No. ________

In The
Supreme Court of the United States

EMBARQ CORPORATION, *et al.*,

Petitioners,

v.

WILLIAM DOUGLAS FULGHUM, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the "fraud or concealment" exception to the statute of repose found in 29 U.S.C. § 1113 for alleged breaches of an ERISA fiduciary's duty apply only when a defendant takes affirmative steps to hide the alleged breach—as the First, Third, Seventh, Eighth, Ninth, and DC Circuits have held—or can the exception be invoked any time the underlying claim is premised on a fraud theory—as the Second and Tenth Circuits have held?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceedings include, in addition to those listed on the cover, petitioners Embarq Corporation; Sprint Nextel Corporation; Embarq Mid-Atlantic Management Services Company, formerly known as Sprint Mid-Atlantic Telecom, Inc.; Carolina Telephone and Telegraph, LLC, formerly known as Carolina Telephone and Telegraph Company; Randall T. Parker, as Plan Administrator for all of the Employee Welfare Benefit Plans of Embarq Corporation and Carolina Telephone and Telegraph Company, LLC; and Employee Benefits Committee of Embarq Corporation as Plan Administrator of The Embarq Retiree Medical Plan; and respondents Dorsey Daniel; John Douglas Hollingsworth; Willie Dorman; Robert E. King; Calvin B. Joyner; Timothy Dillon; Sue Barnes; William Games; Betsy Bullock; Kenneth A. Carpenter; Betty A. Carpenter; Carl W. Somdahl; Wanda W. Shipley; Laudie Colon McLaurin, individually and on behalf of all others similarly situated; James W. Britt, class representative (deceased); Carol Nelson, administrator of the Estate of James W. Britt; Bessie M. Reveal, substitute named plaintiff and

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT—Continued

class representative for James W. Britt; and Donald Ray Clark.[1]

Petitioner Sprint Nextel Corporation has changed its name to "Sprint Communications, Inc." and is a wholly owned subsidiary of Sprint Corporation, a publicly traded corporation (trading symbol S) and is incorporated in Delaware. More than 10 percent of Sprint Corporation's stock is owned by SoftBank Corporation, also a publicly traded corporation (trading symbol 9984—Tokyo Stock Exchange). Petitioners Carolina Telephone and Telegraph Company, LLC and Embarq Mid-Atlantic Management Services Company are wholly owned subsidiaries of Petitioner Embarq Corporation, which is a wholly owned subsidiary of CenturyLink, Inc. ("CenturyLink"), a publicly traded corporation (trading symbol CTL) incorporated in Louisiana. No

[1] The defendants in this case also include Embarq Retiree Medical Plan; Sprint Retiree Medical Plan; Group Health Plan for Certain Retirees and Employees of Sprint Corporation; Sprint Welfare Benefit Plan for Retirees and Non-Flexcare Participants; Sprint Group Life and Long-Term Disability Plans; Group Life Accidental Death and Dismemberment and Dependent Life Plan for Employees of Carolina Telephone and Telegraph Company Voluntary Employees' Beneficiary Association Sickness Death Benefit Plan. These parties are not defendants, however, against the fiduciary duty claims that are at issue in this petition (and they are represented by the same counsel as petitioners in all events).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT—Continued

publicly held corporation owns 10 percent or more of the stock of CenturyLink. Petitioner Randall T. Parker was the Plan Administrator for all of the Employee Welfare Benefit Plans of Embarq Corporation and Carolina Telephone and Telegraph Company, LLC. Petitioner Employee Benefits Committee of Embarq Corporation was the Plan Administrator of The Embarq Retiree Medical Plan.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Embarq Corporation; Sprint Nextel Corporation; Embarq Mid-Atlantic Management Services Company, formerly known as Sprint Mid-Atlantic Telecom, Inc.; Carolina Telephone and Telegraph, LLC, formerly known as Carolina Telephone and Telegraph Company; Randall T. Parker, as Plan Administrator for all of the Employee Welfare Benefit Plans of Embarq Corporation and Carolina Telephone and Telegraph Company, LLC; and Employee Benefits Committee of Embarq Corporation as Plan Administrator of The Embarq Retiree Medical Plan respectfully submit this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS AND ORDERS BELOW

The order of the court of appeals granting panel rehearing in part and denying *en banc* rehearing (App., *infra* 176-77), is reported at 785 F.3d 395 (10th Cir. 2015). The revised panel opinion (App., *infra* 1-54), is reported at 785 F.3d 395 (10th Cir. 2015). The district court's opinion and order (App., *infra* 75-175), is reported at 938 F. Supp. 2d 1090 (D. Kan. 2013).

STATEMENT OF JURISDICTION

The court of appeals filed its order granting panel rehearing in part and denying *en banc* rehearing on April 27, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of § 413 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1113, are set forth at App. 178.

STATEMENT

"[P]ension and welfare plans [are central to] the national economy, and * * * the financial security of the Nation's work force * * * *" *Boggs* v. *Boggs*, 520 U.S. 833, 839 (1997). They are safeguarded by ERISA, a comprehensive statute that "protects employee pensions and other benefits by providing insurance * * *, specifying certain plan characteristics in detail * * *, and by setting forth certain general fiduciary duties." *Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996). In enacting ERISA, Congress acknowledged the importance of employee benefit plans and the need to protect them by federal law. *Boggs*, 520 U.S. at 840-41. In seeking uniformity in this area of law—a characteristic previously noted by this Court, see, e.g., *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 16-17 (1987)—Congress provided that ERISA expressly preempts any state law related to employee benefit plans. See 29 U.S.C. § 1144(a).

ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993). In addressing ERISA questions, "courts may have to take account of competing congressional purposes." *Varity Corp.*, 516 U.S. at 497. On one side of the ledger is "Congress' desire to offer employees enhanced protection for their benefits" and on the other is "its desire not to create a system that is so complex that administrative costs, *or litigation expenses*, unduly discourage employers from offering welfare benefit plans in the first place." *Ibid.* (emphasis added).

This case involves a critical component of ERISA's statutory scheme—a six-year statute of repose, codified at 29 U.S.C. § 1113(1). The essence of statutes of repose, as this Court noted long ago, is to "protect[ ] parties from the prosecution of stale claims, when by loss of evidence from the death of some witnesses and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth." *Weber* v. *Bd. of Harbor Comm'rs*, 85 U.S. 57, 70 (1873) (citation and internal quotation marks omitted). Section 1113 provides employers with a substantive right to be free from claims of fiduciary breach after six years, but makes an exception "in the case of fraud or concealment." While the majority of the courts of appeals have held that this exception is triggered by "fraud or concealment" *after* the underlying breach of fiduciary duty, the Tenth Circuit has now joined the Second Circuit in holding that *any* underlying breach of fiduciary duty allegedly involving fraud or concealment can trigger the exception. Compare *Fulghum* v. *Embarq Corp.*, App. 32-40, and *Caputo* v. *Pfizer*, *Inc*., 267 F.3d 181, 189 (2d Cir. 2001); with *J. Geils Band Emp. Benefit Plan* v. *Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1252-55 (1st Cir. 1996); *Kurz* v. *Philadelphia Elec. Co.*, 96 F.3d 1544, 1551-52 (3d Cir. 1996); *Radiology Ctr.* v. *Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1220-21 (7th Cir. 1990); *Schaefer* v. *Ark. Med. Soc'y*, 853 F.2d 1487, 1491-92 (8th Cir. 1988); *Barker* v. *Am. Mobil Power Corp.*, 64 F.3d 1397, 1401-02 (9th Cir. 1995); *Larson* v. *Northrop Corp.*, 21 F.3d 1164, 1172-74 (D.C. Cir. 1994).[2]

[2] Although ERISA sets forth a limitations period for breach of fiduciary duty claims, 29 U.S.C. § 1113, it does not contain a statute of limitations for denial of benefits claims. As a result, courts typically borrow the most analogous state statute of limitations, which is typically the state statute of limitations for breach of contract cases. See, e.g., *Syed* v. *Hercules Inc.*, 214 F.3d 155, 159 (3d Cir. 2000); *Harrison* v. *Digital Health Plan*, 183 F.3d 1235, 1241 (11th Cir. 1999). In *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604 (2013), this Court unanimously held that a contractual limitation on the time to file suit is enforceable unless that period is "unreasonably short" or contrary to a controlling statute. *Id.* at 610-12. This Court further resolved a 2-5 split in holding that the limitations period can begin to run before the participant's cause of action accrues. *Ibid.*

The Tenth Circuit expressly acknowledged that in siding with the Second Circuit, it was widening an entrenched split. App. 34-36. That split involves an exceedingly important, recurring issue of federal law in an area where Congress has commanded uniformity. As things stand, whether ERISA's statute of repose applies to claims for fiduciary breach—thereby precluding the litigation of those claims—now depends on the circuit in which the claims are brought. And not only will the Tenth Circuit's decision widen the existing circuit split, it will also eviscerate ERISA's statute of repose and improperly allow plaintiffs to assert breach of fiduciary duty claims based (as here) on decades-old alleged oral misrepresentations. The Court should restore uniformity to this important area of law, and this case is an ideal vehicle for resolving the conflict. The Court should grant the petition and resolve the conflict among the courts of appeals on this issue.

1. Although the procedural history of this case is complex, the facts necessary to understand the question presented are straightforward. The named plaintiffs in this case brought suit after their former employers "altered or eliminated health and life insurance benefits for retirees." App. 4. The complaint contains (1) ERISA claims for contractually vested benefits; (2) ERISA claims for breach of fiduciary duty by misrepresenting and concealing the terms of welfare benefit plans; and (3) Age Discrimination in Employment Act and parallel state-law claims. *Id.* at 4-5.

Only the alleged breach of fiduciary duty claims are at issue here.

2. The defendants invoked ERISA's six-year statute of repose to defend against the breach of fiduciary duty claims. The pertinent statutory language provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> (1) six years after
>
> (A) the date of the last action which constituted a part of the breach or violation, or
>
> (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> *except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation*.

29 U.S.C. § 1113 (emphasis added).

3. Many of the claims at issue are based on alleged misrepresentations that are decades old. For

instance, one plaintiff, Laudie McLaurin, alleges that two managers told him in 1988—27 years ago—that the retiree health and life insurance benefits were "lifetime" benefits. App. 182. Similarly, plaintiff James Britt claims that an unnamed human resources representative told him the same thing in 1985—30 years ago. *Id.* at 196-97. Neither plaintiff can identify a single document they ever received that misrepresented, or withheld information about, their retiree benefits. Nor can they identify a single oral misrepresentation about those benefits during the roughly 20 years before they filed this lawsuit.

4. With the exception of two plaintiffs whose retirement dates were more recent, the district court held that ERISA's statute of repose applied to bar the breach of fiduciary duty claims. First, the district court recognized that "[a]s a statute of repose, § 413 serves as an absolute barrier to an untimely suit." App. 148 (quoting *Radford* v. *Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998)). The district court then rejected plaintiffs' reliance on § 413's exception, which provides that "in the case of fraud or concealment," a civil enforcement action "may be commenced not later than six years after the date of discovery of [the] breach or violation." 29 U.S.C. § 1113. Plaintiffs claimed the "fraud or concealment" exception was triggered because their fiduciary duty claim was "based on misrepresentations." App. 148.

In rejecting plaintiffs' argument, the district court referenced with approval the Third Circuit's interpretation of the "fraud or concealment" exception:

> [W]hen a lawsuit has been delayed because the defendant itself has taken steps to hide its breach of fiduciary duty, the limitations period will run six years after the date of the claim's discovery. The relevant question is therefore not whether the complaint "sounds in concealment," but rather whether there is evidence that the defendant took affirmative steps to hide its breach.

Id. at 149 (quoting *Kurz*, 96 F.3d at 1552). The district court concluded that "the fraud or concealment provision is inapplicable because there is no evidence that [d]efendants actively concealed their alleged breach of fiduciary duty." *Id.* at 150. As a result, the district court held that 15 plaintiffs' breach of fiduciary duty claims were untimely, granted summary judgment to defendants on those claims, and certified the judgment as final under Rule 54(b) to allow an immediate appeal. *Id.* at 155-56, 67.

5. As relevant here, the Tenth Circuit reversed. To begin, the court recognized that it "ha[d] never addressed the issue and the other circuit courts of appeals are split on it." App. 34. The court acknowledged that the "First, Third, Seventh, Eighth, Ninth, and D.C. Circuits have all held the 'fraud or concealment' standard does not apply to breach of fiduciary duty claims based on a fraud theory but applies only when a fiduciary conceals the alleged breach." *Id.* at 35 (citing *Kurz*, 96 F.3d at 1552; *J. Geils Band*, 76

F.3d at 1253; *Barker*, 64 F.3d at 1401-02; *Larson*, 21 F.3d at 1172-73; *Radiology Ctr.*, 919 F.2d at 1220-21; *Schaefer*, 853 F.2d at 1491-92).

Nonetheless, the court rejected the majority view and widened the split by following the Second Circuit:

> [T]he exception to the general six-year statute applies when the alleged breach of fiduciary duty involves a claim the defendant made "a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury" or when the defendant conceals the alleged breach of fiduciary duty.

Id. at 38-39 (quoting *Caputo*, 267 F.3d at 189-90) (footnote omitted).

The court offered two justifications for departing from the majority view. First, the court asserted that its interpretation gives "fraud" and "concealment" their ordinary meanings while giving "separate meanings" to each. *Id.* at 38. Second, the court asserted that its interpretation "promotes one of the primary purposes of ERISA—'to ensure that employees receive sufficient information about their rights under employee benefit plans to make well informed * * * decisions.'" *Id.* at 40 (quoting *Harte* v.

Bethlehem Steel Corp., 214 F.3d 446, 451 (3d Cir. 2000) (ellipsis in original)).[3]

6. On petitions for panel rehearing and rehearing *en banc*, the court denied *en banc* rehearing and granted panel rehearing to the extent it revised its prior opinion. App. 176-77. The court did not change its construction of § 1113's "fraud or concealment" exception to the six-year statute of repose. *Id.* at 32-40. It did, however, clarify that "[b]ecause [p]laintiffs have not argued [d]efendants concealed their alleged breach of fiduciary duty, it is unnecessary to determine the scope of the concealment element of the statute of repose." *Id.* at 38 n.22. The court reversed the dismissal of plaintiffs' breach of fiduciary duty claims to the extent those claims are premised on a fraud theory. *Id.* at 5.

7. On remand in the district court, the parties filed a joint report in which both sides indicated their intention to seek certiorari in this Court. Parties' Joint Status Report, *Fulghum* v. *Embarq Corp.*, No. 07-CV-2602 (EFM/JPO) (D. Kan. June 30, 2015), ECF No. 536 [hereinafter "Joint Status Report"]. And both sides agree that a trial of plaintiffs' breach

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[3] The Department of Labor filed an *amicus* brief as a matter of right under Federal Rule of Appellate Procedure 29(a) addressing the statute-of-limitations issue and explicitly urging the court of appeals to reject the Third Circuit's view (which the Department recognized as the majority view) and embrace the Second Circuit's minority view. See Brief of the Secretary of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants Urging Reversal and Remand at 22-26, *Fulghum* v. *Embarq Corp.*, 785 F.3d 395 (2015) (No. 13-3230), 2013 WL 6823660.

of fiduciary duty claims—if necessary—should wait until after this Court's resolution of this petition. *Id.* at 2.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit's Decision Widens A Recognized Split On The "Fraud Or Concealment" Exception To ERISA's Statute Of Repose.

In deciding this case, the Tenth Circuit expressly recognized that the "circuits are split" on whether the "fraud or concealment" exception to ERISA's six-year statute of repose applies only when the defendant takes affirmative steps to hide the alleged fiduciary breach, as the First, Third, Seventh, Eighth, Ninth, and D.C. Circuits have held, or whether the exception can be invoked any time the underlying claim is premised on a fraud theory, as the Second and now the Tenth Circuits have held. *Supra*, at 3-4 (citing cases). This case is an excellent vehicle for resolving the conflict and restoring uniformity in this important area of the law.[4]

[4] Commentators, as well as courts, have acknowledged the split and the importance of resolving it. See, e.g., Raphael Janove, *All out of Chewing Gum: A Case for a More Coherent Limitations Period for ERISA Breach-of-Fiduciary-Duty Claims*, 81 U. CHI. L. REV. 801, 808 (2014) (noting "there are two interpretations of the fraud-or-concealment provision" implicated in the "circuit split" at issue). The Sixth Circuit, while not squarely addressing

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Section 413 of ERISA provides that a claim for breach of fiduciary duty must be brought within six years of the last alleged breach, or the latest date the fiduciary could have cured the breach, whichever occurs first. 29 U.S.C. § 1113(1). In cases of "fraud or concealment," however, a claim may be brought within six years of *discovery* of the breach. *Id.* at § 1113. The circuits have divided over the proper construction of "fraud or concealment" for purposes of triggering the exception, i.e., whether the "fraud or concealment" exception to the general limitations period requires proof of post-breach fraud or concealment by the

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the issue, has expressed support for the construction adopted by the Second and Tenth Circuits. See, e.g., *Cataldo* v. *U.S. Steel Corp.*, 676 F.3d 542, 550 (6th Cir 2012). This Court subsequently denied the plaintiffs' petition for certiorari in *Cataldo*, but as the brief in opposition pointed out, that case did not implicate the issue that has "divided lower courts" because the Sixth Circuit "did not resolve, and did not need to resolve" that issue. Brief in Opposition at 5, *Cataldo* v. *U.S. Steel Corp.*, 133 S. Ct. 1239 (2013) (No. 12-306), 2013 WL 29761. Unlike *Cataldo*, this case squarely and cleanly raises the issue that has split the circuits. Similarly, this Court previously denied review of a Third Circuit case correctly decided under the majority view when the issue was still splitless. See *Tonnies* v. *Unisys Corp.*, 534 U.S. 1018 (2001). More recently, this Court denied a petition in which the Sixth Circuit assumed, without deciding, that the longer limitations period applied yet still held petitioners' claims time barred. See *Dublin Eye Assocs., P.C.* v. *Mass. Mut. Life Ins. Co.*, 135 S. Ct. 1846 (2015). And when the petition in that case was filed, the Tenth Circuit had not yet decided this case—and widened the split—and neither the brief in opposition nor the reply mentioned the Tenth Circuit's decision or the widened split. None of these denials, then, militates against a grant in the case at bar.

fiduciary, or also applies in all cases in which the alleged breach itself is based on fraud or concealment.

The majority view, adopted by the First, Third, Seventh, Eighth, Ninth, and D.C. Circuits, is that the "fraud or concealment" exception requires proof of affirmative acts of fraud or concealment after the alleged breach. App. 35. The Second Circuit, however, applies the exception whenever a breach claim is based on fraud or there is proof of fiduciary fraud or concealment after the breach. *Id.* at 36. In this case, the court of appeals reversed the district court and adopted the Second Circuit's construction of the fraud exception's scope, reasoning that its interpretation remedies "what would otherwise be a harsh result in situations where a fiduciary has engaged in prohibited conduct that cannot readily be discovered." *Id.* at 39. According to the Tenth Circuit, that construction of the statute is consistent with ERISA's goal of ensuring adequate disclosures to plan participants. *Id.* at 40.

That construction, however, misreads the statutory language, alters the balance struck by Congress, and promotes improper forum-shopping. When interpreting a statutory term like "fraud or concealment," this Court "consider[s] not only the bare meaning of the word[s] but also [their] placement and purpose in the statutory scheme." *Bailey* v. *United States*, 516 U.S. 137, 145 (1995), superseded by statute on other grounds as stated in *Abbott* v. *United States*, 562 U.S. 8, 16 (2001). Further, in "construing provisions * * * in which a general statement of policy is qualified by an exception," this Court "usually read[s] the exception narrowly in order to preserve the primary operation of the provision." *C.I.R.* v. *Clark*, 489 U.S. 726, 739 (1989). And, of course, this Court must "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 internal quotation marks omitted). The Tenth Circuit's construction of the statute conflicts with those principles.

As the First Circuit has explained, "[b]y its very language * * * Section 1113 explicitly incorporates the federal common law 'discovery rule.'" *J. Geils Band*, 76 F.3d at 1253. And the federal common law discovery rule incorporates, in turn, the doctrine of fraudulent concealment. See *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) (holding that the doctrine of fraudulent concealment is read into every federal statute of limitations). Under this doctrine, the statutory tolling exception can only be invoked where "defendants engaged in a course of conduct designed to conceal evidence of their alleged wrong-doing." *Larson*, 21 F.3d at 1172 (citation and internal quotation marks omitted). That is why the majority of circuits properly require proof of post-breach concealment by the fiduciary to trigger the "fraud or concealment" exception to the statute of repose.

In reaching a different conclusion, the Second Circuit—now joined by the Tenth Circuit—focused on the statute's use of the disjunctive in refusing to "follow [its] sister circuits in fusing the phrase 'fraud *or* concealment' into the single term 'fraudulent concealment.'" *Caputo*, 267 F.3d at 189. True, "[c]anons of construction *ordinarily* suggest that terms connected by a disjunctive be given separate meanings, *unless the context dictates otherwise*." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979) (emphasis added). Here, the "context dictates otherwise," as the purpose of the "fraud or concealment" exception was to codify the doctrine of "fraudulent concealment." See, e.g., *Dep't of Revenue of Or.* v. *ACF Indus., Inc.*, 510 U.S. 332, 343 (1994) (explaining that even when the meaning of statutory language may seem plain when "viewed in isolation" such a reading should be rejected if it is "untenable in light of [the statute] as a whole"); see also *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015) (emphasizing the importance of context in statutory interpretation).

What is more, to treat "fraud" as referencing the cause of action leaves the term "concealment" with no work to do, because "there is no recognized legal cause of action for 'concealment,' either now or when ERISA was enacted." *Radiology Ctr.*, 919 F.2d at 1220. That is why the Seventh Circuit reasoned that "fraud" cannot be referring to the underlying legal claim but is referencing the action(s) that take place after the initial alleged breach. *Ibid.* At the same time, that court offered an interpretation giving effect to *both* terms: "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)." *Ibid.*

The Seventh Circuit also noted that the majority interpretation "harmonizes the phrase's meaning with the widely known doctrine of fraud*ulent* concealment," a doctrine that "tolls the running of a statute of limitations when the defendant has prevented the plaintiff's timely discovery of the wrong." *Ibid.* In contrast, if the Second and Tenth Circuits' interpretation of the "fraud or concealment" exception is allowed to stand, it will eviscerate §§ 1113(1) & (2) and result in the exception swallowing the rule.

