2d 1059 (table), 1991 WL 11271 (6th Cir. 1991), was not based on the language of ADEA and predated *O'Connor*. *Rudwall v. Blackrock, Inc.*, 2011 WL 767965 (N.D.Calif. Feb. 28, 2011), was not based on the language of ADEA and did not mention either *O'Connor* or the Ninth Circuit's acceptance without comment of a disparate-impact showing for employees 55 and older. *E.E.O.C. v. Borden's, Inc.*, 724 F.2d 1390, 1394-95 (9th Cir. 1984).

Defendants' authorities concerned possible atypical situations, in which one subgroup might be adversely impacted while the protected group overall might benefit. *E.g.*, *E.E.O.C. v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999). However, this possibility also exists for disparate-treatment but was rejected in *O'Connor*. Again, there is no reason to construe the statute differently for disparate-impact cases.

3. Plaintiffs' Comparisons Are Appropriate.

Defendants rely on three inapposite decisions of this Court to argue that retirees did not use proper comparators. In *Pippin v. Burlington Resources Oil & Gas Co.*, 440 F.3d 1186, 1201 (10th Cir. 2006), the plaintiff simply showed that the RIF resulted in a greater absolute number of over-40 lay-offs without showing everyone's ages. Disparate impact cannot be shown if the percentage of laid-off employees over 40 is not greater than their percentage in the workforce. *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1196-1204 (10th Cir. 2006), held only that overtime eligibility must be taken into account to demonstrate disparate impact in overtime work. *Ortega v. Safeway Stores, Inc.*, 943 F.2d 1230, 1245 (10th Cir. 1991), similarly turned on failure to consider qualifications and preferences in analyzing rehires.

These cases are inapposite because this entire class was precisely as qualified as younger retirees for the benefits. In a case involving disparate impact of benefit changes where everyone is qualified, caselaw on selection decisions involving both qualified and unqualified candidates is not apposite.

Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1313-15 (10th Cir. 1999), *overruled on other grounds by National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), is more directly relevant. *Bullington* held that an imperfect showing of gender-based disparate impact met the threshold test of reliability to

preclude summary judgment, where that showing was directly related to the relevant employment decisions, even though the defendant could try to negate this showing at trial.

4. The Means of Proving Disparate Impact.

This Court will be the first appellate court to rule on what is a proper means of proving disparate impact in a case involving retiree benefit changes. While defendants argue that retirees' showing should be rejected because it is novel, defendants' position also is novel. It is clear that ADEA covers disparate-impact benefits reduction claims. Decision of this appeal will establish new law declaring what is a reasonable showing.

One existing guideline is the common judicial recognition that, for disparate-impact claims in general, there is no one magical way to make a showing of impact, and defendants are always free to make their own showing using different factors. "Disparate-impact plaintiffs are permitted to rely on a variety of statistical methods and comparisons to support their claims." *Adams v. City of Indianapolis*, __ F.3d __, 2014 WL 406772, *10 (7th Cir. Feb. 4, 2014). Statistics "come in infinite variety and, like any other kind of evidence, they may be rebutted." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977). *Accord*, *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1257-58 (10th Cir. 1988); *Colon-Sanchez v. Marsh*, 733 F.2d 78, (10th Cir. 1984).

Here, both the lower court and defendants agree that the benefit changes imposed greater burden on older retirees. Defendants even call this "indisputable" as to life insurance. (Resp. Br. 50) That in itself is sufficient to proceed to trial. In a disparate-treatment case, disproportionately forcing African-American employees to work much harder than whites to get their pay was actionable. *See James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 327-28 (5th Cir. 1977). Imposing on retirees the burden of either going without life insurance or paying substantially more for replacement coverage is the essence of disparate impact. So, too, is the burden of medical costs not covered by Medicare.

Defendants mischaracterize retirees' claims as being limited to the higher costs of replacement coverage and mistakenly treat the inability of most retirees to afford it as proof of no disparate impact. But the adverse impact lies in both not having the insurance and having to pay more for it.

Defendants fail to show how retirees' analysis, which tracks precisely the class members at their ages at the time of the changes, compared to themselves ten years younger, would differ in any respect from defendants' preferred analysis comparing class members at one age to "different" class members with the same variables at the specified younger age. Defendants fail because there is no such difference. The actuarial tables yield the same results in each case.

Finally, a comparison of retirees to persons 39 and younger would necessarily show a much greater impact.