After all, any plaintiff whose claim would otherwise be barred by the statute of repose could potentially circumvent § 1113(1) and revive the stale claim simply by alleging that the fiduciary fraudulently failed to disclose the facts comprising the breach. See App. 38 ("[T]he exception to the general six-year statute applies when the alleged breach of fiduciary duty involves * * * concealment of that which should have been disclosed * * * *"). If the Tenth Circuit's holding arguably allows virtually every breach of fiduciary duty claim to be pled as non-disclosure amounting to concealment, the "fraud or concealment" exception would completely swallow the rule. That interpretation must be wrong. See, e.g., *Yates* v. *United States*, 135 S. Ct. 1074, 1085 (2015) ("resist[ing] a reading of [a statutory provision] that would render superfluous an entire provision passed in proximity as part of the same Act" (citing *Marx* v.

Gen. Revenue Corp., 133 S. Ct. 1166, 1178 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."))).

The claims in this case prove the point—and underscore the serious practical implications if the Second and Tenth Circuits' interpretation of the statute is permitted to stand. For example, with respect to plaintiffs Laudie McLaurin and James Britt, neither one can identify a single document they ever received that misrepresented or withheld information about their retiree benefits. Nor can they identify a single oral misrepresentation about those benefits during the roughly 20 years before they filed this lawsuit in 2007. Instead, McLaurin's claim is based entirely on allegations that two managers told him in 1988 that retiree health and life insurance benefits were "lifetime" benefits. App. 182-83. Similarly, Britt's claim is based entirely on allegations that a human resources representative, whose name he could not recall, told him the same thing in 1985. *Id.* at 195-97. Under the Second and Tenth Circuits' interpretation of the statute, these stale, alleged misrepresentations could nullify the six-year statute of repose and potentially allow plaintiffs to bring claims for breach of fiduciary duty nearly 30 years after "the date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1)(A).

Significantly, the Second and Tenth Circuits' interpretation renders ERISA's statute of repose a dead letter not only where alleged fiduciary misrepresentations are involved, but also where *any* fiduciary malfeasance is involved. That is because those courts have construed "fraud" to include "concealment of that which should have been disclosed." App. 38 (quoting *Caputo*, 267 F.3d at 189-90). For example, an ERISA fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants" and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity * * * would use," 29 U.S.C. § 1104(a)(1) & (a)(1)(B), with respect to duties such as "the proper management * * * of plan assets" and "the avoidance of conflicts of interest." *Mertens*, 508 U.S. at 251-52 (citation, internal quotation marks, and alteration omitted). Claims involving the breach of those duties would also come within the Second and the Tenth Circuits' construction of fraud, because information regarding a fiduciary's conflict of interest or failure to diversify plan assets allegedly "should have been disclosed" by the fiduciary. See, e.g., *Glaziers & Glassworkers Union Local No. 252 Annuity Fund* v. *Newbridge Sec., Inc.*, 93 F.3d 1171, 1182 (3d Cir. 1996).[5]

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[5] The Tenth Circuit revised its original opinion on this point, but did not resolve a contradiction within its own opinion. In response to petitioners' request for rehearing, the Tenth Circuit deleted language from its original opinion that defined "concealment" but left in place a quotation from the Second Circuit's opinion in *Caputo* that defines "fraud" for purposes of the "fraud or concealment" exception to include concealment, *i.e.*,

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The Second and Tenth Circuits' approach thus potentially allows any plaintiff whose claim would otherwise be barred by the statute of repose to circumvent the statute and revive the claim simply by alleging that the fiduciary did not disclose the facts constituting its breach. That cannot be right. The Tenth Circuit attempted to justify its interpretation of the statute by asserting that it "promotes one of the primary purposes of ERISA—'to ensure that employees receive sufficient information about their rights under employee benefit plans to make well-informed * * * decisions.'" App. 40 (alteration in original) (quoting *Harte*, 214 F.3d at 451). But that is hardly ERISA's only concern. As this Court has stated, ERISA reflects "competing congressional purposes"—

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to include "concealment of that which should have been disclosed." App. 38 (quoting *Caputo*, 267 F.3d at 189-90). The Tenth Circuit's original opinion stated that the exception would apply in circumstances including "when the defendant conceals his breach of fiduciary duty *by withholding information of which he knows and which he is duty bound to reveal*. *Caputo*, 267 F.3d at 189-90." *Fulghum* v. *Embarq Corp.*, 778 F.3d 1147, 1166 (10th Cir. 2015) (emphasis added), opinion superseded and amended by 785 F.3d 395 (10th Cir. 2015). The revised opinion omits the italicized language and notes instead that "[b]ecause Plaintiffs have not argued Defendants concealed their alleged breach of fiduciary duty, it is unnecessary to determine the scope of the concealment element of the statute of repose." See App. 38 n.22. But the deleted text only emphasized a contradiction that still exists in the Tenth Circuit's final opinion, namely that the Tenth Circuit interprets "fraud" to include "concealment," but also states that its interpretation gives the two words "separate meanings." *Id.* at 38. Any confusion on this point, however, only underscores the need for this Court's review.

not merely "Congress' desire to offer employees enhanced protection for their benefits," but also "its desire not to create a system" under which "litigation expenses[ ] unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp.*, 516 U.S. at 497.

Plan fiduciaries will face enormous risks if § 1113's statutes of repose and limitations are essentially nullified and they are exposed to litigation based on decades-old allegations of fiduciary malfeasance. The costs associated with these increased risks will inevitably be passed on to participants to some degree, as higher fees, reduced benefits, or both. This Court should grant the petition, correct the Second and Tenth Circuits' error, and resolve the conflict in this important area of the law.[6]

[6] Another pending petition for certiorari, *DeFazio* v. *Hollister*, No. 15-171, purports to seek resolution of this split, but does not squarely implicate it and would be a poor vehicle besides. First, the Ninth Circuit in its unpublished opinion in that case expressly refrained from addressing the key question—how "fraud or concealment" should be construed—because the case would have come out the same way regardless of the construction of the statute. *DeFazio* v. *Hollister Emp. Share Ownership Trust*, Nos. 12-15973, 12-16099, 2015 WL 2330181, at *2 (9th Cir. May 15, 2015). Second, petitioners in *DeFazio* focus primarily on the ancillary issue of what "fraudulent concealment" should entail—not on the primary issue of statutory construction that has divided the circuits. And third, the facts of *DeFazio* are unusual—petitioners there seek to rely on statements made during the litigation, not (as in the run of cases, including the case at bar) on an underlying alleged fraud that happened years earlier. Whatever other issues might be at stake in the *DeFazio* petition, the circuit split at issue here is not implicated there.

II. The Split Implicates A Recurring Issue Of National Importance.

Retiree-benefit plans are increasingly subject to litigation, a trend likely to increase as the Patient Protection and Affordable Care Act continues to revolutionize the health-care landscape. At stake in these cases is nothing less than billions of dollars and thousands of jobs—jobs that will be affected if employers are stripped of the repose Congress provided in ERISA. Moving forward, employers and employees across the country need predictable rules regarding § 1113(1)'s statute of repose to properly evaluate potential claims of fiduciary breach. At this point, only this Court's review will resolve the conflict and provide the uniformity that is needed on this important, recurring issue of law.

This Court has recognized the centrality and importance of ERISA and its protections. *Boggs*, 520 U.S. at 839. Indeed, Congress enacted nationwide legislation to have uniformity in this vital area—a goal especially important in a statute-of-repose context. See *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002) ("[ERISA] induc[es] employers to offer benefits by assuring a predictable set of liabilities * * * *"). Yet ERISA claims may be brought in "the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." 29 U.S.C. § 1132(e)(2). This means that not only will employers and employees have vastly different rights depending on their location, but also that a fiduciary who administers a plan that covers employees who work in locations in the Tenth Circuit and the Seventh Circuit may have conflicting liability for the same conduct. Such a scenario demonstrates the reason Congress desired uniformity nationwide in this area.

The current conflict not only undermines that congressional purpose, it also promotes improper forum-shopping. On one side of the split (the Second and Tenth Circuits) the statute of repose is effectively a dead letter because any claim alleging fiduciary breach may potentially be brought *at any time* no matter how stale that claim is. On the other side of the split (the First, Third, Seventh, Eighth, Ninth and D.C. Circuits) the same claim would be barred after six years. The widened split will no doubt translate into plaintiffs seeking a receptive forum for their claims. That, in turn, will result in a scenario where more tenuous fiduciary breach claims that would be untimely in most jurisdictions can nonetheless be litigated in other jurisdictions. Such disparity on an issue that should be resolved uniformly across the country is intolerable.

ERISA requires "efficiency, predictability, and uniformity." *Conkright* v. *Frommert*, 559 U.S. 506, 518 (2010). Absent review by this Court, litigation of fiduciary breach claims will remain unpredictable, contrary to this Court's cases and the statutory scheme itself. Further percolation is unnecessary, and this Court should grant certiorari to resolve the conflict and restore uniformity.

III. This Case Is An Ideal Vehicle For Resolving The Split.

This case is an ideal vehicle for resolving an entrenched conflict on an important but discrete issue of ERISA law. The issue is one of pure law and is squarely presented by the Tenth Circuit's published decision in this case. There is no need to await further percolation—or to wait for cases involving a final judgment—where the legal issues and disagreements are directly addressed by the Tenth Circuit, resolved incorrectly, and place a wedge in an already entrenched split. As all parties in this case recognized in seeking postponement of the trial of plaintiffs' fiduciary breach claims until this Court has the opportunity to resolve the purely legal issues presented in the petition, further development of the facts will not accomplish anything toward the resolution of the discrete question of statutory interpretation cleanly presented here. Joint Status Report, at 2.

Waiting only prolongs the time when employers will receive the repose from litigation they deserve (or employees have the right to litigate such claims if this Court eventually agrees with the Second and Tenth Circuits). After all, similar to immunity from suit, the right at stake is the right to be free from litigation altogether. As this Court recently recognized in a different context, "[l]ike a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability." *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175, 2183 (2014). Waiting to resolve the conflict over how to construe ERISA's statute of repose thus diminishes the very rights at issue.

That is why the interlocutory posture of this case does not militate against review now. To the contrary, allowing the issue to continue to be litigated in the district court will only add time and delay to the resolution of this important issue for both sides. This is exactly contrary to Congress' purpose in enacting ERISA's statute of repose in the first place, and its concern that employers not be put to the expense of litigation needlessly. See *Varity Corp.*, 516 U.S. at 497. That is precisely what the litigation here entails. It undercuts the very essence of statutes of repose which are meant to "protect[ ] parties from the prosecution of stale claims, when by loss of evidence from the death of some witnesses and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth." *Weber*, 85 U.S. at 70 (citation and internal quotation marks omitted). This Court's review is thus needed, and appropriate, now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WILLIAM DOUGLAS FULGHUM; DORSEY DANIEL; JOHN DOUGLAS HOLLINGSWORTH; WILLIE DORMAN; ROBERT E. KING; CALVIN BRUCE JOYNER; TIMOTHY DILLON; SUE BARNES; WILLIAM GAMES; BETSY BULLOCK; KENNETH A. CARPENTER; BETTY A. CARPENTER; CARL W. SOMDAHL; WANDA W. SHIPLEY; LAUDIE COLON MCLAURIN, individually and on behalf of all others similarly situated; JAMES W. BRITT, class representative (deceased); CAROL NELSON, Administrator of the Estate of James W. Britt; Bessie M. Reveal, proposed substitute named plaintiff and class representative for James W. Britt; DONALD RAY CLARK, Plaintiffs-Appellants, v. EMBARQ CORPORATION; EMBARQ RETIREE MEDICAL PLAN; SPRINT NEXTEL CORPORATION; EMBARQ MID-ATLANTIC MANAGEMENT SERVICES COMPANY, formerly known as Sprint Mid-Atlantic Telecom, Inc.;	No. 13-3230

SPRINT RETIREE MEDICAL PLAN; GROUP HEALTH PLAN FOR CERTAIN RETIREES AND EMPLOYEES OF SPRINT CORPORATION; SPRINT WELFARE BENEFIT PLAN FOR RETIREES AND NON-FLEXCARE PARTICIPANTS; SPRINT GROUP LIFE AND LONG-TERM DISABILITY PLANS; CAROLINA TELEPHONE AND TELEGRAPH COMPANY, LLC, formerly known as Carolina Telephone and Telegraph Company; GROUP LIFE ACCIDENTAL DEATH AND DISMEMBERMENT AND DEPENDENT LIFE PLAN FOR EMPLOYEES OF CAROLINA TELEPHONE AND TELEGRAPH COMPANY; CAROLINA TELEPHONE AND TELEGRAPH COMPANY VOLUNTARY EMPLOYEES' BENEFICIARY ASSOCIATION SICKNESS DEATH BENEFIT PLAN; RANDALL T. PARKER, as Plan Administrator for all of Employee Welfare Benefit Plans of Embarq Corporation and Carolina Telephone and Telegraph Company, LLC; EMPLOYEE BENEFITS COMMITTEE OF EMBARQ CORPORATION AS PLAN ADMINISTRATOR OF THE EMBARQ RETIREE MEDICAL PLAN,

Defendants-Appellees.

THOMAS E. PEREZ, Secretary,
United States Department of Labor;
SECRETARY OF LABOR,

Amicus Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. NO. 2:07-CV-02602-EFM)

[Filed Apr. 27, 2015]

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Christopher J. Koenigs, Sherman & Howard L.L.C., Denver, Colorado (Joseph J. Costello, Morgan, Lewis & Bockius LLP, Philadelphia, Pennsylvania, and James P. Walsh, Jr., Morgan, Lewis & Bockius LLP, Princeton, New Jersey, with him on the brief), for Defendants-Appellees.

Stephen A. Silverman, U.S. Department of Labor, Washington, DC (M. Patricia Smith, Solicitor of Labor; G. William Scott, Acting Associate Solicitor, Plan Benefits Security Division; and Nathaniel I. Spiller, Counsel for Appellate and Special Litigation, U.S. Department of Labor, Washington, DC, with him on the brief), for Amicus Curiae.

Before **LUCERO**, **MURPHY**, and **BACHARACH**, Circuit Judges.

MURPHY, Circuit Judge.

I. Introduction

Plaintiffs-appellants represent a class of retirees (collectively "Plaintiffs") formerly employed by Sprint-Nextel Corporation ("Sprint"), Embarq Corporation ("Embarq"), or a predecessor and/or subsidiary company of either Embarq or Sprint (collectively "Defendants"). Plaintiffs brought this suit after Defendants altered or eliminated health and life insurance benefits for retirees. Plaintiffs asserted Defendants (1) violated the Employee Retirement Income Security Act of 1974 ("ERISA") by breaching their contractual obligation to provide vested health and life insurance benefits; (2) breached their fiduciary duty by misrepresenting the terms of multiple welfare benefit plans; and (3) violated the Age Discrimination in Employment Act ("ADEA") and applicable state laws by reducing or eliminating health and life insurance benefits. Defendants sought summary judgment on the breach of fiduciary duty claims, the ADEA claims, the state-law age discrimination claims, and some of the contractual vesting claims. The district court granted Defendants' motions in part and Plaintiffs obtained a Rule 54(b) certification.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, this court concludes Defendants did not contractually agree to provide Plaintiffs with lifetime health or life insurance benefits and thus we **affirm in part** the grant of summary judgment as to the contractual vesting claims. To the extent the district court granted summary judgment against class members whose contractual vesting claims arise, in whole or in part, from summary plan descriptions ("SPD"s) other than those identified in Defendants' motion, we **reverse** the grant of summary judgment against those class members. We **reverse** the district court's dismissal of Plaintiffs' breach of fiduciary duty claims to the extent those claims are premised on a fraud theory. Finally, because Defendants' decision to reduce or terminate the group life insurance benefit was based on a reasonable factor other than age, their actions did not violate the ADEA and we **affirm** the grant of summary judgment in favor of Defendants on those claims. We likewise **affirm** the dismissal of Plaintiffs' ADEA claims involving the reduction or elimination of post-retirement health benefits for Medicare-eligible employees because an agency regulation expressly permits Defendants' actions.

II. ERISA Claims

A. Background

Seventeen named plaintiffs represent class members whose post-retirement health and life insurance benefits were reduced or eliminated by Defendants. *Fulghum* v. *Embarq Corp.*, 938 F. Supp. 2d 1090, 1097-99 (D. Kan. 2013). The class "includes retired employees and their eligible dependents who retired before January 1, 2008 from Embarq or a business that became part of Embarq and who were participating in any of the retiree medical, prescription drug and life insurance benefit plans of Sprint Nextel Corporation and Embarq Corporation." *Id.* at 1099 (quotation omitted). Defendants include: Sprint (formerly known as United Telecommunications, Inc. and Sprint Corporation), Embarq, Embarq Mid-Atlantic Management Services Company (formerly known as Sprint Mid-Atlantic Telecom, Inc.), Carolina Telephone & Telegraph ("CT & T"), Employee Benefits Committee of Embarq Corporation, and Randall T. Parker. *Id.* Welfare benefit plans named as additional defendants include: Embarq Retiree Medical Plan, Sprint Retiree Medical Plan, Group Health Plan for Certain Retirees and Employees of Sprint Corporation, Sprint Welfare

Benefit Plan for Retirees and Non-Flexcare Participants, Sprint Group and Long Term Disability Plans, Group Life Accidental Death and Dismemberment and Dependent Life Plan for Employees of Carolina Telephone and Telegraph Company, and Carolina Telephone and Telegraph Company Voluntary Employees' Beneficiary Association Sickness Death Benefit Plan ("VEBA") (collectively the "Plans"). *Id.*

The actions giving rise to Plaintiffs' claims began in November 2005 when Sprint announced it was modifying prescription drug benefits for retirees eligible for Medicare Part D coverage. *Id.* Effective January 1, 2008, Embarq eliminated "company-sponsored medical coverage and the prescription drug subsidy provided to Medicare-eligible retirees and Medicare-eligible dependents of retirees." *Id.* As to company-provided life insurance for retirees, basic coverage was eliminated for retirees participating in the VEBA plan and was capped at $10,000 for all other class members. *Id.* Plaintiffs filed suit in December 2007, challenging the reduction and/or elimination of their benefits. *Id.* at 1100. Defendants moved for summary judgment in March 2012.[1]

Written SPDs explain the health and life insurance benefits available to the relevant named plaintiffs and class members. In their motions for summary

[1] Defendants sought summary judgment against seventeen named plaintiffs and selected class members. *Fulghum* v. *Embarq Corp.*, 938 F. Supp. 2d 1090, 1100 (D. Kan. 2013).

judgment, Defendants organized thirty-two SPDs into five groups based on language and coverage similarities, *id.*, asserting the relevant named plaintiffs and class members retired under an identified SPD or an SPD identical in all material respects to one of the identified SPDs. The district court analyzed Plaintiffs' contractual vesting claims by reference to Defendants' grouping and, on appeal, Plaintiffs do not challenge the district court's approach.[2] Accordingly, this court's analysis will also comport with Defendants' grouping.[3]

B. Standard of Review

Plaintiffs' complaint alleges Defendants contractually agreed to provide subsidized health and life insurance benefits to retirees for their lifetimes. Plaintiffs sought, *inter alia*, payment of past-due benefits and a determination of their right to future benefits. *See* 29 U.S.C. § 1132(a)(1)(B), (a)(3). We review the district court's grant of summary judgment in favor of Defendants on these claims de novo. *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1996), *abrogated on other grounds by CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866 (2011).

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[2] *But see* Section II. E.

[3] The district court's disposition of the claims assigned to Group 5 are not at issue in this appeal.

C. Discussion

The plans at issue all provide health or life insurance benefits and, thus, are all welfare benefit plans under ERISA. 29 U.S.C. § 1002(1). Welfare benefit plans are not governed by ERISA's minimum vesting standards and 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); *see also Deboard* v. *Sunshine Mining & Ref. Co.*, 208 F.3d 1228, 1239-40 (10th Cir. 2000). If, however, an employer has contractually agreed to provide retirees with vested benefits, it may not unilaterally modify or terminate the welfare benefit plan that establishes those benefits. *Deboard*, 208 F.3d at 1240.

The interpretation of an ERISA plan is governed by federal common law. *Foster* v. *PPG Indus., Inc.*, 693 F.3d 1226, 1237 (10th Cir. 2012). "In deciding whether an ERISA employee welfare benefit plan provides for vested benefits, we apply general principles of contract construction. In particular, the Supreme Court has directed us to interpret an ERISA plan like any contract, by examining its language and determining the intent of the parties to the contract." *Deboard*, 208 F.3d at 1240 (quotation omitted). A plaintiff cannot prove his employer promised vested benefits unless he identifies "clear and express language" in the plan making such a promise. *Chiles*, 95 F.3d at 1513 (quotation omitted). *But see Am. Fed. of Grain Millers* v. *Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) (noting a circuit split on the summary judgment standard for contractual vesting and adopting a lower standard). "[A] promise to provide vested benefits must be incorporated * * * into the formal written ERISA plan. SPDs are considered part of the ERISA plan documents."[4] *Chiles*, 95 F.3d at 1511 (quotation and citation omitted). Having reviewed the SPDs at issue in this matter, we conclude Plaintiffs cannot show that any plan contains clear and express language promising vested benefits.

1. Group 1

The first group of SPDs ("Group 1") consists of sixteen documents, accurately described by the district court as each containing (1) a statement that a retiree's coverage ends upon her death and (2) a reservation of rights ("ROR") clause pursuant to which the employer reserved the right to amend or terminate the relevant plan at any time.[5] *Fulghum*,

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[4] Neither party has asserted the SPDs conflict with the Plans, contain terms unsupported by the Plans, or contain provisions not authorized by or made part of the Plans. *See CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1878 (2011); *Eugene S.* v. *Horizon Blue Cross Blue Shield*, 663 F.3d 1124, 1131 (10th Cir. 2011). Accordingly, we proceed on the assumption "the SPD is part of the Plan." *Horizon*, 663 F.3d at 1131.

[5] The resolution of this appeal was unnecessarily hampered by Plaintiffs' repeated disregard of 10th Cir. R. 28.1(A), which requires them to provide applicable references to the *appendix.* The Rule is *not* satisfied by referencing documents filed in the district court. *See Ashley Creek Phosphate Co.* v. *Chevron USA, Inc.*, 315 F.3d 1245, 1256 n.10 (10th Cir. 2003) ("[Appellant's]

(Continued on following page)

938 F. Supp. 2d at 1103. Specifically, all sixteen SPDs include a section entitled, "When Coverage Ends." Under the subheading, "Retirees," the documents state, in part: "Your coverage under the Retiree Medical Plan ends when you die, or you do not pay your share of the cost of your coverage." SPDs 5-6 and 24-32 all have additional provisions detailing life insurance benefits for retirees. SPDs 5, 6, and 24 contain a provision stating: "[B]asic life insurance coverage ends on the date of your death." SPDs 25-27 and 31 state: "Retirees eligible for Basic Life insurance will be covered as of their effective pension date. Coverage ends on the date of death." SPDs 28-30 and 32 state: "Retirees eligible for Basic Life insurance became covered as of their effective pension date. Coverage is offered at no cost to the retiree. Coverage ends on the date of death."

All the SPDs in Group 1 also contain an ROR clause located on one of the introductory pages, stating, in part:[6] "[The relevant company] expects to continue the Retiree Benefits Program indefinitely. However, the Company reserves the right to change or discontinue any or all benefits under this program, or any statement in this summary plan description,

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consistent practice of citing to its own factual assertions in its various legal memoranda filed below, rather than citing to the relevant portions of the record supporting a given factual assertion has seriously delayed the resolution of this appeal.").

[6] The ROR language in SPDs 25-32 differs in an immaterial way.

at any time." In addition, a section in SPDs 1-4 titled, "What the Plan Covers," states: "Just as medical coverage can change in the future for active employees, so can the coverage that is available to retirees." SPDs 5, 24-27, and 29-31 have a section titled, "Legal Information," which contains language stating the relevant company "reserves the right to amend any part of the Plan, to change the method of providing benefits, or to terminate any or all of the plans." SPDs 5, 6, and 24 all contain provisions stating: "Appendix D explains the life insurance coverage available to retirees. In the future, the company may change or terminate any of the coverages described in this Section." This language immediately precedes the description of the life insurance coverage available to retirees under the relevant plan.

Plaintiffs argue the SPDs in Group 1 are ambiguous because they contain conflicting provisions—one promising lifetime benefits and the other reserving the right to alter or terminate the plan. Plaintiffs argue the plan documents must be construed in their favor to grant lifetime benefits. *See Rasenack ex rel. Tribolet* v. *AIG Life Ins. Co.*, 585 F.3d 1311, 1318 (10th Cir. 2009) ("The doctrine of *contra proferentem*, which construes all ambiguities against the drafter, applies to *de novo* review of ERISA plans."). "Whether an ERISA plan term is ambiguous depends on the common and ordinary meaning as a reasonable person in the position of the plan participant would have understood the words to mean." *Foster*, 693 F.3d at

1237 (quotation omitted). Having reviewed the SPDs in Group 1, we conclude they are not ambiguous.

As to the health coverage provided by all the plans in Group 1, the language on which Plaintiffs rely for their vesting argument is found in the section titled, "When Coverage Ends." In part, that section 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." Plaintiffs argue this section conferred vested medical benefits on plan participants, relying heavily on our opinion in *Deboard* for that proposition.

In *Deboard*, this court concluded a letter distributed to employees in which their employer encouraged them to voluntarily retire early in exchange for "higher vesting rights" created a separate welfare benefit plan. 208 F.3d at 1238-39. The letters specifically stated: "[T]he Plan provides that you and your eligible dependents would be entitled to receive health care under our current group hospitalization plan with Massachusetts Mutual, fully paid for at [the Company's] expense until the time of your death." *Id.* at 1233. This court concluded "the terms of the * * * letters demonstrate an intent on the part of defendants to provide plaintiffs with vested insurance benefits. In particular, the letters unequivocally indicated persons taking advantage of the early retirement plan would be provided with health insurance for their lifetimes, at company expense." *Id.* at 1241.

Unlike the letters mailed to plan participants in *Deboard*, the SPDs in Group 1 do not unequivocally state that medical benefits will continue to be provided to retirees at company expense until the date of the retiree's death. Instead, the statements, "[y]our coverage ends under the Retiree Medical Plan when you die," convey the self-evident message that a retiree's medical coverage terminates when she dies. Further, the purpose of the "When Coverage Ends" section of the SPDs in Group 1 is to detail how the coverage of others, *i.e.*, the retiree's surviving spouse and dependent children, is affected by the retiree's death. Read in context, the language on which Plaintiffs rely does not clearly and expressly state that health benefits are vested and, thus, it cannot reasonably be interpreted as a promise of lifetime benefits.

We reach the same conclusion as to the life insurance provisions in SPDs 5-6, and 24-32, but for a slightly different reason. The language stating basic life insurance coverage ends on the date of the retiree's death also follows the heading, "When Coverage Ends," but there are no additional provisions detailing the effect the cessation of coverage has on those individuals who survive the retiree. Further, several of the SPDs—those numbered 28, 29, 30, and 32—state that life insurance coverage "is offered at no cost to the retiree." These provisions, however, must be reconciled with the other provisions in the SPDs.[7] *See Foster*, 693 F.3d at 1237 (stating ERISA plan must be examined "as a whole").

Here, each SPD that includes a description of life insurance coverage also contains at least one ROR clause, pursuant to which Defendants expressly and unambiguously reserved the right to "change or discontinue any or all benefits" or to "amend or terminate" the plan. As many of our sister circuits have previously concluded, plan language that arguably promises lifetime benefits can be reconciled with an ROR clause if the promise is interpreted as a qualified one, subject to the employer's reserved right to amend or terminate those benefits. *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 58 F.3d 896, 904 & n.12 (3d Cir. 1995); *UAW* v. *Rockford Powertrain, Inc.*, 350 F.3d 698, 704 (7th Cir. 2003); *Abbruscato* v. *Empire Blue Cross & Blue Shield*, 274 F.3d 90, 98-99 (2d Cir. 2001); *Spacek* v. *Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998) overruled on other grounds by *Cent. Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739, 743 (2004); *Sprague* v. *Gen. Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998); *Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 856 (4th Cir. 1994); *Howe* v. *Varity Corp.*, 896 F.2d 1107, 1109 (8th

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[7] As to the life insurance benefits, Plaintiffs' comparison of the SPDs in Group 1 to the plan documents in *Deboard* is unavailing. The employer in *Deboard* did not retain the right to alter or terminate plan benefits at any time. *Deboard* v. *Sunshine Mining & Ref. Co.*, 208 F.3d 1228, 1240 (10th Cir. 2000).

Cir. 1990). In other words, when each SPD in Group 1 is read in its entirety, giving effect to all its provisions, it unambiguously explains to retirees that they will continue to receive life insurance benefits unless the terms of the plan are changed prior to their death. Accordingly, the SPDs in Group 1 cannot be interpreted to contain clear and express language promising vested lifetime benefits.

2. Group 2

There are three SPDs in Group 2 and all relate to ERISA plans that provide life insurance benefits to retirees. Having reviewed these SPDs, we conclude no SPD in Group 2 contains "clear and express language" promising vested benefits. *Chiles*, 95 F.3d at 1513.

In their appellate brief, Plaintiffs allude to one provision in the Group 2 SPDs they assert is sufficient to promise vested life insurance benefits. That provision is found in the section of the SPDs titled, "Benefits For You." Plaintiffs argue this provision promises retirees lifetime benefits because it states a participant's life insurance "will be" the amount equal to their active employee coverage subject only to a 50% reduction "on the fifth anniversary of retirement." Nothing in the provision identified by Plaintiffs, however, could reasonably be construed as a promise of lifetime benefits. The section to which Plaintiffs refer provides plan participants with information regarding the *amount* of the life insurance benefit. It, in no way, speaks to the *duration* of the benefit.

Plaintiffs argue a determination the SPDs do not expressly promise lifetime benefits does not end the inquiry. They assert Defendants lacked the power to unilaterally amend the Group 2 plans, regardless of whether the plan documents contain an express promise of lifetime benefits, because Defendants failed to reserve the right to amend. This argument is derived from our opinion in *Deboard*, in which we stated: "Although ERISA pension plans are subject to mandatory vesting requirements, ERISA employee welfare benefit plans are not subject to such standards, and employers are generally free to amend or terminate these plans unilaterally (*assuming the plan provides for this right*)." 208 F.3d at 1239-40 (emphasis added) (citation omitted).

Plaintiffs note the district court agreed the SPDs in Group 2 "do not contain an express reservation of rights provision." *Fulghum*, 938 F. Supp. 2d at 1109. They argue the Group 2 plans thus cannot be amended in a way that alters or reduces the benefits described therein. *See* 29 U.S.C. § 1102(b)(3) (requiring employee benefit plans to "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan").[8] The SPDs

[8] Beginning in 2001, plan amendment provisions are now required to be included in SPDs. 29 C.F.R. § 2520.102-3(1); 65 Fed. Reg. 70226, 70229 (Nov. 21, 2000). The three plans in Group 2 were all issued before 2001.

in Group 2, however, provide that insurance under the "Group Policy" ends on "the date the Group Policy terminates." The SPDs also contain conversion provisions, entitling participants to have individual life insurance policies issued to them if "the Group Policy is terminated or amended so as to terminate the life insurance for the class to which" the participant belongs. Plaintiffs argue this language, at best, permits Defendants to terminate the policies, not the plans. The district court disagreed, concluding Plaintiffs failed to show a distinction between the policies and the relevant plans and, thus, they failed to show the termination of the policies would not also result in the termination of the plans. *See Gable*, 35 F.3d at 856 ("[T]he fact that the modification provision stated that the company may amend the 'Policy' does not limit the company's amendment right, because the [insurance] policy constituted the entirety of the company's welfare benefit plan."). Accordingly, the district court ruled the SPDs unambiguously permit Defendants to terminate life insurance benefits by terminating the Group Policy.

Plaintiffs argue the district court's analysis is flawed because "the SPDs are not the policies" and "the plan is a separate reporting entity under ERISA." Neither of these arguments is responsive to the district court's determination that, under the facts presented here, there is no distinction between the policies and the plans and, thus, termination of the policies would necessarily terminate the plans. Plaintiffs' reliance on *Deboard* for the proposition that the right to change or terminate a particular insurance policy does not equate to the right to change or terminate the plan is also not persuasive. *See* 208 F.3d at 1240. *Deboard* does not state such a proposition. The placement of the provision in *Deboard* made it unlikely the employer was permitted to do anything other than change carriers. Nothing about the placement of the provisions at issue here raises the same suggestion.

Having reviewed the record and considered the arguments of the parties, we agree with the district court that the Group 2 SPDs unambiguously contemplate termination of the plans. The conversion language discussed above specifically states that a participant is "entitled to have an individual life insurance policy issued to" her if the group life insurance "ceases because the Group Policy is terminated or amended so as to terminate the life insurance." Coupled with the provision stating that insurance terminates when the policy terminates, this language demonstrates Defendants had the power to terminate a retiree's group life insurance benefit. Because the life insurance coverage provided by the plans in Group 2 can be terminated or amended and Plaintiffs have failed to identify any "clear and express" language promising lifetime life insurance benefits under those plans, the district court did not err by granting summary judgment to Defendants on the ERISA claims relating to the plans in Group 2.[9]

3. *Group 3*

The four ERISA plans in Group 3 are described in SPDs 10, 11, 12, and 19. These plans provide medical benefits to retirees. Plaintiffs argue they are entitled to lifetime benefits under these plans because the SPDs contain provisions stating benefits "will continue after retirement" and that retirees "will be insured." The language to which Plaintiffs refer, however, does not clearly and expressly promise lifetime benefits because it does not state that benefits will continue, unaltered, until the retiree's death. *See Deboard*, 208 F.3d at 1242 (interpreting nearly identical language as not suggesting "an intent on the part of defendants to create vested rights in * * * insurance coverage"). Although Plaintiffs argue the district court considered the language "in isolation and overlooked the other provisions indicating vested benefits," Plaintiffs have not shared those "other provisions" with this court. After locating the sections of the SPDs referenced by Plaintiffs,[10] we have

[9] The district court denied summary judgment as to named Plaintiff James Britt because his Group 2 ERISA claims were possibly impacted by a collective bargaining agreement. *Fulghum*, 938 F. Supp. 2d at 1113.

[10] Again, Plaintiffs have failed to provide any meaningful citations to the appendix, requiring this court to comb through the 9661-page record to locate the four relevant documents and,

(Continued on following page)

reviewed them in their entirety and conclude the provisions address eligibility requirements and the effect of retirement on a plan participant's benefits; they do not promise lifetime benefits.

As with the plans in Group 2, Plaintiffs also argue the benefits provided by the plans in Group 3 could not be altered or terminated because the SPDs do not expressly permit amendment. As to SPD #19, a group health plan covering employees of United Telephone Company of Texas, Inc., page 3 of the SPD contains the following ROR clause: "The Company expects to continue the Plan for the foreseeable future. However, the Company reserves the right to amend, discontinue or terminate the Plan and/or Plan benefits." This clause leaves no doubt the plan could be amended or terminated at any time. Thus, the grant of summary judgment to Defendants as to SPD #19 was proper.

Each remaining SPD in Group 3 contains an ROR clause allowing amendment or termination of the plan "for reasons of business necessity or financial hardship." Plaintiffs assert on appeal that this standard should be read in conformity with Treasury Regulation § 1.401-1(b)(2), which addresses the disqualification of *pension plans* from favorable tax treatment if the plan is amended or terminated "for any reason other than business necessity." Revenue

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then, review the entirety of each document to locate the referenced language.

Ruling 69-25 interpreted the term "business necessity," as used in that Treasury Regulation, to mean "adverse business conditions, not within the control of the employer, under which it is not possible to continue the plan." Rev. Rul. 69-25, 1969-1 C.B. 113.

There are multiple reasons why we reject Plaintiffs' argument. First, it was not presented to the district court and, therefore, it is not preserved for appellate review. *See Crow* v. *Shalala*, 40 F.3d 323, 324 (10th Cir. 1994). Second, even if the issue had been preserved, Plaintiffs' reliance on Revenue Ruling 69-25 for the definition of "business necessity" is misplaced because "IRS revenue rulings are not binding precedent on this court." *ABC Rentals of San Antonio, Inc.* v. *Commissioner*, 142 F.3d 1200, 1205 (10th Cir. 1998). "Revenue rulings do not have the force and effect of law, but rather are offered for the guidance of taxpayers, IRS officials, and others concerned * * * * " *True Oil Co.* v. *Commissioner*, 170 F.3d 1294, 1304 (10th Cir. 1999) (quotation omitted). Further, Revenue Ruling 69-25 addresses pension plans, not welfare benefit plans. Plaintiffs have failed to explain how the analysis of the term "business necessity" in the Revenue Ruling is relevant in the context of welfare benefit plans which, unlike pension plans, can generally be terminated "for any reason at any time." *Curtiss-Wright Corp.*, 514 U.S. at 78. The Revenue Ruling itself states the Treasury Regulations provide "that the term 'plan' implies a permanent * * * program" and, thus, "abandonment of a plan for any reason other than business necessity within a few years after it has taken effect will be evidence that the plan from its inception was not a bona fide program for the exclusive benefit of employees in general." Rev. Rul. 69-25, 1969-1 C.B. 113. No such concerns exist with welfare benefit plans.

In the alternative, Plaintiffs also argue the business necessity standard was not met here because "the company was profitable and the benefits represented a minute portion of operating expenses." In *Chiles*, we concluded an ROR clause permitting the employer to alter or terminate a welfare benefit plan if it became "necessary" gave the employer "almost unlimited discretion * * * to change the plan." 95 F.3d at 1513 (holding the term "'if necessary'" was "not conditioned on any event or circumstance" and thus "its meaning cannot fairly imply * * * that the plans can only be amended if necessary to their fiscal survival"). *Chiles* rejected essentially the same argument Plaintiffs make here. The ROR clauses at issue here are cabined only by the condition that the change in coverage be based on a business decision.

The record shows Defendants' motivation for amending the plans was to avoid duplicating benefits available to retirees through Medicare. It was estimated the changes would reduce Sprint's annual expenses by more than $22 million and Embarq's expenses by more than $21 million. Plaintiffs' only challenge to this evidence is their assertion "the company was profitable and the benefits represented a minute portion of operating expenses."[11] Defendants, however, were not required to show anything other than a business justification for the amendments. The evidence in the record is sufficient to meet that burden and the grant of summary judgment was appropriate.

4. Group 4

Group 4 consists of seven ERISA plans which are summarized in SPDs 13-15 and 20-23. Plaintiffs generally argue these SPDs promise lifetime benefits to retirees because they contain duration limits for some plan participants but not for retirees. Plaintiffs cannot prevail on this claim because they must identify affirmative language promising lifetime benefits and they have wholly failed to do so. *See Chiles*, 95 F.3d at 1513. Further, according to Plaintiffs, all the SPDs in Group 4 contain ROR clauses permitting Defendants to amend the plans for reasons of business necessity. Because Plaintiffs present no appellate argument that the amendments were not motivated by business reasons, their claims fail

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[11] Plaintiffs provide a reference to the appendix to support this argument, but that reference leads this court to Plaintiffs' memorandum in opposition to Defendants' motion for summary judgment and not to the section of the appendix actually supporting the proposition. *See supra* n.5 (noting such a practice was specifically condemned in this court's *Ashley Creek* decision).

and summary judgment in favor of Defendants was appropriate.

D. Extrinsic Evidence

Read in context, no reasonable person in the position of a plan participant would have understood any of the language identified by Plaintiffs as a promise of lifetime health or life insurance benefits. That same reasonable person would have understood the Plans permitted the amendments made by Defendants. Accordingly, there is no ambiguity that must be resolved in Plaintiffs' favor and the district court did not abuse its discretion by refusing to consider the extrinsic evidence Plaintiffs sought to introduce, including "course-of-performance" evidence and the opinion of Gail Stygall. *Fulghum*, 938 F. Supp. 2d at 1102-03; *see Kerber* v. *Qwest Pension Plan*, 572 F.3d 1135, 1149-50 (10th Cir. 2009) (holding district court properly refused to consider extrinsic evidence because the ERISA plan at issue was unambiguous).

E. Motion for Reconsideration

After the district court granted summary judgment in favor of Defendants on Plaintiffs' contractual vesting claims, Plaintiffs filed a motion for reconsideration. They asserted, *inter alia*, the court erred by granting summary judgment against class members covered by SPD #7 who were, at some point during their employment, parties to collective bargaining agreements ("CBAs") similar to the one which precluded the grant of summary judgment against named plaintiff Britt. *See supra* n.9. The district court denied the motion as to this point. On appeal, Plaintiffs assert the 185 class members covered by SPD #7[12] "are subject to the same legal conclusions as Britt" and, thus, their claims should also be allowed to proceed.

In their appellate brief, Plaintiffs do not explain exactly why the denial of the motion for reconsideration on this point was an abuse of discretion. Instead, in a footnote, they incorporate by reference arguments made before the district court, directing this court to the forty-five pages in the appendix containing documents they filed in the district court. This is not acceptable appellate procedure. "Allowing litigants to adopt district court filings would provide an effective means of circumventing the page limitations on briefs set forth in the appellate rules and unnecessarily complicate the task of an appellate judge." *Gaines-Tabb* v. *ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998) (citations omitted). Accordingly, we deem the argument waived. *See id.*

In any event, it is impossible to discern from the pages of the appendix to which Plaintiffs' appellate

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[12] Plaintiffs also argue summary judgment should not have been entered against the class members covered by SPD #10. Plaintiffs' motion for reconsideration makes no mention of SPD #10. We, therefore, do not consider this argument.

brief refers whether there was any abuse of discretion. If the record before the district court included all the CBAs covering the SPD #7 class members and those documents contained terms materially similar to the CBA to which Britt was a party, *see Fulghum*, 938 F. Supp. 2d at 1113, then Plaintiffs may have a compelling argument the district court abused its discretion by denying the motion for reconsideration. *But see infra* n.15. Plaintiffs, however, have not met their burden of demonstrating these documents were part of the district court record. To the contrary, Plaintiffs appended multiple documents to their motion for reconsideration, indicating these documents were not part of the record when the district court ruled on Defendants' motion for summary judgment. Further, in the memorandum Plaintiffs filed in support of their motion for reconsideration, they conceded these appended documents were incomplete, asking the district court to "presume" that an unproduced document "contains the same general provisions." In short, Plaintiffs' inadequate and obtuse briefing makes it impossible for this court to determine whether the necessary documents were part of the district court record. Accordingly, Plaintiffs have failed to show any abuse of discretion on the part of the district court with respect to the claims of class members covered by SPD #7.

The second basis on which Plaintiffs sought reconsideration is more troublesome. As we understand the parties' arguments, Plaintiffs' motion for reconsideration asserted that summary judgment should not have been granted against class members identified in Defendants' motion to the extent Defendants' Mapping[13] showed that a large percentage of those class members were also covered by additional SPDs[14] and CBAs[15] not mentioned in Defendants' motion for summary judgment. In other words, and by example, if a class member was identified in Defendants' motion because she asserted a claim to vested life insurance benefits arising under one of the thirty[16] SPDs identified in that motion, Plaintiffs argue it was error to enter summary judgment against her

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[13] Defendants submitted documents in spreadsheet format in which they "identified the SPDs that they contended were applicable to each class member." *Fulghum*, 938 F. Supp. 2d at 1102 n.31. The parties refer to these documents as the "Mapping."