B. The EEOC's Exemption for Reducing or Eliminating Health Benefits for Older Retirees is Invalid.

Defendants' response to the retirees' arguments is notable for what it omits.[8] Defendants criticize retirees' argument that the EEOC's justification for its exemption in 29 C.F.R. §1625.32 is a social-welfare reason unrelated to ADEA's purpose to eliminate age discrimination. Defendants argue that it is excellent social welfare policy helping older persons, but they make no effort to justify its age discrimination. *Compare* Opening Br. 56 *with* Resp. Br. 55-56.

Defendants ignore retirees' arguments that the exemption power is limited by the word "reasonable" and the constitutional delegation doctrine. *Compare* Opening Br. 53-54, 56 *with* Resp. Br. 55.

Defendants ignore retirees' arguments that rules of statutory construction require that specific limitations in the later-enacted OWBPA limit what the EEOC can declare "reasonable." Defendants rely on a presumed, but unexplained and nonexistent, obligation of Congress to expressly limit exemption power before courts are permitted to read the statute as a whole and apply rules of construction giving effect to each provision. *Compare* Opening Br. 55 *with* Resp. Br. 58.

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[8] Retirees withdraw their reliance (Opening Br. 57) on *Lee v. Gallup Auto Sales, Inc.*, 135 F.3d 1359, 1360-61 (10th Cir. 1998).

Defendants do not justify the lower court's view that the EEOC's exemption power would be rendered meaningless if OWBPA were held to impose any limit on that power, or its distinction between retirees and employees. *Compare* Opening Br. 54, 55-56 *with* Resp. Br. 55-60.

Defendants incorrectly argue that retirees limited their claim to the dates of actual changes in benefits. (Resp. Br. 58-59) This is incorrect. Retirees' statement of ADEA violations listed all of defendants' actions as violations. 2A804 ¶128.

C. Defendants Have Not Shown that Reduction of Life Insurance Benefits Was Justified by RFOA.

Defendants rely on the alternative holding or *dicta* in *Pippin*, 440 F.3d at 1201-02, to argue that reduction of costs and desire to conform benefits to those of other companies are RFOAs. *Pippin* is inapposite. It did not involve benefit reductions but selection for a RIF. It did not involve a statutorily-adopted regulatory requirement that cost savings be "significant" and that lesser savings, such as reductions in paid vacations and uninsured sick leave, are inadequate to support RFOA. *Pippin* did not involve an effort to mimic other companies' benefits, devoid of any showing how that would benefit defendants such that discrimination should be allowed. *Pippin* instead involved policies that were production-related, such as skills and experience. The decision concluded that "Corporate restructuring, performance-based evaluations, retention decisions based

on needed skills, and recruiting concerns" together were reasonable business considerations on which the plaintiff had cast no doubt.[9]

Defendants treat their burden of persuasion on their RFOA defense as if it were a mere burden of articulation under *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55, 258 (1981). This is insufficient.

Defendants' proffered justification also takes the word "reasonable" out of the statute. That is a word of limitation which cannot be ignored. Cost savings for companies the size of defendants may not be "reasonable" even where the same saving for a smaller enterprise could well be. The limitation requires consideration of other factors, including the scale of savings in this particular enterprise.

For this reason, reliance on the RFOA defense in *dictum* or in alternative or non-precedential holdings in four cases retirees discussed (Opening Br. 65-66) does not support defendants' position that *any* cost saving automatically constitutes RFOA. (Resp. Br. 52 n.15) In *Aldridge v. City of Memphis*, 404 F. App'x 29, 41 (6th Cir. 2010), Memphis introduced evidence of size and scale and did not merely rely on a "cost savings" mantra as defendants do here. *Allen v. Sears Roebuck & Co.*, 803 F. Supp. 2d 690, 697-98 (E.D.Mich. 2011), did not discuss size or scale of savings and does not support defendants' position that *any* saving is enough. The other cases involved clearly substantial savings. (Opening Br. 65-66).

[9] *Pippin* was decided two years before *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008).

Section 1625.10(a)(1)'s requirement of "significant" cost savings for age-based benefit reductions also supports this critical limitation.

Defendants rely on *Smith v. City of Jackson*, 544 U.S. 228, 241-42 (2005), to justify their desire to mimic benefits of other companies. Jackson showed it was paying less to police officers with some ranks and seniorities than other localities, and that its disproportionate raises to those officers were important to attract and retain staff. 544 U.S. at 231. It met its burden by linking compensation changes to business needs. Here, defendants made no showing that their drastic benefit reductions were necessary to attract or retain employees. Defendants failed to produce evidence and their changes facially impede the anti-discrimination goals discussed in *Smith*.

CONCLUSION

The judgment should be reversed and the case remanded for further proceedings.

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Respectfully submitted,

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