[14] In their response to Plaintiffs' motion for reconsideration, Defendants did not contest Plaintiffs' assertion that multiple class members who were parties to the identified SPDs were also parties to additional SPDs and had asserted contractual vesting claims based on those additional SPDs.

[15] It appears Plaintiffs are now claiming the right to vested benefits may arise under the terms of various CBAs. We agree with Defendants' assertion Plaintiffs have waived any such claim by stating in the Pretrial Order that their right to benefits arose pursuant to the terms of various SPDs and that the CBAs were merely extrinsic evidence. *Wilson* v. *Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002) ("[C]laims * * * not included in the pretrial order are waived even if they appeared in the complaint * * * *"). Although the issue is not before this court, it is accordingly unclear why the district court refused to grant summary judgment in favor of Defendants on the claims raised by named plaintiff Britt. *See Fulghum*, 938 F. Supp. 2d at 1109, 1113.

[16] *See supra* n.3.

on *all her claims to vested life insurance benefits* if Defendants' Mapping showed she was covered by multiple life insurance SPDs, at least one of which was not among the thirty. Although Defendants characterized Plaintiffs' motion for reconsideration as a "stealth motion" seeking to "gut" the district court's order, Plaintiffs' point is well-taken.

In their motion for summary judgment, Defendants made the following representation to the district court:

> Defendants seek summary judgment only on the contractual vesting claims of those class members for whom the SPDs in effect when they retired are the same as or identical in all material respects to, those in effect when one or more Named Plaintiff retired * * * * Thus, if the Court grants summary judgment to Defendants on particular Named Plaintiffs' contractual vesting claims, Defendants will automatically be entitled to summary judgment on the corresponding class members' claims for the same vested benefits.

There is only one reasonable way to interpret this language consistent with controlling legal principles: Defendants sought summary judgment only on the specific claims of identified class members and only to the extent those claims arose from the thirty SPDs identified and discussed in Defendants' motion. Thus, Defendants were only entitled to summary judgment as to *claims premised on the thirty SPDs*, not as to *all* health or life insurance benefit claims asserted by each identified class member. Defendants did not seek, and thus clearly were not entitled to, summary judgment on *claims* premised on SPDs which they did not identify or discuss in their motion. This means Plaintiffs had no burden to present any evidence as to those additional claims in response to the motion for summary judgment.

Accordingly, to the extent an identified class member's claim to life insurance benefits arises from the terms of an SPD other than the thirty specifically discussed in the motion for summary judgment, it was error to dismiss that claim to life insurance benefits even though summary judgment was proper as to the claim arising from the identified SPD. *See supra* Section II. C. Likewise, to the extent an identified class member's claim to health benefits arises from an SPD other than the thirty specifically discussed in Defendants' motion, it was error to dismiss that claim to health benefits even though summary judgment was proper as to the claim arising from the identified SPD. *See id.* It was an abuse of discretion to deny Plaintiffs' motion for reconsideration on these two points because Defendants failed to present any evidence necessary to sustain the grant of summary judgment on claims not presented in their motion. *See Barber ex rel. Barber* v. *Colo. Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009) ("Rule 59(e) relief is appropriate only where the court has misapprehended the facts, a party's position, or the controlling law." (quotation omitted)).

III. Breach of Fiduciary Duty Claims

A. Background

In the Third Amended Complaint, seventeen named plaintiffs raised claims alleging Defendants breached their fiduciary duties by misrepresenting and concealing material benefits information, and misleading them into believing their health and life insurance benefits could not be amended or terminated. The breach of fiduciary duty claims arose under 29 U.S.C. § 1104(a)(1) and were brought pursuant to 29 U.S.C. § 1132(a)(3).[17] All seventeen plaintiffs were employed by companies that eventually became wholly owned subsidiaries of Defendant Embarq

[17] In their rehearing petition, Plaintiffs have clarified their claims and disavowed raising any claim pursuant to 29 U.S.C. § 1133, the ERISA provision governing claims alleging the denial of benefits. *See Wright* v. *Sw. Bell Tel. Co.*, 925 F.2d 1288, 1290 (10th Cir. 1991) (concluding the most analogous state statute of limitations applies to § 1133 claims). It is for this reason that the original decision must be reassessed. Because it is now clear the § 1132(a)(3) claims arise *solely* from an alleged violation of the duties imposed on plan fiduciaries pursuant to 29 U.S.C. § 1104, the six-year statute of repose set out in 29 U.S.C. § 1113, rather than a state statute of limitations, is applicable to Plaintiffs' breach of fiduciary duty claims. *Id.* at 1290 ("Section 1113 is * * * only applicable to actions arising out of violations of the portion of the Act addressing fiduciary responsibilities, 29 U.S.C. §§ 1101-12.").

Corporation; all retired between 1976 and 2003; and all participated in Defendants' various ERISA plans.[18]

The district court granted the motion on the timeliness basis as to fifteen of the seventeen plaintiffs.[19]

B. Discussion

This court applies a de novo standard of review to questions involving the applicability of a statute of limitations. *Wright* v. *Sw. Bell Tel. Co.*, 925 F.2d 1288, 1290 (10th Cir. 1991). This court has previously held that 29 U.S.C. § 1113 governs the time for filing a breach of fiduciary duty claim arising from an alleged violation of the duties imposed on ERISA plan fiduciaries by § 1104(a)(1). *Id.* Section 1113, *inter alia*, sets out the following six-year limitations period:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation

[18] Plaintiffs' breach of fiduciary duty claims involve defendants Embarq, the Committee, Sprint Nextel, Embarq Mid-Atlantic, CT & T, and Parker.

[19] Although the district court refused to grant summary judgment in favor of two named plaintiffs on Defendants' statute of repose argument, it failed to address any of the other bases on which Defendants claimed they were entitled to judgment on the § 1104 claims asserted by those two plaintiffs. *See Fulghum*, 938 F. Supp. 2d at 1123 n.117, 1127. Neither party has mentioned this anomaly in their appellate briefing.

> under this part, or with respect to a violation of this part, after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (b) [sic] in the case of an omission the latest date on which the fiduciary could have cured the breach or violation * * * *

29 U.S.C. § 1113. Neither party challenges the district court's determination that this general six-year limitation is a statute of repose. *See Ranke* v. *Sanofi-Synthelabo, Inc.*, 436 F.3d 197, 205 (3d Cir. 2006); *Radford* v. *Gen. Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998). Although Plaintiffs allege they did not, and could not, discover the alleged breach of fiduciary duty until Defendants amended the plans, statutes of repose operate to "extinguish a plaintiff's cause of action whether or not the plaintiff should have discovered within that period that there was a violation or an injury." *Nat'l Credit Union Admin. Bd.* v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1224 (10th Cir. 2014) (quotation omitted). Thus, assuming the statute of repose is applicable here, Plaintiffs had six years to file their suit—the six-year period being measured from (1) the date of the last action constituting a part of the breach or (2) the latest date on which the breach could have been cured by the fiduciary.[20] 29 U.S.C. § 1113.

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[20] Plaintiffs argue their action was timely under the statute of repose because their claims did not accrue until Defendants

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In addition to the statute of repose, and a separate three-year statute of limitations not applicable here, § 1113 contains language providing that "in the case of fraud or concealment," a civil enforcement action "may be commenced not later than six years after the date of discovery of [the] breach or violation." 29 U.S.C. § 1113. The parties disagree on whether this provision applies when the fiduciary fraudulently conceals the alleged breach of fiduciary duty, thereby preventing a plaintiff from discovering it, *or* when the underlying breach of fiduciary duty claim involves allegations the fiduciary engaged in fraud. If it is the latter, Plaintiffs assert their claims are timely because they were filed within six years after amendment of the Plans led to the discovery of the alleged breach.

This court has never addressed the issue and the other circuit courts of appeals are split on it. The

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amended or terminated the plans. In support, they assert actual harm is an element of the relevant breach of fiduciary duty claims and, here, no harm occurred until the Plans were amended. The district court rejected this argument, concluding a company is not acting as a fiduciary when it exercises its right to amend or terminate a welfare benefit plan, *see Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995), and further concluding an ERISA cause of action can accrue even if the plaintiff has not yet suffered an actual harm because accrual under the statute of repose is triggered by an act of the fiduciary. Plaintiffs reassert their arguments on appeal but it is unnecessary to address the issue because we conclude the breach of fiduciary duty claims are timely under the exception to the statute of repose to the extent those claims are premised on a fraud theory. *See infra.*

First, Third, Seventh, Eighth, Ninth, and D.C. Circuits have all held the "fraud or concealment" standard does not apply to breach of fiduciary duty claims based on a fraud theory but applies only when a fiduciary conceals the alleged breach. *Kurz* v. *Phila. Elec. Co.*, 96 F.3d 1544, 1552 (3d [sic] 1996) (holding the "fraud or concealment" language in § 1113 incorporates the federal doctrine of fraudulent concealment[21] and applies when the fiduciary has taken steps to conceal the breach of fiduciary duty); *J. Geils Band Emp. Benefit Plan* v. *Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1253 (1st Cir. 1996) (same); *Barker* v. *Am. Mobil Power Corp.*, 64 F.3d 1397, 1401-02 (9th Cir. 1995) (same); *Larson* v. *Northrop Corp.*, 21 F.3d 1164, 1172-73 (D.C. Cir. 1994) (same); *Radiology Ctr.* v. *Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1220-21 (7th Cir. 1990) (same); *Schaefer* v. *Ark. Med. Soc'y*, 853 F.2d 1487, 1491-92 (8th Cir. 1988) (same). With the exception of the Seventh Circuit, these courts have

[21] The doctrine of fraudulent concealment tolls the running of a statute of limitations when the defendant has prevented the plaintiff from timely discovering the breach of a duty. To take advantage of the doctrine, a plaintiff must show "(1) the use of fraudulent means by the party who raises the ban of the statute [of limitations]; (2) successful concealment from the injured party; and (3) that the party claiming fraudulent concealment did not know or by the exercise of due diligence could not have known that he might have a cause of action." *Ballen* v. *Prudential Bache Sec., Inc.*, 23 F.3d 335, 337 (10th Cir. 1994) (quotations omitted); *see also Cooper* v. *NCS Pearson, Inc.*, 733 F.3d 1013, 1016 (10th Cir. 2013) ("[F]raudulent concealment * * * by a defendant can toll the statute of limitations of a federal cause of action * * * *").

adopted the standard without any in-depth analysis or discussion. The Second Circuit has taken a different approach, declining to "fus[e] the phrase 'fraud or concealment' into the single term 'fraudulent concealment.'" *Caputo* v. *Pfizer, Inc.*, 267 F.3d 181, 189 (2d Cir. 2001). That court concluded, *inter alia*, the fraud or concealment provision does not toll the running of the six-year statute of repose but, instead, is a separate six-year statute of limitations applicable in certain types of cases. *Id.* at 189. After setting out the relevant definitions of the terms "fraud" and "concealment" and the statute's legislative history, the Second Circuit concluded the statute of limitations is applicable in two situations: when the plaintiff's breach of fiduciary duty claim is based on a fraud theory *and* when the defendant acts to conceal its breach from the plaintiff. *Id.* at 190.

As an initial matter, we do not agree with the Second Circuit's conclusion that the "fraud or concealment" provision is a separate statute of limitations. We believe the better view is that the "fraud or concealment" provision is a legislatively created exception to the six-year statute of repose. *See Nat'l Credit Union Admin. Bd.*, 764 F.3d at 1225 n.12 (noting statutes of repose "are subject to legislatively created exceptions" (quotation and alteration omitted)). The structure of § 1113 supports our conclusion. The statute of repose is set out in subparagraph (1) and a separate three-year statute of limitations is set out in subparagraph (2). 29 U.S.C. § 1113. The language creating the "fraud or concealment" exception follows these two paragraphs but is not contained in a third numbered paragraph. This statutory structure suggests the "fraud or concealment" provision is not meant to be a separate and distinct statute of limitations. Further, the provision begins with the word "except," indicating it must be read with reference to the two preceding subsections and not as a separate and independent statute of limitations.

Although we conclude the "fraud or concealment" provision is an exception to the statute of repose and not a separate statute of limitations, we must also determine the scope of the exception it creates. ERISA does not define the terms "fraud" or "concealment" and, therefore, our "inquiry focuses on the ordinary meaning of the [term] at the time Congress enacted" the statute. *Nat'l Credit Union Admin. Bd.*, 764 F.3d at 1227. When § 1113 was enacted, "fraud was defined as a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury." *Caputo*, 267 F.3d at 189 (*citing Black's Law Dictionary* 788 (Rev. 4th ed. 1968)); *see also Nat'l Credit Union Admin. Bd.*, 764 F.3d at 1227 ("Courts often begin an ordinary meaning analysis by consulting contemporary dictionary definitions."). Concealment, at the time, "was defined as a withholding of something which one knows and which one, in duty, is bound to reveal." *Caputo*, 267 F.3d at 189 (*citing Black's Law Dictionary* 360 (Rev. 4th ed.

1968)). The fraud or concealment exception at issue here is set out in the disjunctive and "[c]anons of construction indicate that terms connected in the disjunctive * * * be given separate meanings." *Garcia* v. *United States*, 469 U.S. 70, 73 (1984); *United States* v. *Gonzales*, 456 F.3d 1178, 1182 (10th Cir. 2006) ("The use of the disjunctive 'or' indicates [the two words used in the statute] are to have different meanings."); *see also United States* v. *O'Driscoll*, 761 F.2d 589, 597 (10th Cir. 1985) ("When the term 'or' is used, it is presumed to be used in the disjunctive sense unless the legislative intent is clearly contrary."). We concede there is some overlap between the two terms. It is possible, however, to give the terms separate meanings. We, thus, conclude the exception to the general six-year statute applies when the alleged breach of fiduciary duty involves a claim the defendant made "a false representation of a matter of fact, whether by words or conduct, by false or misleading allegations or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury" or when the defendant conceals[22]

[22] Because Plaintiffs have not argued Defendants concealed their alleged breach of fiduciary duty, it is unnecessary to determine the scope of the concealment element of the statute of repose. For example, the Second Circuit has concluded the concealment element applies in situations involving fraudulent concealment. *Caputo* v. *Pfizer, Inc.*, 267 F.3d 181, 190 (2d Cir. 2001) ("Accordingly, our interpretation of ERISA § 413's 'fraud or concealment' provision overlaps somewhat with that of our sister circuits as we construe it to apply in cases of fraud or [fraudulent]

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the alleged breach of fiduciary duty. *Caputo*, 267 F.3d at 189-90.

"Statutes of repose are intended to demarcate a period of time within which a plaintiff must bring claims or else the defendant's liability is extinguished." *Joseph* v. *Wiles*, 223 F.3d 1155, 1168 (10th Cir. 2000). Because a statute of repose "creates a substantive right in those protected to be free from liability after a legislatively-determined period of time," it is not subject to equitable tolling, *Amoco Production Co.* v. *Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996) (quotation omitted), or equitable estoppel, *Augutis* v. *United States*, 732 F.3d 749, 755 (7th Cir. 2013). Congress, by creating the "fraud or concealment" exception to the six-year statute of repose in § 1113, has effectively restored the judicial doctrines of equitable tolling and equitable estoppel to selected ERISA breach-of-fiduciary-duty claims. By ameliorating what would otherwise be a harsh result in situations where a fiduciary has engaged in prohibited conduct that cannot readily be discovered

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concealment." (quotation omitted)). Even under the approach taken by the Second Circuit, there remains the further question of whether fraudulent concealment encompasses both self-concealing ERISA violations or only overt acts taken subsequent to the alleged breach. *See, e.g.*, *Laskin* v. *Siegel*, 728 F.3d 731, 735 (7th Cir. 2013); *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 242 F.3d 497, 503 (3d Cir. 2001) (defining a "self-concealing act" as "an act committed during the course of the original fraud that has the effect of concealing the fraud from its victims").

by a plan participant, even a participant exercising ordinary care to protect her rights, the exception promotes one of the primary purposes of ERISA—"to ensure that employees receive sufficient information about their rights under employee benefit plans to make well-informed * * * decisions." *Harte* v. *Bethlehem Steel Corp.*, 214 F.3d 446, 451 (3d Cir. 2000). We are not persuaded by Defendants' assertion our interpretation will result in the exception swallowing the general six-year statute of repose. The exception Congress has created to the statute of repose is defined and limited.

There remains the question of whether the breach of fiduciary duty claims raised by Plaintiffs fall under the exception to the six-year statute of repose. The district court concluded Plaintiffs have not asserted Defendants concealed their alleged breach of fiduciary duty; Plaintiffs do not contest this conclusion on appeal. Thus, Plaintiffs' claims are timely only if the alleged breach of fiduciary duty is based on a fraud theory.

In a footnote in the reply brief they filed in district court, Defendants asserted Plaintiffs have failed to plead fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure and, thus, have failed to show the applicability of the "fraud or concealment" exception to the statute of repose. The district court agreed, and based its dismissal of Plaintiffs' breach of fiduciary duty claims on this argument. Although we agree Plaintiffs failed to plead fraud with the required particularity, dismissal of Plaintiffs' claims on this basis was error.

The purpose of Rule 9(b), which is "to ensure that the complaint provides the minimum degree of detail necessary to begin a competent defense," would not be served by relying on the Rule to dismiss Plaintiffs' claims at this stage of the proceedings. *McCarthy* v. *Ameritech Pub., Inc.*, 763 F.3d 469, 478 n.2 (6th Cir. 2014). Although Defendants filed a motion to dismiss many of Plaintiffs' claims, they did not move to dismiss the breach of fiduciary claims because they failed to conform to Rule 9(b) or because they were untimely. Instead, Defendants alluded to the Rule 9(b) issue only after they filed their motion for summary judgment. This motion was filed after discovery was complete and the reference to Rule 9(b) was made for the first time in a footnote in Defendants' reply brief. It is no surprise, therefore, that Plaintiffs have never moved to further amend their complaint. *See* Fed. R. Civ. P. 15(a), (b).

In their summary judgment motion, Defendants set out each plaintiff's fraud theories in detail based on the information obtained during discovery. Plaintiffs' responsive brief also contains a comprehensive list of the factual allegations relating to the fraud claims. On appeal, Defendants rely solely on Rule 9(b) and make no argument that Plaintiffs' breach of fiduciary duty claims do not conform to the evidence. *United States ex rel. SNAPP, Inc.* v. *Ford Motor Co.*, 532 F.3d 496, 504 (6th Cir. 2008). Because the record was fully developed on the fraud claim, the district court erred by applying Rule 9(b). *See Seattle-First Nat. Bank* v. *Carlstedt*, 800 F.2d 1008, 1011 (10th Cir. 1986) (holding "[d]ismissal of a complaint * * * pursuant to Rule 12(b)(6) is a dismissal on the pleadings unless 'matters outside the pleading are presented to and not excluded by the court * * * ' in which case 'the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56' "); Fed. R. Civ. P. 12(d). Thus, the district court erred when it dismissed Plaintiffs' breach of fiduciary duty claims based on Rule 9(b). Accordingly, we **reverse** the district court's ruling on this point to the extent Plaintiffs' breach of fiduciary duty claims are premised on a fraud theory. On remand, Defendants, if they so choose, may present argument regarding the timeliness of Plaintiffs' breach of fiduciary duty claims not inconsistent with this opinion, including argument that Plaintiffs did not bring suit within "six years after the date of discovery" of the alleged breach. 29 U.S.C. § 1113.

IV. ADEA Claims

A. Life Insurance Benefits

In their complaint, Plaintiffs alleged the reduction or termination of their life insurance benefits constituted disparate impact discrimination based on age, in violation of the ADEA.[23] *See Smith* v. *City of*

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[23] The ADEA Plaintiffs brought their disparate impact claims pursuant to 29 U.S.C. § 623(a)(2). *See Smith* v. *City of*

(Continued on following page)

Jackson, 544 U.S. 228, 239-40 (2005) (holding the ADEA authorizes disparate impact claims). The defendants against whom the ADEA claims were leveled are Embarq Corporation, CT & T, and Embarq Mid-Atlantic Management Service Company (collectively the "ADEA Defendants"). The ADEA class is defined as: "All persons, including all plan participants and all eligible spouse and dependent plan beneficiaries, whose rights to retiree life insurance benefits have been adversely affected by the terminations, reductions and changes in retiree life insurance benefits which were announced by Defendant Embarq Corporation on July 26, 2007" (the

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Jackson, 544 U.S. 228, 236 n.6 (2005) (concluding 29 U.S.C. § 623(a)(1) "does not encompass disparate-impact liability"). Section 623(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to *deprive any individual of employment opportunities* or otherwise adversely affect his status as an employee, because of such individual's age." (emphasis added). The ADEA Plaintiffs do not allege they have been deprived of employment opportunities. The ADEA provision applicable to disparate treatment claims, makes it unlawful for an employer to "discriminate against any individual with respect to his *compensation, terms, conditions, or privileges of employment*, because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). Although the ADEA Plaintiffs' claims appear to arise pursuant to § 623(a)(1), the argument has not been presented to us and thus we express no opinion on whether ADEA claims involving a *reduction in retiree benefits* must proceed under a disparate treatment theory rather than a disparate impact theory. *See Erie Cnty. Retirees Ass'n* v. *Cnty. of Erie*, 220 F.3d 193, 210 (3d Cir. 2000) (addressing ADEA claims similar to those asserted here under 29 U.S.C. § 623(a)(1), not § 623(a)(2)).

"ADEA Plaintiffs"). On that date, the ADEA Defendants reduced the maximum amount of basic life insurance coverage for many ADEA Plaintiffs to $10,000; group life insurance benefits for other ADEA Plaintiffs were eliminated completely.[24] No ADEA Plaintiff has replaced the reduced or eliminated insurance.

Disparate impact claims are grounded in the premise that "some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988). Accordingly, "a claim for disparate impact [does not] require proof of intentional discrimination." *Cinnamon Hills Youth Crisis Ctr., Inc.* v. *Saint George City*, 685 F.3d 917, 922 (10th Cir. 2012). A plaintiff asserting a claim of disparate impact discrimination can make out a prima facie case by demonstrating the challenged employment practice caused a disparate impact on the protected group. *Tabor* v. *Hilti, Inc.*, 703 F.3d 1206, 1220 (10th Cir. 2013). "Statistical evidence is an acceptable, and common, means of proving disparate impact." *Id.* at 1222 (quotation omitted).

[24] The district court noted that the ADEA Plaintiffs whose group life insurance benefits were eliminated will still receive a company-provided death benefit.

The framework applied to ADEA disparate impact claims differs from that applied to Title VII disparate impact claims because the "scope of disparate-impact liability under ADEA is narrower than under Title VII." *Smith*, 544 U.S. at 240. This is so because the ADEA "contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is based on reasonable factors other than age.'" *Id.* at 233 (quoting the ADEA). Thus, although a Title VII defendant has the burden of producing evidence of a "business necessity" for the challenged employment practice, an ADEA disparate-impact defendant need only produce evidence the practice is based on "reasonable factors other than age" ("RFOA"). *Id.* at 241-43; *see also id.* at 238-39 (noting the RFOA provision is inapplicable when an ADEA plaintiff proceeds under a disparate treatment theory). "Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement." *Id.* at 243. At trial, the ADEA defendant must persuade the factfinder its reasonableness "defense is meritorious." *Meacham* v. *Knolls Atomic Power Lab., Inc.*, 554 U.S. 84, 101 (2008).

The district court granted summary judgment in favor of the ADEA Defendants on the life insurance disparate impact claim, ruling the ADEA Plaintiffs failed to meet their burden of setting out a prima facie case because they failed to present any relevant statistical evidence.[25] In the alternative, the district court concluded the ADEA Defendants were entitled to summary judgment because their decision to reduce or terminate the group life insurance benefit was based on a reasonable factor other than age.

The ADEA Defendants presented evidence that the change in employee life insurance benefits was motivated by a desire to reduce costs and bring life insurance benefits in line with those provided by other companies. There was evidence showing 73% of all companies and 85% of non-manufacturing companies do not provide life insurance benefits to retirees. The ADEA Defendants also presented evidence the cost reductions would not affect customer service but would assist them in remaining competitive and maintaining profitability. None of this evidence was controverted by the ADEA Plaintiffs and the ADEA Plaintiffs do not challenge the district court's statement the evidence showed the reduction or elimination of group life insurance benefits "would result in annual cash savings of approximately $4 million, annual expense reductions of $9.4 million, and a reduction in accrued balance sheet liabilities of $72.4 million."

[25] The district court concluded the ADEA Plaintiffs had not identified appropriate comparators because their statistical evidence compared Plaintiffs to *hypothetical* younger versions of *themselves.*

On appeal, the parties continue to dispute whether the ADEA Plaintiffs' statistical evidence was sufficient to meet the prima facie burden. It is unnecessary to address this issue because summary judgment in favor of the ADEA Defendants was appropriate based on the RFOA defense.

The ADEA Plaintiffs assert the ADEA Defendants cannot meet their burden under the RFOA test unless they satisfy the standard set out in 29 C.F.R. § 1625.10(a), which permits reductions in employee benefit plans if justified by "significant cost considerations." The district court concluded this argument is misguided because § 1625.10(a) is inapplicable to the RFOA defense. Having reviewed the applicable law and the parties' arguments, we conclude, as did the district court, that § 1625.10(a), by its express terms, applies only to the equal cost/equal benefit safe harbor set out in 29 U.S.C. § 623(f)(2)(B)(i) and not the RFOA defense set out in 29 U.S.C. § 623(f)(1).[26]

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[26] The ADEA Plaintiffs argue the ADEA Defendants cannot meet their burden under the RFOA defense unless they show the challenged employment practice was based on significant cost considerations. They do not argue the RFOA defense is wholly inapplicable to their disparate impact claim. Nor could they. The Supreme Court has held that an employer can defend against a disparate impact ADEA claim by raising the RFOA defense. *Meacham* v. *Knolls Atomic Power Lab., Inc.*, 554 U.S. 84, 93-96 (2008). The RFOA is only inapplicable when the plaintiff proceeds under a disparate treatment theory. *See Smith*, 544 U.S. at 238-39; *see also supra* n.23.

The ADEA Plaintiffs have failed to challenge the evidence supporting the ADEA Defendants' RFOA defense, confining their argument to an assertion the ADEA Defendants' evidence does not meet the significant cost consideration standard because any savings from the life insurance changes were not significant. Because the ADEA Plaintiffs have not identified a disputed issue of material fact on the reasonableness of the ADEA Defendants' actions under the applicable RFOA standard, the district court was correct to grant summary judgment in favor of the ADEA Defendants on the life insurance disparate impact claim.

B. Health Insurance Benefits

In September 2007 and January 2008, Defendant Embarq terminated or reduced company-paid medical and prescription drug benefits for Medicare-eligible retirees. The ADEA Plaintiffs alleged this was a violation of the ADEA. The ADEA Defendants moved to dismiss these health benefit claims, arguing they failed as a matter of law because federal regulations expressly permitted the reduction in such benefits for Medicare-eligible employees.

"Section 9 of the ADEA authorizes the EEOC to 'establish such reasonable exemptions to and from any or all provisions of [the ADEA] as it may find necessary and proper in the public interest.'" *AARP* v. *EEOC*, 489 F.3d 558, 563 (3d Cir. 2007) (quoting 29 U.S.C. § 628). In 2007, the EEOC adopted a regulation exempting from all ADEA prohibitions any alteration, reduction, or elimination of health benefits for retirees who are eligible for Medicare health benefits. 29 C.F.R. § 1625.32(b). The district court concluded § 1625.32(b) foreclosed the ADEA Plaintiffs from prevailing on their claims and dismissed them.

The parties' appellate arguments center on whether 29 C.F.R. § 1625.32 is a valid exercise of the authority granted to the EEOC by Congress in Section 9. The ADEA Plaintiffs argue § 1625.32 is not a valid exercise of agency powers because it conflicts with the Older Workers Benefit Protection Act of 1990 ("OWBPA"). *See Ragsdale* v. *Wolverine World Wide, Inc.*, 535 U.S. 81, 86 (2002) ("A regulation cannot stand if it is arbitrary, capricious, or manifestly contrary to the statute." (quotations omitted)). In response to a ruling from the Supreme Court that bona fide employee benefit plans were not covered by the ADEA, Congress enacted the OWBPA, amending the ADEA to provide such coverage. *Ky. Retirement Sys.* v. *EEOC*, 554 U.S. 135, 148-49 (2008). The purpose of the OWBPA was "to provide that an employee benefit plan that discriminates on the basis of age is unlawful, except when the employer establishes entitlement to one of the affirmative defenses Congress has provided." *Id.* at 154 (Kennedy, J., dissenting). The ADEA Plaintiffs argue § 1625.32 is an invalid exercise of the EEOC's authority because it is inconsistent with congressional intent, which was to provide ADEA coverage for employee benefit plans. This argument is illogical. The very purpose of

Section 9 is to permit the EEOC to establish exceptions to "*any or all*" provisions of the ADEA in limited circumstances. 29 U.S.C. § 628. We fully agree with the Third Circuit that any exception promulgated by the EEOC pursuant to the express power granted it by Congress, even those shown to be reasonable and proper, will necessarily be inconsistent with the express terms of the ADEA. *AARP*, 489 F.3d at 563 ("By definition, the power to grant 'exemptions' provides an agency with authority to permit certain actions at variance with the express provisions of the statute in question."); *see Chevron, U.S.A., Inc.*, v. *Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court * * * must give effect to the unambiguously expressed intent of Congress."). Thus, the ADEA Plaintiffs' argument is easily rejected.

Congress has made clear, however, that any exception promulgated by the EEOC must be "reasonable" and "necessary and proper in the public interest." *AARP*, 489 F.3d at 564. The ADEA Plaintiffs challenge the reasonableness of § 1625.32 on only one basis. In support of their position, the ADEA Plaintiffs reference Section 101 of the OWBPA which states Congress intended "to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990). They assert the EEOC's regulation permits employers to circumvent the requirements of the equal-cost-equal-benefit provision, which was added to the ADEA by the OWBPA, thereby thwarting the purpose for which the OWBPA was passed. 29 U.S.C. § 623(f)(2)(B)(i) (permitting an employer to operate an employee benefit plan that discriminates on the basis of age when "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker").

The ADEA Plaintiffs' reasoning is oddly circular. As we have already concluded, the very purpose of Section 9 is to allow the EEOC to promulgate exceptions that conflict with the express terms of the ADEA. Because *any* exception, even a valid one, will necessarily conflict with the ADEA, a party cannot challenge the reasonableness of the exception by simply identifying the conflict as the ADEA Plaintiffs have done here. *See AARP*, 489 F.3d at 563 (holding an EEOC regulation allowing practices not otherwise permitted under the ADEA "does not render the regulation invalid").

The ADEA Plaintiffs' brief could be construed to argue the EEOC regulation is not reasonable because it is inconsistent with the overall purpose of the equal-cost-equal-benefit provision, not just the plain language of that provision. At the time the exception was proposed, the EEOC stated the purpose of the regulation was to "ensure that the application of the ADEA does not discourage employers from providing health benefits to their retirees." *Age Discrimination* *in Emp't Act; Retiree Health Benefits*, 68 Fed. Reg. 41,542, 41,542 (July 14, 2003) (notice of proposed rulemaking). After conducting a study in 2001, the EEOC concluded "the number of employers providing retiree health benefits ha[d] declined considerably over the last ten years." *Id.* The EEOC's findings indicated employers were choosing to reduce health benefits for *all* retirees, including those ineligible for Medicare who required bridge coverage, rather than risk violating the ADEA by reducing benefits only for retirees who could obtain coverage under Medicare. *Id.* at 41,545-46. The EEOC further found, "[a]fter extensive study," it was not "practicable" to apply the equal-benefit-equal-cost test "to the practice of coordinating employer-sponsored retiree health benefits with Medicare." *Id.* at 41,546. Accordingly, the EEOC promulgated 29 C.F.R. § 1625.10(a) "to protect and preserve the important employer practice of providing health coverage for retirees"—something not being accomplished under the ADEA as amended by the OWBPA. *Id.* Thus, the EEOC concluded the exception would benefit all retirees—a purpose in harmony, not conflict, with both the equal-cost-equal-benefit provision and the ADEA in general.[27] The

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[27] The Third Circuit has addressed a nearly identical argument. That court concluded the "EEOC considered, at length, whether the equal cost equal benefit provision would be sufficient to address the problem of declining retiree health benefits, and concluded as a policy matter that relying solely on this approach would be impractical or impossible." *AARP* v. *EEOC*, 489 F.3d 558, 567 (3d Cir. 2007).

ADEA Plaintiffs do not mention, let alone challenge, the EEOC's findings or conclusion. Accordingly, we reject their argument that § 1625.10(a) conflicts with the purpose of the ADEA.

The ADEA Plaintiffs have failed to show the EEOC lacked the authority to promulgate § 1625.10. They have also failed to show the regulation is invalid. They have made no argument that the actions of the ADEA Defendants are not permitted under the applicable regulation. Accordingly, they have failed to show they can prevail on their claim. The district court therefore correctly dismissed the claim.

V. Conclusion

Having concluded Defendants did not contractually agree to provide Plaintiffs with lifetime health or life insurance benefits, we **affirm** the grant of summary judgment as to the contractual vesting claims arising from the thirty SPDs identified in Defendants' motion for summary judgment. To the extent the district court granted summary judgment against class members whose contractual vesting claims arise, in whole or in part, from SPDs other than the relevant thirty, we **reverse** the grant of summary judgment against those class members and remand for further proceedings not inconsistent with this opinion. We **reverse** the dismissal of Plaintiffs' § 1104(a)(1) breach of fiduciary claims but only to the extent those claims are premised on a fraud theory. Because Defendants' decision to reduce or terminate the group life insurance benefit was based on a reasonable factor other than age, their actions did not violate the ADEA and we **affirm** the grant of summary judgment in favor of Defendants on that claim. We also **affirm** the dismissal of Plaintiffs' ADEA claims involving the reduction or elimination of post-retirement health benefits for Medicare-eligible employees because an applicable regulation expressly permits Defendants' actions.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, et al., individually and on behalf of all others similarly situated, *Plaintiffs*, vs. EMBARQ CORPORATION, et al., *Defendants.*	Case No. 07-2602

MEMORANDUM AND ORDER

[Filed July 16, 2013]

Plaintiffs, on behalf of themselves, a certified class, and a certified collective class, brought suit alleging that Defendants' modification and elimination of retirees' medical, prescription drug, and life insurance benefits, violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and Ohio, Oregon, and Tennessee's anti-discrimination statutes. On February 24, 2013, the Court issued an Order addressing eleven motions, including four motions for summary judgment, two motions to decertify the class and collective class, and several miscellaneous motions, including several motions to exclude expert testimony.[1]

Now, there are ten additional pending motions, including four motions for reconsideration. The Court will address nine of these motions below.[2]

I. Procedural Background

The Court will only briefly set forth the pertinent procedural background here. Plaintiffs brought suit in 2007 as a putative class action and brought seven claims against several Defendants. The Court subsequently certified a class, and a sub-class, with respect to several of Plaintiffs' ERISA claims, and it certified a collective class for Plaintiffs' ADEA claim. In Plaintiffs' first claim, pursuant to ERISA section 502(a)(1)(B),[3] seventeen named Plaintiffs and an approximate 15,000-member class assert that the summary plan descriptions (SPDs) in effect when they retired, as well as other written documents and oral representations, give them a contractual right to vested health, prescription drug, and life insurance benefits. Plaintiffs' third claim seeks declaratory relief that they are entitled to the reinstatement of

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[1] Doc. 407; *Fulghum* v. *Embarq Corp.*, ___ F. Supp. 2d ___, 2013 WL 589611 (D. Kan. Feb. 14, 2013).

[2] Plaintiffs recently filed a Motion to Substitute Party (Doc. 450) that has not been fully briefed. Thus, the Court will not address this motion in this Order.

[3] 29 U.S.C. § 1132(a)(1)(B).

their benefits in the form in which they received them at retirement. The first and third claims are Plaintiffs' contractual vesting claims. On February 14, 2013, the Court issued an Order granting in part and denying in part Defendants' motion for summary judgment on the contractual vesting claims.[4] Specifically, the Court granted summary judgment in Defendant's favor with respect to fifteen of the seventeen named Plaintiffs and approximately 11,000 class members.[5] Two named Plaintiffs', James Britt[6] and Donald Clark, and approximately 4,500 class members' contractual vesting claims remain.

In Plaintiffs' second claim, pursuant to ERISA section 502(a)(3),[7] the seventeen named Plaintiffs allege that Defendants breached their fiduciary duty by misrepresenting the terms of the plans by affirmatively telling Plaintiffs, through SPDS, written communications, and oral statements, that their medical and life insurance benefits were lifetime benefits.[8]

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[4] The Court will not set forth the substance of that Order here. *See* Doc. 407; *Fulghum*, 2013 WL 589611.

[5] The Court dismissed approximately 8,136 class members' medical and life insurance benefits claims, 2,388 class members' medical benefit claims, and approximately 566 class members' life insurance benefits claims.

[6] After the Court issued its February 14, 2013 Order, Plaintiffs notified the Court that James Britt died on February 18, 2013. *See* Doc. 438.

[7] 29 U.S.C. § 1132(a)(3).

[8] The Court did not certify a class with respect to this claim. An additional, approximate 920 Plaintiffs filed a separate lawsuit,
(Continued on following page)

Plaintiffs also contend that Defendants failed to inform them that their benefits could change. In the Court's February 14, 2013, Order, the Court granted summary judgment in Defendants' favor with respect to fifteen of the seventeen named Plaintiffs. Only two named Plaintiffs', Timothy Dillon and Sue Barnes, breach of fiduciary duty claim remain.

In Plaintiff's fourth claim, they contend that Defendants violated the ADEA when Defendants reduced or eliminated their life, medical, and prescription drug benefits.[9] On December 2, 2008, the Court dismissed the medical and prescription drug benefit portion of the claim.[10] On February 24, 2013, the Court granted summary judgment in Defendants' favor and against the seventeen named Plaintiffs, an additional 750 named individuals, and an approximate 8,000-member collective class on the remaining portion of Plaintiffs' ADEA and state law age discrimination claims.

In sum, as of February 14, 2013, (1) all of Plaintiffs' federal and state age discrimination claims were dismissed or had been previously dismissed;

Case No. 11-2572-EFM-GLR, in which they assert a breach of fiduciary duty claim against Defendants. That case is stayed pending the resolution of this case.

[9] Plaintiffs' fifth, sixth, and seventh claims are identical to the ADEA discrimination claim except they are brought under Ohio's, Oregon's, and Tennessee's age discrimination laws.

[10] Doc. 17; *Fulghum* v. *Embarq Corp.*, 2008 WL 5109781 (D. Kan. Dec. 2, 2008).

(2) fifteen of the seventeen named Plaintiffs' and approximately 11,000 class members' ERISA contractual vesting claims were dismissed, leaving only two of the seventeen named Plaintiffs' and approximately 4,500 class members' contractual vesting claims; and (3) fifteen of the seventeen named Plaintiffs' breach of fiduciary duty claims were dismissed leaving only two named Plaintiffs' breach of fiduciary duty claims.

Over the past several months, the parties have filed additional motions.[11] There are four motions for reconsideration (Docs. 409, 411, 418, and 420), with a related motion to strike a portion of a reply and a motion for leave to file a surreply (Docs. 442, 444); a motion for partial final judgment (Doc. 415); a motion to redefine the class and decertify the class (Doc. 430); and a motion for an extension of time to conduct mediation (Doc. 424).[12] The Court will address these motions in four different sections below.

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[11] As noted above, ten motions have been filed, but the Court will only address nine motions because one motion is not yet ripe.

[12] The Court notes that Plaintiffs and Defendants disagree about every aspect of this case and have filed approximately 500 pages of briefing with regard to these nine motions.

II. Analysis

A. Motions for Reconsideration (Docs. 409, 411, 418, 420)

There are four pending motions for reconsideration—two by Plaintiffs and two by Defendants. Plaintiffs bring their motions pursuant to D. Kan. Rule 7.3(b), or in the alternative Fed. R. Civ. P. 59(e) and 60(a). Defendants bring their motions pursuant to Fed. R. Civ. P. 59(e).[13] District of Kansas Rule 7.3(b) governs motions to reconsider non-dispositive orders and requires that a motion for reconsideration be filed within fourteen days after the Court files its order. Rule 59(e) of the Federal Rules of Civil Procedure permits a party to request reconsideration of a final judgment within twenty-eight days after entry of judgment.[14]

The Court will first address Defendants' motions for reconsideration. As noted above, Defendants bring their motion pursuant to Rule 59(e). Not surprisingly, the parties disagree over whether the Court's February 14, 2013 Order was a dispositive or non-dispositive order. Plaintiffs argue that it was not a dispositive order because it did not dispose of all claims and all parties. Thus, Plaintiffs assert that

[13] Defendants also state that they bring their motions pursuant to the Court's inherent power to reconsider its Orders.

[14] Fed. R. Civ. P. 59(e) ("A motion to alter or amend a judgment must be filed no later than 28 days after the entry of judgment.").

Defendants' motions for reconsideration are untimely because they were not filed within the fourteen-day time period required by D. Kan. Rule 7.3(b) for non-dispositive motions. Defendants contend that the Court issued a dispositive order, and their motions are timely because they are within the twenty-eight day deadline of Fed. R. Civ. P. 59(e).

In this case, the Court's February 14, 2013 Order was not dispositive.[15] Although several claims and numerous parties no longer remain in the case, four named Plaintiffs' claims remain.[16] Indeed, Defendants' motions for reconsideration assert that the Court erred in allowing these four Plaintiffs' claims to remain in the case. The fact that Defendants complain that the Court erred in not dismissing these four Plaintiffs' claims demonstrates that the Court's Order was certainly not dispositive as to those individuals. And the Court has not entered judgment in this case to make Rule 59(e) applicable.[17] Accordingly, the Court's Order was not dispositive, and the Court

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[15] The Court notes that "[s]ome uncertainty exists with respect to whether orders disposing of some but not all claims are dispositive or non-dispositive under D. Kan. Rule 7.3." *Turner* v. *Nat'l Council of State Bd. of Nursing*, *Inc.*, 2013 WL 139750, at *1 (D. Kan. Jan. 10, 2013).

[16] In addition, approximately 4,500 class members remain in the case. There is also Plaintiffs' pending motion for Rule 54(b) certification—which the Court will rule upon in this Order.

[17] Federal Rule of Civil Procedure 59(e) states that a motion must be filed 28 days after the entry of *judgment*.

denies Defendants' motions (Docs. 418, 420) because they are untimely.[18]

With respect to Plaintiffs' motions, under D. Kan. Rule 7.3(b), a party may seek reconsideration of a non-dispositive order 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.[19] In other words, a motion for reconsideration "is only appropriate where the Court has obviously misapprehended a party's position, the facts or applicable law, or where the party produces new evidence that it could not have obtained earlier through the exercise of due diligence."[20] A motion for reconsideration is not, however, an appropriate vehicle for revisiting issues already considered or arguing matters that were not raised in prior briefs.[21] Plaintiffs do not identify any ground for the Court to reconsider its prior ruling. Thus, the Court denies Plaintiffs' motions (Docs. 409, 411).

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[18] Plaintiffs also filed a Motion to Strike Portions of Defendants' Reply (Doc. 442) and a Motion for Leave to File a Sur-Reply (Doc. 444) in relation to one of Defendants' motions for reconsideration. The Court denies Plaintiffs' motions.

[19] D. Kan. Rule 7.3(b).

[20] *Baer* v. *Daley*, 2013 WL 3013621, at *1 (D. Kan. June 17, 2013).

[21] *Id.*

B. Motion for Partial Final Judgment (Doc. 415)

Plaintiffs move for an entry of partial final judgment pursuant to Fed. R. Civ. P. 54(b). They seek a 54(b) certification of the Court's December 2, 2008, and February 14, 2013, Orders. These rulings include the (1) dismissal of all the federal and state age discrimination claims, (2) dismissal of the contractual vesting claims of fifteen of the seventeen named Plaintiffs and approximately 11,000 class members, and (3) dismissal of the ERISA breach of fiduciary duty claims of fifteen of the seventeen named Plaintiffs.

Pursuant to Rule 54(b), when multiple claims or parties are involved in an action, "the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay."[22] In deciding a Rule 54(b) motion, the Court must consider "whether the claims under review [are] separable from the others remaining to be adjudicated and whether the nature of the claims already determined [are] such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals."[23] If the Court

[22] Fed. R. Civ. P. 54(b).

[23] *Stockman's Water Co.* v. *Vaca Partners*, *L.P.*, 425 F.3d 1263, 1265 (10th Cir. 2005) (internal quotation marks omitted) (alterations in original).

concludes that certification is appropriate, it must make two express findings: (1) that the judgment is final, and (2) that there is no just reason to delay review of the final order until it has conclusively ruled on all claims presented by the parties to the case.[24]

1. Finality of the December 2, 2008 and February 14, 2013 Orders

To be final, an order "must be final in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action."[25] Claims are considered disposed of if they are "distinct and separable from the claims left unresolved."[26] Although there is no hard-and-fast rule for determining whether claims are separable, "courts should consider whether the allegedly separate claims turn on the same factual questions, whether they involve common legal issues, and whether separate recovery is possible."[27]

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[24] *See id.*

[25] *Okla. Tpk. Auth.* v. *Bruner*, 259 F.3d 1236, 1242 (10th Cir. 2001) (internal quotation marks omitted).

[26] *Id.* at 1243.

[27] *Inola Drug*, *Inc.* v. *Express Scripts*, *Inc.*, 390 F. App'x 774, 774 (10th Cir. 2010).

Age Discrimination Claims (December 2, 2008 and February 14, 2013 Orders)

With the above principles in mind, the Court finds that both the December 2, 2008 and February 14, 2013 Orders are final orders with respect to the age discrimination claims for purposes of Rule 54(b). The December 2, 2008 Order eliminated a portion of Plaintiffs' age discrimination claims. The February 14, 2013 Order eliminated the remaining portion of Plaintiffs' age discrimination claims. Thus, the federal and state law age discrimination claims have been dismissed for all named Plaintiffs and class members in the collective action as to all types of benefits in dispute. No named Plaintiff or class member can pursue these claims any longer. The age discrimination claims are separate and distinct from the other remaining claims and turn on different legal issues. Accordingly, the Court concludes that the December 2, 2008 and February 14, 2013 Orders satisfy the finality requirement with respect to the age discrimination claims.

ERISA Contractual Vesting Claims (February 14, 2013 Order)

With respect to Plaintiffs' ERISA contractual vesting claims, the Court also finds that its February 14, 2013, ruling constitutes a final order. The fifteen named Plaintiffs and the approximate 11,000 class members, relying on the SPDs that were presented in Defendants' motion for summary judgment no longer have a claim for vested ERISA benefits. The Court found that the SPDs were unambiguous and allowed Defendants to amend or terminate benefits at any time. Although two named Plaintiffs and an approximate 4,500 class members still have contractual vesting claims, none of these individuals can or do rely upon the written SPDs that the Court has already concluded are unambiguous and do not allow for a contractual vesting claim. Thus, although there are remaining individuals with the same claims, their claims rely upon entirely different evidence, and their claims are distinct and separable from the Plaintiffs' and class members' claims that the Court dismissed. Accordingly, the Court finds that its February 14, 2013, ruling on fifteen named Plaintiffs' and approximately 11,000 class members' ERISA contractual vesting claims satisfies the finality requirement.

In addition, the Court ruled in the February 14, 2013 Order that Plaintiffs' designated expert, Gail Stygall, could not provide testimony as to whether the SPDs at issue were ambiguous because the Court concluded that an expert was unnecessary to make this determination. Thus, the Court excluded her report and testimony and did not rely upon it. The Court's ruling on this issue presents a legal question as to whether an expert is necessary when interpreting SPDs, and the Court's ruling precludes Ms. Stygall's expert testimony as to the ambiguity of SPDs in this case. Accordingly, the Court concludes that its ruling excluding Gail Stygall's expert testimony is also final for Rule 54(b) purposes.

ERISA Breach of Fiduciary Duty Claims (February 14, 2013 Order)

With respect to Plaintiffs' breach of fiduciary duty claims, the Court ruled in the February 14, 2013 Order that fifteen of the seventeen named Plaintiffs' claims were barred by the statute of limitations. These fifteen Plaintiffs can no longer pursue their claims, and the Court's ruling on the statute of limitations issue is a separate and distinct ruling from the remaining two Plaintiffs' breach of fiduciary duty claim. The Court concludes that its ruling with respect to these fifteen Plaintiffs' breach of fiduciary duty claim satisfies the finality requirement of Rule 54(b).

2. Whether a Just Reason for Delaying Review of the December 2, 2008 and February 14, 2013 Orders Exists

In deciding whether the second requirement for Rule 54(b) certification is satisfied, the Court "must take into account judicial administrative interests as well as the equities involved."[28] In this case, all of the federal and age state discrimination claims have been fully adjudicated by the December 2, 2008 and February 13, 2013 Orders, and these individuals are entitled to prompt appellate review. With respect to the ERISA contractual vesting claims, a significant number of Plaintiffs' and class members' claims have

[28] *Curtiss-Wright Corp.* v. *Gen. Elec. Co.*, 446 U.S. 1, 8 (1980).

been fully adjudicated, and there does not appear to be a quick resolution to the remaining individual or class members' claims.[29] Appellate review of this Court's February 13, 2013 Order regarding the viability of these Plaintiffs' and class members' contractual vesting claims appears to be the more equitable manner to obtain resolution. Finally, with respect to the breach of fiduciary duty claims, the statute of limitations determination is a legal issue that is entitled to prompt appellate review. Fifteen named Plaintiffs no longer have a breach of fiduciary duty claim, and there is no just reason to delay review as to whether this Court's ruling was proper.

In sum, the Court concludes that the December 2, 2008 Order on Plaintiffs' age discrimination claims and the February 14, 2013 Order on Plaintiffs' age discrimination claims, ERISA contractual vesting claims (and related ruling precluding Plaintiffs' expert testimony), and Plaintiffs' breach of fiduciary duty claim satisfies both of the requirements for Rule 54(b) certification. The Court accordingly grants Plaintiffs' Motion for Rule 54(b) Certification (Doc. 415).

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[29] The Court notes that the parties assert that a quick adjudication is possible. However, given the nature of the litigation so far in this case, and the parties' inability to agree upon almost every detail, the Court does not believe that a quick adjudication is possible.

C. Motion to Amend Class Definitions and Decertify Remaining Classes (Doc. 430)

Defendants first request that the Court amend the current class definition to reflect that the Court granted summary judgment in Defendants' favor. The Court finds Defendants' proposal unnecessary because the Court's February 14, 2013 Order makes clear that the Court granted summary judgment against certain Plaintiffs and class members.

Defendants then request that the Court decertify the class, as it is redefined. Defendants refer to the redefined class as the "Remaining Classes."[30] Because the Court will not redefine the class as Defendants request, their argument as to why the "Remaining Classes" should be decertified is largely moot because it addresses the class as it is redefined. Thus, the Court denies Defendants' Motion to Amend Class Definitions and Decertify Remaining Classes. The Court's ruling is again without prejudice, and the Court notes several items of consideration for the parties.

This case has been proceeding for almost six years, and the Court recently granted summary judgment against approximately 11,000 class members. The Court was able to do so because numerous individuals' claims fell under the same or similar language in the SPDs. It would appear that the

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[30] There are two classes because there is a VEBA sub-class.

remaining class members' claims could be determined in a similar manner. However, as previously noted in the Court's February 14, 2013 Order, it was unclear to the Court how many class members and SPDs remained in the case. Accordingly, the Court denied Defendants' request for decertification based on the changing factual circumstances.

The parties still have not narrowed the issues for the Court. Defendants make the sweeping assertion that class adjudication is impossible due to numerous individualized issues. They assert that there are approximately 78 remaining SPDs and 4,500 class members.[31] Plaintiffs too make the sweeping assertion that class adjudication is possible and that most of the remaining SPDs contain identical or similar language that the Court previously considered and ruled upon.[32] Plaintiffs also contend that the Court

[31] Defendants assert that they did not previously seek summary judgment on these 4,500 class members' contractual vesting claims because Plaintiffs had failed to comply with the Court's previous discovery order, and there was insufficient time to prepare such complex motions by the dispositive motion deadline of March 2, 2012. The Court notes that this dispositive motion deadline passed long ago, and neither party filed any motion for an extension of time to this deadline.

[32] Plaintiffs contend that the parties are in the position to stipulate to the disposition of many of the remaining class members' claims or that the parties would submit additional summary judgment motions for the Court to rule upon. Both propositions appear unworkable. As previously noted, the parties have agreed upon little, if anything, in this litigation. Thus, stipulation to the disposition of claims seems highly unlikely. With respect to additional summary judgment briefing, as noted

(Continued on following page)

can apply its previous ruling with regard to language in SPDs to the language in the remaining SPDs.[33] The parties, however, do not specifically identify how many class members are covered by each SPD, the language in the remaining SPDs (and the similarity or lack of similarity of that language to other SPDs), or whether the language in these SPDs is ambiguous or not.[34] Accordingly, the Court cannot make a well-informed decision as to the appropriateness of adjudicating the remaining class members' claims as a class at this time.

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above, no party sought extension to the dispositive motion deadline which expired over a year ago.

[33] The Court is unaware of the similarities between the language between the 32 SPDs it previously considered and the remaining approximate 78 SPDs.

The Court also notes that Plaintiffs obtained, in this Order, a Rule 54(b) certification with respect to the Court's previous ruling on the meaning of the language of the SPDs. The Court, therefore, questions the wisdom of applying the previous ruling to the remaining SPDs while this ruling is on appellate review. It also appears to be a waste of the parties' and the Court's time and resources.

[34] The Court notes that the Tenth Circuit Court of Appeals recently issued an opinion, *Wallace B. Roderick Revocable Living Trust* v. *XTO Energy*, *Inc.*, ___ F.3d ___, 2013 WL 3389469 (10th Cir. July 9, 2013), in which the court discussed the rigorous requirements of class certification. Although Defendants seek to decertify the class, both parties should be prepared to address the Tenth Circuit's requirements in any subsequent motion to decertify.

D. Motion to Extend Mediation Deadline (Doc. 424)

Defendants filed a Motion to Extend Mediation Deadline. This motion is largely moot because Defendants seek an extension of six weeks from the date this Court rules upon the parties' pending motions for reconsideration, Plaintiffs' motion for partial final judgment, and Defendants' motion to decertify. The Court makes its ruling on those motions in this Order. Thus, because the Court did not rule upon the extension request until it considered the above motions, the mediation deadline has already effectively been extended. Accordingly, the Court grants Defendants' Motion to Extend Mediation Deadline and sets the mediation deadline for August 28, 2013.

III. Sanctions (Filing Limitations)

The Court has the "inherent power to impose a variety of sanctions to regulate its docket, promote judicial efficiency and deter frivolous filings."[35] In this case, the parties have abused the court process by filing multiple, unnecessarily lengthy motions. The parties filed four motions for reconsideration (and approximately 250 pages of briefing) on separate issues of the Court's February 14, 2013 Order.[36] With

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[35] *Resolution Trust Corp.* v. *Dabney*, 73 F.3d 262, 267 (10th Cir. 1995).

[36] In one of Defendants' motions for reconsideration, Defendants effectively submitted an entirely new motion for summary judgment on two of the named Plaintiffs' breach of fiduciary

(Continued on following page)

respect to a dispute over whether Defendants included inappropriate new legal arguments in a reply brief, the parties submitted approximately 60 additional pages of briefing. The parties disagree over every facet of this case. Although the Court appreciates that counsel represents their clients' interest, the parties are not working "to secure the just, speedy, and inexpensive determination" of this action.[37]

As of the date of this Order, the parties are not allowed to file briefs in excess of 30 pages (including factual contentions), absent leave of Court. The Court will only grant an extension to this 30-page limit for good cause, which will not be freely given. Furthermore, a motion for reconsideration of this Order is not encouraged. Should such a motion be filed, it shall be limited to ten pages. The response to that motion also should not exceed ten pages. No reply will be permitted.

IT IS ACCORDINGLY ORDERED this 16th day of July, 2013, that Plaintiffs' Motions for Reconsideration (Docs. 409, 411) are **DENIED**.

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duty claims—complete with thirty-four "undisputed material facts." Plaintiffs, of course, disputed those facts and added fifty-seven additional facts of their own. A motion for reconsideration is not an appropriate avenue to bring an additional summary judgment motion.

[37] *See* Fed. R. Civ. P. 1 (stating that the Federal Rules of Civil Procedure "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding").

IT IS FURTHER ORDERED that Defendants' Motions for Reconsideration (Docs. 418, 420) are **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Entry of Partial Final Judgment Based on Rulings Made in the Court's February 24, 2013 Memorandum and Order and in the Court's December 2, 2008 Memorandum and Order (Doc. 415) is **GRANTED**.

IT IS FURTHER ORDERED that Defendants' Motion to Amend Class Definition and Decertify (Doc. 430) is **DENIED**.

IT IS FURTHER ORDERED that Defendants' Motion to Extend Mediation Deadline (Doc. 424) is **GRANTED**. The parties must participate in mediation by August 28, 2013.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike Portions of Defendants' Reply (Doc. 442) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Leave to File a Sur-Reply (Doc. 444) is **DENIED**.

IT IS SO ORDERED.

/s/ Eric F. Melgren
ERIC F. MELGREN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, et al., individually and on behalf of all others similarly situated, *Plaintiffs*, vs. EMBARQ CORPORATION, et al., *Defendants.*	Case No. 07-2602-EFM

MEMORANDUM AND ORDER

[Filed Feb. 14, 2013]

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[5] Plaintiffs, on behalf of themselves, a certified class, and a certified collective class, bring suit alleging that Defendants' modification and elimination of retirees' medical, prescription drug, and life insurance benefits, violated the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and Ohio, Oregon, and Tennessee's anti-discrimination statutes.

In Plaintiffs' first claim, pursuant to ERISA section 502(a)(1)(B),[1] seventeen named Plaintiffs and an approximate 15,000 member class assert that the summary plan descriptions (SPDs) in effect when they retired, as well as other written documents and

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[1] 29 U.S.C. § 1132(a)(1)(B).

oral representations, give them a contractual right to vested health, prescription drug, and life insurance benefits. In Plaintiffs' third claim, they seek declaratory relief that they are entitled to the reinstatement of their benefits in the form in which they received them at retirement. These two claims overlap and are Plaintiffs' contractual vesting claims.

In Plaintiffs' second claim, pursuant to ERISA section 502(a)(3),[2] the seventeen named Plaintiffs allege that Defendants breached their fiduciary duty by misrepresenting the terms of the plans by affirmatively telling Plaintiffs, through SPDs, written communications, and oral statements, that their medical and life insurance benefits were lifetime benefits. Plaintiffs also contend that Defendants failed to inform them that their benefits could change.

In Plaintiffs' fourth claim, the seventeen named Plaintiffs, an additional 750 named individuals,[3] and an approximate collective class of 8,000 members, contend that Defendants [6] violated the ADEA when they reduced or eliminated Plaintiffs' life insurance benefits because it had a disparate impact upon older retirees. Plaintiffs' fifth, sixth, and seventh claims are identical to the ADEA discrimination claim except

[2] 29 U.S.C. § 1132(a)(3).

[3] There are 750 named individuals in the Third Amended Complaint, referred to as the "individual age discrimination plaintiffs."

that they are brought under Ohio's, Oregon's, and Tennessee's age discrimination laws.

There are eleven pending motions before this Court. The Court will address these motions in three different sections and will set forth the applicable parties, facts, and law in each respective section.[4] In the first part of the Order, the Court will address Plaintiffs' contractual vesting claims under ERISA. This section includes: Defendants' Motion for Summary Judgment on the Named Plaintiffs' Contractual Vesting Claims (Doc. 323), Defendants' Motion for Summary Judgment on Selected Class Members' Contractual Vesting Claims (Doc. 332), Defendants' Motion to Exclude Gail Stygall Expert Testimony (Doc. 321), and Defendants' Motion to Decertify Class Action (Doc. 285).

In the second part of the Order, the Court will address the seventeen named Plaintiffs' breach of fiduciary duty claim under ERISA. This section includes Defendants' Motion for Summary Judgment on Plaintiffs' Breach of Fiduciary Duty Claim (Doc. 338).

In the third part of the Order, the Court will address Plaintiffs' age discrimination claims. This section includes: Defendants' Motion for Summary Judgment on Plaintiffs' Age Discrimination Claims (Doc. 329), Defendants' Motion to Decertify Collective

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[4] There will be some duplication of the facts in the three sections.

Action (Doc. 287), Defendants' Motion to Exclude the Report and Testimony of Terry Long (Doc. 325), Defendants' Motion to Exclude the Report and Testimony of David L. Crawford (Doc. 327), Plaintiffs' Motion for [7] Advisory Jury (Doc. 333), and Plaintiffs' Motion for Hearing on Defendants' Motions for Summary Judgment (Doc. 392).

I. Contractual Vesting Claims under ERISA

In Plaintiffs' first and third claims (the contractual vesting claims), they allege that Defendants' reduction or elimination of their prescription drug, medical, and life insurance benefits violated ERISA because those benefits were vested. Plaintiffs seek a declaration that these benefits are vested under section 502(a)(1)(B) of ERISA and a restoration of those benefits.[5]

A. The Parties

1. Named Plaintiffs

There are seventeen named Plaintiffs who are retired, long-term management and unionized employees of several regional and local telephone operating companies. All of these companies eventually became wholly-owned subsidiaries of Defendant Embarq Corporation upon its spin-off from Defendant Sprint Nextel Corporation in May 2006. As retired employees,

[5] 29 U.S.C. § 1132(a)(1)(B).

Plaintiffs and their eligible spouses and dependents were participants in various ERISA-governed plans.

a. Carolina Telephone & Telegraph Company ("CT&T") Plaintiffs

Eleven named Plaintiffs retired from CT&T. Plaintiff Donald Clark retired from CT&T in August 1976. Plaintiffs James Britt and Laudie McLaurin retired from CT&T in approximately June 1985 and December 1988. Plaintiffs Willie Dorman and Calvin Joyner retired from CT&T in March 1994. Plaintiffs William Fulghum and William Daniel retired from CT&T in September 1996 and June 1999, respectively. Plaintiffs John Hollingsworth, Betsy Bullock, and William Games retired from CT&T in December 2001. Plaintiff Sue Barnes retired from CT&T in March 2003.

[8] *b. United Telephone Companies' Plaintiffs*

Five named Plaintiffs retired from United telephone companies. Plaintiff Robert King retired from United Telephone Company of Florida ("UTC-Florida") in September 1993. Plaintiffs Betty and Kenneth Carpenter retired from United Telephone Company of Ohio ("UTC-Ohio") in November 1997 and January 1998. Plaintiff Carl Somdahl retired from United Telephone Company of the Northwest ("UTC-NW") in January 1999. Plaintiff Wanda

Shipley retired from United InterMountain Telephone Company ("Inter-Mountain") in June 1999.

c. Sprint Plaintiff

One Plaintiff, Timothy Dillon, retired from Sprint North Supply Company in approximately December 2002.[6]

2. Defendants

There are several companies that are named as Defendants. These include Defendant Sprint, formerly known as United Telecommunications, Inc. and Sprint Corporation; Defendant Embarq Corporation ("Embarq"); Defendant Embarq Mid-Atlantic Management Services Company, formerly known as Sprint Mid-Atlantic Telecom, Inc.; and Defendant CT&T, formerly a wholly-owned subsidiary of Sprint.

Numerous welfare benefit plans are named as Defendants. These include: Embarq Retiree Medical Plan, Sprint Retiree Medical Plan, Group Health Plan for Certain Retirees and Employees of Sprint

[6] The Court notes that Plaintiff Dillon's retirement date of December, 2002 is an "uncontroverted fact" with respect to Defendants' Motion for Summary Judgment on Named Plaintiffs' Contractual Vesting Claims. The parties, however, disagree as to the timing of Dillon's retirement in Defendants' Motion for Summary Judgment on Plaintiffs' Breach of Fiduciary Duty Claims. The Court will discuss this issue in more detail in Section II(C)(2).

Corporation, Sprint Welfare Benefit Plant for Retirees and Non-Flexcare Participants, Sprint Group and Long Term Disability Plans, Group Life Accidental Death and Dismemberment [9] and Dependent Life Plan for Employees of Carolina Telephone and Telegraph Company, and Carolina Telephone and Telegraph Company Voluntary Employees' Beneficiary Association Sickness Death Benefit Plan ("VEBA") (collectively, "the Plans").

There are two additional defendants. Defendant Employee Benefits Committee of Embarq Corporation ("the Committee") is the administrator of the Plans sponsored by Embarq and CT&T. Defendant Randall T. Parker served as Embarq's Director of Benefits between August 2005 and March 2010 and as Sprint's Director—Benefits Strategy and Sprint Benefits Brand Management between 1995 and August 2005.

3. Class Members

In early 2011, the Court certified a class with respect to the two contractual vesting claims. The class definition as set forth in the class notice is as follows:

> The certified ERISA class includes retired employees and their eligible dependents who retired before January 1, 2008 from Embarq or a business that became part of Embarq and who were participating in any of the

> retiree medical, prescription drug and life insurance benefit plans of Sprint Nextel Corporation and Embarq Corporation.[7]

There is also sub-class which includes individuals who were participants in CT&T's Voluntary Employee Benefits Association ("VEBA") plan. This sub-class is known as the "VEBA sub-class." There are approximately 15,000 ERISA class members.

[10] **B. Factual Background**

In November 2005, Sprint announced that the prescription drug benefits for participants and beneficiaries who were eligible for Medicare Part D coverage would be modified such that each participant and beneficiary would receive $41.67 a month, or $500 a year, effective January 1, 2006.

On July 26, 2007, Embarq announced that (1) company-sponsored medical coverage and the prescription drug subsidy provided to Medicare-eligible retirees and Medicare-eligible dependents of retirees would be eliminated effective January 1, 2008; (2) basic life insurance coverage would be eliminated for retirees who were participants in the CT&T VEBA effective September 1, 2007; and (3) basic life insurance coverage would be capped at $10,000 for all other retirees effective January 1, 2008.

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[7] Doc. 210-1, p. 6.

In late December 2007, Plaintiffs brought suit over the reduction and elimination of these benefits.

C. Defendants' Motions for Summary Judgment on Plaintiffs' Contractual Vesting Claims (Docs. 323, 332)

In this case, the summary plan descriptions ("SPDs") explain Plaintiffs' and class members' medical and life insurance benefits. Some of the SPDs address medical benefits,[8] some of the SPDs pertain to life insurance benefits,[9] and several of the SPDs address both medical and life insurance benefits in the same document.[10] Plaintiffs rely upon language in these SPDs that their medical and life insurance benefits are vested lifetime benefits.

[11] Defendants bring two summary judgment motions on Plaintiffs' and class members' contractual vesting claims. Defendants' first motion addresses the seventeen named Plaintiffs. There are seventeen SPDs at issue with respect to these Plaintiffs' contractual vesting claims. These include SPDs 1 through 17. Defendants' second summary judgment motion addresses certain class members that either fall under the same SPDs as the named Plaintiffs or fall

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[8] These include SPDs 1 through 4; 10 through 12; 16; 18; and 19.

[9] These include SPDs 7 through 9; 13 through 15; 17; and 20 through 23.

[10] These include SPDs 5 and 6; and 24 through 32.

under SPDs that contain similar language. There are fifteen SPDs at issue in Defendants' Motion for Summary Judgment on selected class members' contractual vesting claims. These include SPDs 18 through 32. Defendants group these thirty-two SPDs into five different groups based on the similarity of language contained within those SPDs. The Court will address each group of SPDs.

1. Summary Judgment Legal Standard

Summary judgment is appropriate if the moving party demonstrates that "there is no genuine dispute as to any material fact" and that it is "entitled to judgment as a matter of law."[11] The court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party.[12] The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact.[13] To meet this standard, the moving party need not disprove the nonmoving party's claim; rather, the movant must simply point out the lack of evidence on an essential element of the nonmoving party's claim.[14]

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[11] Fed. R. Civ. P. 56(a).

[12] *LifeWise Master Funding* v. *Telebank*, 374 F.3d 917, 927 (10th Cir. 2004).

[13] *Thom* v. *Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986)).

[14] *Id.* (citing *Celotex*, 477 U.S. at 325).

[12] If the moving party carries its initial burden, the party opposing summary judgment cannot rest on the pleadings but must bring forth "specific facts showing a genuine issue for trial."[15] "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein."[16] Conclusory allegations alone cannot defeat a properly supported motion for summary judgment.[17]

2. ERISA Contractual Vesting Law

There are two types of employment benefits under ERISA: welfare benefits and pension benefits.[18] In this case, these benefits are welfare benefits.[19] Welfare benefit plans do not have the same requirements as pension benefit plans.[20] That is, ERISA does not establish minimum participation, vesting, or funding requirements for welfare benefit plans.[21] Thus, "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt,

[15] *Garrison* v. *Gambro*, *Inc.*, 428 F.3d 933, 935 (10th Cir. 2005).

[16] *Adler* v. *Wal-Mart Stores*, *Inc.*, 144 F.3d 664, 671 (10th Cir. 1998).

[17] *White* v. *York Int'l Corp.*, 45 F.3d 357, 363 (10th Cir. 1995).

[18] *See* 29 U.S.C. § 1002(1)-(2).

[19] *See* 29 U.S.C. § 1002(1). *See also* Pretrial Order, Doc. 295.

[20] *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995).

[21] *Id.*

modify, or terminate welfare benefit plans."[22] The exception to this rule is if an employer or other plan [13] sponsor contractually agrees to grant vested benefits.[23] An employer or plan sponsor "who changes the vested benefits granted in a welfare plan may be liable to a beneficiary under the plan."[24]

Plaintiffs bear the burden of showing an agreement or other demonstration of employer intent to vest welfare benefits.[25] "Contractual vesting of a welfare benefit is an extra-ERISA commitment that must be stated in clear and express language * * * [It] is a narrow doctrine."[26] To determine whether a welfare benefit plan provides for vested benefits, the Court applies general principles of contract construction by looking at the contract language and considering the parties' intent.[27] Only if the language is ambiguous does the Court consider extrinsic evidence.[28]

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[22] *Id.*

[23] *See Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1510 (10th Cir. 1996), *abrogated on other grounds* by *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866 (2011).

[24] *Id.* (citing 29 U.S.C. § 1132(a)(1), (3)).

[25] *Id.* at 1511.

[26] *Welch* v. *Unum Life Ins. Co.*, 382 F.3d 1078, 1086 (10th Cir. 2004) (internal quotation marks and citation omitted).

[27] *Deboard* v. *Sunshine Mining & Ref. Co.*, 208 F.3d 1228, 1240 (10th Cir. 2000).

[28] *Id.*

Otherwise, the Court construes the documents as a matter of law.[29]

Title 29 U.S.C., section 1022(b) requires that an SPD contain information about "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." Section 1022(a) requires that the SPD be "written in a manner calculated to be understood by the average plan participant," and it must be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan."

> An SPD is considered part of the plan documents required by ERISA. If the clause to be construed does not itself determine the plan sponsor's intent, we read the [14] language of the SPD as a whole. Because the SPD best reflects the expectations of the parties to the plan, the terms of the SPD control the terms of the plan itself.[30]

In this case, to determine the dispositive issue of whether Defendants intended to confer vested medical and life insurance benefits upon Plaintiffs, the Court must analyze provisions of the SPDs. In analyzing these provisions, the Court must first determine whether they are ambiguous. If they are unambiguous, the Court construes them as a matter of law.

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[29] *Chiles*, 95 F.3d at 1511.

[30] *Id.* at 1515.

3. Evidentiary Issues

Before discussing the language of these SPDs, the Court must address several evidentiary issues.

a. Magistrate Judge O'Hara's Sanction Order

In this case, the parties engaged in lengthy discovery, and there were numerous discovery disputes over the SPDs, collective bargaining agreements, and plan documents. One of the issues involved which party had the responsibility of identifying the SPDs applicable to each class member. On February 24, 2012, Magistrate Judge O'Hara found that Plaintiffs had failed to comply with a previous order requiring Plaintiffs to identify by group the retirees to which Plaintiffs' alleged plan documents applied. Because of Plaintiffs' failure to comply with his previous order, Judge O'Hara imposed a sanction precluding Plaintiffs from taking a position in the litigation inconsistent with Defendants' document-to-class-member mapping.[31] After Plaintiffs sought reconsideration of that order, Judge O'Hara upheld most of it, but clarified that his order did not apply to the seventeen named Plaintiffs because Plaintiffs had previously identified documents with respect to those named [15] Plaintiffs.[32] On May 24, 2012, 2012 WL 1893542,

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[31] *See* Doc. 318. Defendants had identified the SPDs that they contended were applicable to each class member.

[32] *See* Doc. 349.

this Court denied Plaintiffs' Motion to Review Magistrate Judge's February 24, 2012 and March 27, 2012 Orders and upheld the sanction.[33] Thus, Plaintiffs cannot now take a position inconsistent with Defendants' identification of the SPDs applicable to the selected class members.

b. Course of Performance Evidence

Plaintiffs argue that "course of performance" evidence—consisting of alleged oral statements from company representatives to Plaintiffs, internal company documents, and written checklists and letters provided to Plaintiffs—demonstrates Defendants' intent to provide lifetime benefits. All of this "course of performance" evidence is extrinsic evidence. Only if the plan language is ambiguous does the Court need to consider this evidence.[34] For the reasons discussed below, the Court finds that the language in the SPDs is unambiguous. Thus, the Court will not consider

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[33] *See* Doc. 387.

[34] *See Deboard*, 208 F.3d at 1240 (noting that if the plan language is ambiguous, the court may look at extrinsic evidence); *Chiles*, 95 F.3d at 1519 n. 12 (noting that the district court may consider "interpretive statements * * * , past practices, customary usage in the trade, and other competent evidence bearing on the understanding of the parties" when interpreting an ambiguous provision); *see also Kerber* v. *Qwest Pension Plan*, 572 F.3d 1135, 1149-50 (10th Cir. 2009) (finding that the district court "properly refused to consider the extrinsic evidence offered by plaintiffs" when the plaintiffs failed to identify ambiguities in the plan).

the extrinsic evidence in relation to Plaintiffs' contractual vesting claim.[35]

[16] *c. Defendants' Motion to Exclude the Report and Testimony of Professor Gail Stygall (Doc. 321)*

Plaintiffs also attempt to rely upon expert testimony from Gail Stygall, Ph.D., a professor of English and Linguistics, in which she opines, in part, that due to the language of the SPDs, they are ambiguous and "reasonably susceptible to the reader's conclusion that lifetime benefits have been promised."[36] Defendants filed a Motion to Exclude the Report and Testimony of Professor Gail Stygall. The determination of whether language in a contract is ambiguous is a question of law.[37] As explained below, there are numerous court decisions regarding contractual vesting claims. In every one of these decisions, the court makes the determination as to whether or not the language in the contract is ambiguous—the court

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[35] The Court, however, will set forth some of this evidence with respect to Plaintiffs' breach of fiduciary duty claim.

[36] See generally Plaintiffs' facts regarding Gail Stygall's expert report and Ms. Stygall's expert report.

[37] *See Hickman* v. *GEM Ins. Co.*, 299 F.3d 1208, 1212 (10th Cir. 2002). *See also Chiles*, 95 F.3d at 1511 ("In interpreting the terms of an ERISA plan [the court] examine[s] the plan documents as a whole and, if unambiguous, [the court] construe[s] them as a matter of law.").

does not rely on an expert's opinion for this conclusion.

In this case, because the Court must determine whether the contractual language is ambiguous as a matter of law, Professor Stygall's opinion is irrelevant and unnecessary to the Court's determination, and the Court will not consider her opinion. Accordingly, the Court grants Defendants' Motion to Exclude the Report and Testimony.

4. The SPDs

As noted above, Defendants group thirty-two SPDs into five different groups based on the similarity of language contained within those SPDs. The first group of SPDs contains at least one reservation of rights ("ROR") clause providing that the company may amend or terminate the plan at any time. This first group of SPDs also contains a provision that coverage will end upon death. The second group of SPDs does not contain an express ROR. Nor does it contain such provisions [17] that coverage will end upon death. The third and fourth groups of SPDs contain no express language indicating that benefits are vested and contain a reservation of rights clause premised on business necessity. The final group contains only two SPDs, and they are only applicable to named Plaintiff Clark. The Court will address each group of SPDs in turn.

a. The First Group of SPDs (1 through 6, 18, and 24 through 32)

This first group of sixteen SPDs are substantially similar in that they contain at least one ROR stating that the company reserves the right to amend or terminate the plan at any time. They also contain the statement that the retirees' benefit coverage ends upon the retirees' death. These SPDs include 1 through 6, 18, and 24 through 32.

Thirteen named Plaintiffs base their claims for medical benefits on SPDs 1 through 6.[38] An additional

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[38] Named Plaintiffs Fulghum, Dorman, King, Joyner, and the Carpenters contend that SPD 1 was in effect when they retired, and that their medical benefits vested under the terms of that SPD. An additional 1,886 class members retired while SPD 1 was in effect.

Named Plaintiff Daniel contends that his medical benefits vested under SPD 2. An additional 613 class members retired while SPD 2 was in effect.

Named Plaintiff Somdahl contends that SPDs 3 and 4 were in effect when he retired, and his medical benefits vested under the terms of these SPDs. An additional 1,030 class members retired while SPD 4 was in effect.

Named Plaintiffs Hollingsworth, Bullock, Games, and Dillon contend that their medical benefits vested under SPD 5. Plaintiff Dillon relies on SPD 5 for his claim of vested life insurance benefits as well. An additional 984 class members retired while SPD 5 was in effect.

Named Plaintiffs Hollingsworth, Bullock, and Games contend that their life insurance benefits vested under the terms of both SPD 5 and SPD 9.

Named Plaintiff Shipley contends that his medical and life benefits vested under the terms of SPD 6.

4,513 class members retired while SPDs 1 through 6 were in effect. SPD 18 is substantially similar to SPDs 1 through 4, and SPDs 24 through 32 are substantially similar to SPDs 5 and 6. A total of 6,108 selected class members retired while these SPDs 18 and SPDs 24 through 32 were in effect.[39]

[18] *1. Language in the SPDs*

(a) Language in SPDs 1 through 4

SPDs 1 through 4 are medical SPDs. They all include sections entitled "When Coverage Ends." Under the "Retirees" section, it provides:

> Your coverage under the Retiree Medical Plan ends
>
> — when you die, or
>
> — you do not pay your share of the cost of your coverage.

In a section entitled "Answering Your Needs," these plans provide that "[b]y participating in the United Telecom Retiree Medical Plan, you can feel secure that your family's health and well-being will be protected after you stop working." SPDs 1 through 4 also includes ROR provisions. On the first page of each of these SPDs, there is language explaining that

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[39] No named Plaintiffs rely upon SPD 18 or SPDs 24 through 32.

the document is a summary plan description of the medical plan which states:

> The company expects to continue the Retiree Medical Plan indefinitely. However, the company reserves the right to amend or terminate this plan, or any statement made in this summary plan description, at any time.

Other language in the Plans, at various places, indicate that coverage could change in the future. For example, in a section entitled "What the Plan Covers," it states that "[j]ust as medical coverage can change in the future for active employees, so can the coverage that is available to retirees."

SPDs 1, 2, and 4 include a "Legal Information" section.[40] In this section, under the heading "The Plans' Future," it provides that the company intends to continue providing benefits, but it reserves the right to amend the Plan, change the method of providing benefits, or terminate the Plan.

[19] ***(b) Language in SPD 18***

SPD 18 is also a medical SPD and similar to SPDs 1 through 4. SPD 18, however, only contains one ROR clause. It is located at the end of the Table of Contents. It provides: "Embarq intends to continue the Retiree Medical Plan. However, the Company reserves the right to change or discontinue any or all

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[40] SPD 3 does not contain a "Legal Information" section.

benefits under these options, or any statement in this summary plan description, at any time."

(c) Language in SPDs 5 and 6

SPDs 5 and 6 are similar to SPDs 1 through 4. The main distinction between them is that SPDs 5 and 6 cover *both* medical and life insurance benefits, while SPDs 1 through 4 only cover medical benefits.

SPDs 5 and 6 include sections in the medical portion of the Plan entitled "When Coverage Ends." Under the Retiree section, it provides:

> Your coverage under the Retiree Medical Plan ends when:
>
> — you die, or
>
> — you do not pay your share of the cost of your coverage.

They also include a section in the life insurance portion of the Plan entitled "When Does Coverage End" which provides that "[t]he basic life insurance coverage ends on the date of your death."

SPDs 5 and 6 also include several ROR provisions. On the first page of both of these SPDs, there is language explaining that the document is a summary plan description of retiree benefits which states:

> The company expects to continue the Retiree Benefits indefinitely. However, the company reserves the right to amend or terminate this

> plan, or any statement made in this summary plan description, at any time.

[20] Other language throughout the SPDs indicates that coverage could change in the future and that the company may change or terminate coverage.

SPD 5 has a "Legal Information" section. In the "the Plans' Future" section, it provides that the company intends to continue providing benefits, but "it reserves the right to amend any of the plans, to change the method of providing benefits, or to terminate any or all of the plans. You'll be notified of any changes." SPD 6 does not have this "Legal Information" section.

(d) Language in SPDs 24 through 27 and SPDs 29 through 31

SPDs 24 through 27 and 29 through 31 are substantially identical to SPDs 5 and 6.[41] They state that coverage ends when the recipient dies. They also include a general ROR clause at the beginning of the SPDs, language throughout the SPDs indicating that coverage could change in the future, and a "Legal Information" section which includes an additional ROR clause.

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[41] These SPDs also cover both medical and life insurance benefits.

(e) Language in SPDs 28 and 32

SPD 28 and SPD 32 are also similar to SPDs 5 and 6.[42] They include the provision that coverage ends upon death. SPD 28 and SPD 32, however, only contain one ROR clause. The clause is located on the Table of Contents page and provides: "[The Company][43] intends to continue the Retiree Medical Program. However, the Company reserves the right to change or discontinue any or all benefits under these options, or any statement in this summary plan description, at any time."

[21] *2. Discussion of the SPDs*

Defendants contend that the named Plaintiffs and selected class members relying on these SPDs cannot demonstrate that Defendants intended to provide vested medical and life insurance benefits because: (1) although these SPDs state that coverage ends "when you die," that language is insufficient to demonstrate vested lifetime benefits; and (2) even if the language could be construed as a promise of lifetime benefits, the same SPDs state that the company reserves the right to change or terminate benefits at any time. Plaintiffs disagree and state: (1) the "when

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[42] SPD 28 and 32 cover both medical and life insurance benefits.

[43] One SPD references Sprint Nextel, and one SPD references Embarq.

you die" provisions in the SPDs demonstrate that they are entitled to lifetime benefits, and (2) even if the "when you die" language does not establish benefits for life, that language is in conflict with the ROR clause, rendering the SPDs ambiguous. Plaintiffs then contend that if the SPDs are ambiguous, the Court must consider extrinsic evidence to determine whether Defendants intended to provide vested benefits.

In *Chiles* v. *Ceridian Corp.*, the Tenth Circuit discussed the difficulty of making the determination of whether welfare benefits vested under an ERISA plan when the plan contains both an ROR provision and a promise of lifetime benefits.[44] At the time *Chiles* was decided, the Third, Fourth, and Eighth Circuits had addressed the same issue.[45] The Tenth

[44] 95 F.3d at 1511-13.

[45] *See In re Unisys Corp. Retiree Medical Benefit ERISA Litig.* (*Unisys I*), 58 F.3d 896, 903-04 (3d Cir. 1995) (finding that although the plan promised lifetime benefits, the broad and unequivocal reservation of rights clause was unambiguous and allowed the employer to terminate benefits at any time); *Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 856 (4th Cir. 1994) (finding that the express reservation of rights clause providing that the employer could modify or terminate participant's benefits defeated the plaintiffs' claim that the company intended to provide vested benefits); *Howe* v. *Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990) (noting that a plaintiff failed to meet his burden in demonstrating vested lifetime benefits when the employer expressly reserved the right to amend or terminate the plan). *But see Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994) (finding that although reservation of rights clauses are generally inconsistent with a claim for vested benefits, the two reservation

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Circuit noted that in cases [22] in which SPDs contained both a ROR clause and a promise of lifetime benefits, the weight of case authority supports the approach "that a reservation of rights clause allows the employer to retroactively change the medical benefits of retired participants, even in the face of clear language promising company-paid lifetime benefits."[46] In *Chiles*, however, the Tenth Circuit found it unnecessary to adopt a "hard-and-fast rule" that a general reservation of rights clause unambiguously controlled a promise of lifetime benefits found elsewhere in the same ERISA document because it found that the plan language allowed the employer the right to change benefits.[47] Since the Tenth Circuit's decision in *Chiles*, four additional circuits have determined that retirees' benefits were not vested because the same document indicating lifetime benefits also contained an unambiguous reservation of rights provision allowing the employer to terminate or change the plan at any time.[48]

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of rights provisions at issue left "at least some doubt" as to whether the defendant had the right to change benefits to retired individuals).

[46] *Chiles*, 95 F.3d at 1512 n. 2.

[47] *Id.* at 1512.

[48] *See Vallone* v. *CNA Fin. Corp.*, 375 F.3d 623, 634 (7th Cir. 2004) (stating that "the 'lifetime' nature of a welfare benefit does not operate to vest that benefit if the employer reserved the right to amend or terminate the benefit."); *Abbruscato* v. *Empire Blue Cross & Blue Shield*, 274 F.3d 90, 99 (2d Cir. 2001) ("Because the same document that potentially provided the 'lifetime'

(Continued on following page)

Plaintiffs nevertheless argue that the language in the SPDs stating that their benefits will end only "when [they] die" is sufficient to indicate an intent on the part of Defendants to provide lifetime benefits. Plaintiffs rely upon a Tenth Circuit case, *Deboard* v. *Sunshine Mining & Refining Co.*, [23] for this proposition.[49] In *Deboard*, the employer sent letters to employees informing them of an early retirement program.[50] The letter stated that employees who chose to participate in early retirement "would be entitled to receive health care * * * [at the employer's] expense until the time of your death."[51] The letter also contained specifics as to how the plan worked.[52]

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benefits also clearly informed employees that these benefits were subject to modification, we conclude that the language contained in the [ ] SPD is not susceptible to an interpretation that promises vested lifetime life insurance benefits."); *Spacek* v. *Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998) (noting that in the ERISA welfare benefit context, most cases recognize that "a general amendment provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually, and thus become unalterable, after the employee retires."), overruled on other grounds in *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739 (2004); *Sprague* v. *Gen. Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998) (finding no ambiguity in a plan that contained both a promise for lifetime coverage and a reservation of rights clause allowing the employer to amend or terminate the plan and therefore determining that the plaintiffs' benefits were not vested).

[49] 208 F.3d 1228 (10th Cir. 2000).

[50] *Id.* at 1232-33.

[51] *Id.* at 1233.

[52] *Id.* at 1238-39.

The Tenth Circuit found that this letter constituted a new benefit plan, not previously in existence, for early retirees.[53] Accordingly, the Tenth Circuit looked to the terms in that letter to determine whether plaintiffs' rights were vested.[54]

Although the Tenth Circuit found in *Deboard* that the plaintiffs' rights were vested under the plan, the facts in this case are distinguishable. In *Deboard*, the new benefit plan promising benefits until death did not include a reservation of rights clause. Nor did the new benefit plan contain any language indicating that the employer could terminate or change the plan at any time. In addition, the Tenth Circuit determined that even if they read the letter to incorporate a reservation of rights clause from the employer's other plan documents, the reservation of rights provision was ambiguous as to whether the employer had the right to terminate or make changes to the plan.[55] Those facts are not present in this case. The document that contains language indicating that benefits are available until Plaintiffs' deaths also contains several reservation of rights provisions [24] explicitly stating that the company can terminate or change the plan at any time. Furthermore, it is unambiguous as to whom could discontinue or terminate the plan. The SPDs state that the company reserves

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[53] *Id.*

[54] *Id.*

[55] *Id.* at 1240.

the right to discontinue the plan at any time. Thus, the language in the SPDs at issue differs from the language in *Deboard*.[56]

The language in Plaintiffs' SPDs is more akin to language that other circuits have found non-indicative of vested lifetime benefits. In *Crown Cork & Seal Co.* v. *Int'l Association of Machinists*,[57] the Eight [sic] Circuit considered language in an SPD

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[56] Plaintiffs also rely on the Tenth Circuit's unpublished opinion of *Aguilar* v. *Basin Res.*, *Inc.*, 47 F. App'x 872 (2002), for the proposition that a promise of benefits "for life" or "until death" indicates an intent to vest those benefits. In *Aguilar*, the Tenth Circuit interpreted a coal wage collective bargaining agreement. *Id.* at 873. The court determined that the agreement was ambiguous because it contained numerous statements that benefits would continue "for life" or "until death" but also stated several times that health benefits would continue "during the term of 'this' agreement." *Id.* at 875. Thus, the court found it appropriate for the district court to consider extrinsic evidence to determine whether the defendant intended to provide lifetime benefits. *Id.*

The Tenth Circuit's opinion in *Aguilar* is distinguishable and not applicable to the facts of this case. First, the collective bargaining agreement 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 miners. *Id.* at 875 and n. 4. Furthermore, there is only one reference in the SPD that benefits may continue until death, in contrast to the numerous references of lifetime benefits in the collective bargaining agreement in *Aguilar*. Finally, the collective bargaining agreement in *Aguilar* did not contain a reservation of rights clause, while the SPDs here include reservation of rights provisions allowing the company to amend or terminate benefits at any time.

[57] 501 F.3d 912 (8th Cir. 2007).

that provided that coverage continued "until your death."[58] The Eight [sic] Circuit determined that this language was not "explicit vesting language, and in any case, it is inconsistent with the reservation-of-rights clause * * * which controls."[59] And the Third Circuit has held that "[a]n employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed [25] plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist."[60]

Plaintiffs complain that the reservation of rights clause is not cross-referenced in any section, does not appear with a heading or a warning, and is not listed in the Table of Contents. Thus, Plaintiffs assert that allowing Defendants to change or terminate the plan adds language to the "When Coverage Ends" section. The Court disagrees. In all of the SPDs at issue in

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[58] *Id.* at 918. This language was included in the SPD's "Termination of Coverage" section.

[59] *Id. See also Bouboulis* v. *Transport Workers Union of Am.*, 442 F.3d 55, 61 (2d Cir. 2006) (determining that although the plan listed death as a circumstance in which benefits could be terminated, the SPD did not contain any affirmative lifetime language indicating an intent to vest lifetime benefits); *Sengpiel* v. *B.F. Goodrich Co.*, 156 F.3d 660, 668 (6th Cir. 1998) (finding that language in the plan "providing that a retiree's spouse will continue to receive benefits after the retiree dies 'until death or remarriage' " fell "far short of expressing a clear intent to render such benefits 'forever unalterable' ").

[60] *Unisys I*, 58 F.3d at 904.

this section of the Court's order, the ROR clause, even if there is only one, appears either next to the Table of Contents or on the first page of the SPD. In the SPDs in which only one reservation of rights clause appears, it is in bold on the Table of Contents page. The placement of these RORs does not render them obscure, and the Court must read the SPDs as a whole.[61] Furthermore, not allowing Defendants to amend or terminate the plans or benefits under the plans eliminates the stated right to do so and would render the inclusion of the reservation of rights clause meaningless and leave it without effect.[62]

Plaintiffs also argue that the statement in SPDs 1 through 4 that retirees who participate in the plan "can feel secure that your family's health and well-being will be protected after you stop working" is an express assurance of life-long retirement security. The Court disagrees that this statement can be read as an intent to provide unalterable lifetime benefits. The statement simply [26] explains that retirees can participate in the plan once they are retired. It must be read in conjunction with the reservation of rights clause allowing Defendants to amend or terminate the plan *at any time*.

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[61] The Court finds it unnecessary to address the parties' disagreement over the timing of the enactment of several rules in the Code of Federal Regulations.

[62] *See Chiles*, 95 F.3d at 1513 (stating that plaintiffs' interpretation of the plan "would render the termination exception superflous").

In sum, the same document that purports to promise lifetime benefits also contains an unambiguous reservation of rights clause which clearly sets forth that Defendants could amend or terminate benefits at any time. Accordingly, the Court grants summary judgment to Defendants with respect to the contractual vesting claims of the Named Plaintiffs and Selected Class Members covered by SPDs 1 through 6, 18, and 24 through 32.

b. The Second Group of SPDs (7 through 9)

The second group of three SPDs are life insurance SPDs. The language in each of the three SPDs is substantially similar. Unlike the SPDs discussed above, these life insurance SPDs do not contain an express reservation of rights provision. Nor do they contain any express statement that coverage ends upon death.

Named Plaintiff Britt contends that his life insurance benefits vested under SPD 7.[63] Named Plaintiff Britt, however, also relies on a collective bargaining agreement in effect when he retired. Because Britt relies on both SPD 7 and a collective bargaining agreement, the Court will discuss Britt's claim separately below in Section I(4)(b)(3). Named Plaintiff Barnes relies on SPD 8 for her claim of vested

[63] 185 selected class members retired while SPD 7 was in effect.

life insurance benefits.[64] Named Plaintiffs Fulghum, Daniel, Dorman, Joyner, and McLaurin rely on SPD 9.[65] Named Plaintiffs Hollingsworth, Bullock, and Games base their claim [27] for vested life insurance benefits on SPDs 5 and 9. A total of 2,205 selected class members retired while SPDs 7 through 9 were in effect.

1. Language in these SPDs

The pertinent provisions in these life insurance SPDs are as follows. A section entitled "Benefits for You" states:

> If you are an Employee who is retired on pension on or after June 1, 1981, and you were insured as an Active Employee for contributory insurance under the Group Policy, or the Group Policy replaced on June 1, 1981, for the full time after your forty-fifth birthday that you were eligible for such insurance, the amount of your Life Insurance during the first five years following the date of your retirement *will be* an amount equal to the amount of your Life Insurance on the day preceding the date of your retirement. On the fifth anniversary of the date of your retirement the amount of your Life

[64] 813 selected class members retired while SPD 8 was in effect.

[65] 1,207 selected class members retired while SPD 9 was in effect.

> Insurance *will automatically reduce* to the greater of (a) one-half of the amount of Life Insurance applicable to you prior to such fifth anniversary, and (b) $1,500.[66]
>
> If you retired on or after September 1, 1965, but before June 1, 1981, your Life Insurance will be that amount, if any, applicable to you under the Group Policy on May 31, 1981, and, if the fifth anniversary of the date of your retirement is on or after June 1, 1981, will be subject to the reduction set out in the preceding paragraph on the fifth anniversary of the date of your retirement.
>
> If you retired prior to September 1, 1965, your Life Insurance on June 1, 1981, will be that amount, if any, applicable to you under the Group Policy on May 31, 1981.

A section entitled "When Your Insurance Ends" states:

> Your insurance under the Group Policy will end on the earliest of the following dates:
>
> (a) the date the Group Policy terminates;
>
> (b) the date ending the period for which you last contributed toward the cost of your insurance, if you discontinue your contributions; and
>
> (c) the date your employment as a member of the Eligible Group ends.

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[66] Emphasis added.

[28] * * *

> Notwithstanding any provisions herein to the contrary, if any person is absent from active work as the result of retirement on pension, his employment may be deemed to continue for the purposes of insurance hereunder until terminated by the Policyholder.

Another section, "Life Insurance For You" states: "If your death occurs while you are insured under the Group Policy, [insurer[67]] will pay the amount of your group life insurance to your beneficiary."

Finally, three pages at the end of these SPDs set forth additional information about ERISA. One of the provisions states: "The requirements for being covered under this plan, the provision concerning termination of coverage, a description of the plan benefits (including any limitations and exclusion which may result in reduction or loss of benefits) are shown on the preceding pages of this booklet."

SPD 9 also states: "The Group Policy is a contract between the Policyholder and Pilot Life which alone constitutes the agreement under which payments are made. It may be changed or terminated only by those parties."[68] CT&T is designated as the Policyholder.

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[67] In SPD 7, the insurer is EQUICOR. In SPD 8, the insurer is CIGNA. In SPD 9, the insurer is Pilot Life.

[68] SPDs 7 and 8 do not have this provision.

2. Discussion of SPDs 7, 8, and 9

Defendants argue that they are entitled to summary judgment with respect to these SPDs because the named Plaintiffs and selected class members cannot demonstrate an intent to provide vested benefits because (1) the aforementioned SPDs do not state that retirees' life insurance benefits are forever unalterable, and (2) the SPDs contain an express provision allowing for termination of the policy. Plaintiffs contend that (1) because these SPDs do not contain reservation of rights provisions, Defendants do not have the power to make changes; (2) the SPDs contain [29] promises that indicate vested benefits; and (3) the language that the group policy can be terminated is ambiguous.

(a) The SPDs do not contain affirmative, lifetime language

Plaintiffs contend that because these SPDs lack express ROR provisions, Defendants intended to provide vested lifetime benefits. The Tenth Circuit, however, requires that contractual vesting be stated in express language.[69] Other circuits also require affirmative contractual vesting language. "The absence of language in [a plan document] flatly *rejecting* the concept of vesting does not alter the retirees' failure to identify language that affirmatively operates to

[69] *Chiles*, 95 F.3d at 1513; *see also Welch*, 382 F.3d at 1086.

imply vesting."[70] Silence is not "tantamount to an affirmative contractual commitment."[71] Thus, the fact that these SPDs do not contain an express reservation of rights clause stating that the plans can be amended or terminated does not indicate unalterable lifetime benefits for the plan participants.

Plaintiffs also argue that the following language indicates an intent to provide vested, lifetime benefits:

> If you are an Employee who is retired on pension on or after June 1, 1981 * * * the amount of your Life Insurance during the first five years following the date of your retirement *will be* an amount equal to the amount of your Life Insurance on the day preceding the date of your retirement. On the fifth anniversary of the date of your retirement the amount of your Life Insurance

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[70] *Joyce* v. *Curtiss-Wright Corp.*, 171 F.3d 130, 135 (2d Cir. 1999).

[71] *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993). *See also Sullivan* v. *CUNA Mut. Ins. Soc'y*, 649 F.3d 553, 557 (7th Cir. 2011) ("To establish that rights have vested as a matter of contract, the plan participant must demonstrate that the employer tied its own hands. The absence from any given communication of language reserving a right to amend a plan is some distance from the presence of language negating that entitlement. Silence is just that—silence. Participants need more than silence to establish vested rights to lifetime benefits."); *Sengpiel* v. *B.F. Goodrich Co.*, 970 F. Supp. 1322, 1337 (N.D. Ohio 1997) ("[T]he mere absence of a reservation of rights clause does not establish that plan benefits are vested.").

> *will automatically reduce* to the greater [30] of (a) one-half the amount of Life Insurance applicable to you prior to such fifth anniversary, and (b) $1,500.[72]

Plaintiffs, relying upon *Devlin* v. *Empire Blue Cross & Blue Shield*[73] assert that terms of this kind, "will be" and "will automatically reduce," indicate vesting. The Court disagrees. In *Devlin*, the Second Circuit looked at two provisions of an SPD and found that the language was "'capable of reasonably being interpreted' as creating a promise to vest lifetime life insurance benefits."[74] The first provision in the SPD provided that "retired employees, after completion of twenty years of fulltime permanent service and at least age 55 will be insured."[75] The second provision provided that life insurance benefits "will remain at the annual salary level for the remainder of their lives."[76] The language specifically states that individuals, who have completed twenty years of service and

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[72] Emphasis added.

[73] 274 F.3d 76 (2d Cir. 2001).

[74] *Id.* at 85. Notably, the Second Circuit's standard for proving vested welfare benefits appears more lenient than the Tenth Circuit's standard. In the Second Circuit, "[i]t is enough to point to written language *capable of reasonably being interpreted* as creating a promise on the part of the employer to vest the recipient's benefits." *Id.* at 83 (citation omitted). In contrast, in the Tenth Circuit, "[c]ontractual vesting of a welfare benefit is an extra-ERISA commitment that must be stated in clear and express language." *Chiles*, 95 F.3d at 1513.

[75] *Devlin*, 274 F.3d at 84.

[76] *Id.* at 85.

reached 55 years, *will be insured.* The Second Circuit determined that the language could "be construed as an offer that specifies performance as the means of acceptance—sometimes referred to as an offer for a unilateral contract—and promises lifetime insurance benefits upon performance."[77]

In Plaintiffs' case, there is no similar language offering lifetime benefits upon completion of performance. The language states that if an employee retires on pension on or after a certain date, [31] "the amount of [his or her] life insurance * * * will be an amount equal to the amount of your Life Insurance on the day preceding [his or her] retirement." The "will be" refers to the "amount" that the retiree may receive, rather than the term for which the retiree will receive it.

Furthermore, the SPD at issue in *Devlin* contained the additional statement that benefits "will remain at [the annual salary level] *for the remainder of their lives.*"[78] The Second Circuit determined that this " 'lifetime' language * * * [was] sufficient to create a triable issue of fact as to whether [defendant] promised to vest retiree life insurance benefits at the stated level."[79] In this case, the SPDs do not contain any similar durational language promising benefits for the remainder of the retiree's lifetime.

[77] *Id.* at 84.

[78] *Id.* at 85.

[79] *Id.*

Accordingly, the Court finds that these SPDs do not contain express language promising lifetime benefits. Nor do these SPDs contain ambiguous language regarding the company's intent to provide vested benefits.

(b) The SPDs contain termination provisions

The Court must read the SPDs as a whole, and there are several termination provisions in SPDs 7, 8, and 9. All of these SPDs contain provisions which provide that "[y]our insurance under the Group Policy will end on * * * the date the Group Policy terminates." SPD 9 contains an additional, express termination provision that states, "The Group Policy is a contract between the Policyholder and Pilot Life which alone constitutes the agreement under which payments are made. It may be changed or terminated only by those parties." CT&T is designated as the Policyholder.

Plaintiffs nevertheless argue that Defendants cannot terminate or amend the plan because language in the SPDs specifically distinguishes the *plan* from the group *policy*. At the end of the [32] group policy, it states that the plan is "the Group Life, Accidental Death and Dismemberment and Life Insurance on Dependents Plan," and the plan sponsor is CT&T. The SPD also provides that benefits under the plan are provided by the group policy. Because of this distinction between the plan and the policy and the fact that the termination provisions reference the group policy, and not the plan, Plaintiffs contend that Defendants only have the right to terminate the policy—not the plan itself. In the alternative, Plaintiffs contend that the language is ambiguous, which precludes Defendants from amending or terminating the benefits.

In *Gable* v. *Sweetheart Cup Co.*, the Fourth Circuit discussed a similar argument.[80] In that case, the master policy was the relevant plan document, and it contained a provision stating, "This Policy may be amended or discontinued at any time * * * without the consent of or notice to any [plan participant.]"[81] The plaintiffs argued that the modification clause reserved "only a right to change the particular insurance policy that the company purchased, not a right to change plan benefits in general."[82] But, as the Fourth Circuit noted, "A company may establish an employee welfare benefit plan merely by purchasing a group policy for its employees."[83] Thus, the Fourth Circuit found that the modification provision did not limit the company's right to amend the plan because

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[80] 35 F.3d at 856.

[81] *Id.*

[82] *Id.*

[83] *Id.* "An insurance policy may constitute the 'written instrument' of an ERISA plan." *Id.* (citing *Musto* v. *Am. Gen'l Corp.*, 861 F.2d 897, 900-01 (6th Cir. 1988)).

the policy was the entirety of the welfare benefit plan.[84]

[33] In this case, the last pages of the SPDs provide that "all benefits of this plan are provided by [the group policy]." They also state that "[t]he requirements for being covered under this plan * * * are shown on the preceding pages of this booklet." Indeed, Plaintiffs do not identify any other written document establishing plan benefits, and they rely on the language in the SPD in an attempt to establish their vested benefits. Thus, there does not appear to be a distinction between the policy and the plan.

None of these SPDs contain clear and express language providing for vested, lifetime benefits. In addition, all three SPDs contain provisions indicating that benefits may terminate at some point.[85] Accordingly, the Court grants Defendants' motion with respect to those Named Plaintiffs and Selected Class Members covered by SPDs 7 through 9.

3. Discussion of Named Plaintiff Britt's Claim (SPD 7 and the 1984 CBA)

Named Plaintiff Britt retired in 1985. When he retired, CT&T and the Communications Workers of

[84] *Id.*

[85] Admittedly, SPD 9's express termination clause is the strongest. Nevertheless, language in the SPDs indicates that coverage may terminate at some point.

America ("CWA") were parties to a collective bargaining agreement effective November 30, 1984, through November 29, 1987 ("1984 CBA"). Britt contends that SPD 7 and the 1984 CBA are relevant to his claim of vested medical and life insurance benefits. Thus, the Court must consider the 1984 CBA in conjunction with SPD 7 with respect to named Plaintiff Britt.

The 1984 CBA provides that "[t]he Company will maintain a medical insurance plan and pay 100% of the plan premium during the term of the agreement." It also provides that "[o]ther insurance programs of the Company, including group life insurance * * * , shall remain in force during the term of the agreement." Article 36, Section 1 of the 1984 CBA, "Duration of Agreement," [34] provides that "[t]his agreement becomes effective on November 30, 1984 and shall remain in full force and effect until 12:00 midnight on November 29, 1987." Section 2 states:

> This Agreement shall continue in full force and effect after November 29, 1987 unless either party gives the other party sixty (60) days written notice to cancel, revise or modify part of the Agreement. In the event agreement is not reached within sixty (60) days after such notice of cancellation, the Agreement shall in all respects be voided and terminated. Extensions may be agreed to by written agreement between the parties.

Defendants do not specifically address how this CBA relates to named Plaintiff Britt's claim of vested benefits. Plaintiffs also do not address how this CBA specifically relates to Britt's claim, but they do address some of the language contained in the CBA. Plaintiffs contend that because the CBA expressly states that it will continue past the expiration date of November 29, 1987, unless the union and the employer agree to a revision, the CBA providing for the retiree benefits does not expire. Because Defendants do not address whether the CBA remains in effect, they cannot demonstrate the absence of a genuine issue of material fact. Accordingly, the Court denies Defendants' motion for summary judgment as to named Plaintiff Britt.

c. *The Third Group of SPDs (10 through 12 and 19)*

These four SPDs are medical SPDs. The language in these four SPDs is substantially similar. Language in these SPDs indicate that benefits will continue after retirement. There is also an express reservation of rights clause allowing Defendants to terminate or amend the plan for reasons of business necessity and several termination provisions throughout the policy.

[35] Named Plaintiff McLaurin contends that his medical benefits vested under the terms of SPD 10.[86]

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[86] An additional 181 class members retired while SPD 10 was in effect. Named Plaintiff Britt also relies upon SPD 10, but as noted above, Britt also falls under a collective bargaining agreement.

Named Plaintiff Barnes contends that her medical benefits vested under SPDs 11 and 12.[87] A total of 717 selected class members retired while SPDs 10 through 12 were in effect. SPD 19 is substantially similar to SPDs 11 and 12. An additional 55 class members retired while SPD 19 was in effect.

1. Language in these SPDs

SPDs 10 through 12 and 19 include the following provisions. The section entitled "When You Retire" provides that "[a]ll benefits currently offered to active employees will continue after retirement by CT&T." The "When Your Insurance Begins" section includes a sub-heading of "When You Retire." Under this sub-section, it provides:

> All benefits currently offered to active employees will continue after retirement by CT&T.
>
> If you have not attained age 65, you will be insured for the same benefits currently offered to regular employees.
>
> If you have attained age 65, you will be insured for the same benefits currently offered to regular employees but subject to the

[87] An additional 725 class members retired while SPD 11 was in effect, and an additional 811 class members retired while SPD 12 was in effect.

> application of the Non-Duplication of Benefits Provisions.
>
> The "When Insurance Ends" section provides:
>
> Your insurance ends when any of the following events occurs:
>
> (1) you leave our employ
>
> (2) you are no longer eligible
>
> (3) the Group Policy ceases.
>
> * * *
>
> [36] If you are insured for your dependents under the Group Policy on the date of your death, and your spouse survives you, the Medical Care Insurance only on account of your Eligible Dependents may be continued, while the Group Policy remains in force and subject to all its provisions, until the widow's (or widower's) remarriage, provided the payment of any required contribution is made when due.

A "Cessation of Benefits (Group Health Insurance)" section provides:

> No benefits (including any extended benefits) will be paid under the plan for any charges, fees or expenses incurred on or after the first of these dates to occur:
>
> (1) the date the Group Policy ceases
>
> (2) the date the coverage ends on the class of which a person is a member.

Finally, there are several pages at the end of these SPDs setting forth additional information about ERISA rights. One of the provisions states: "The requirements for being covered by this plan, the provision concerning termination of coverage, a description of the plan benefits (including any limitations and exclusion which may result in reduction or loss of benefits) are shown on the preceding pages of this booklet." Under "Future Plan Benefits," it provides that "[t]he Company expects to continue the Plan for the foreseeable future. However, the Company reserves the right to amend, discontinue or terminate the Plan, for reasons of business necessity or financial hardship."

SPD 10 also states, "The Group Policy is a contract between the Policyholder and Pilot Life. They are the only parties to the contract. The contract alone is the agreement by which payments are made. It may be changed or terminated only by one of these parties."[88] CT&T is designated as the Policyholder.

[37] ***2. Discussion of these SPDs***

Defendants argue that they are entitled to summary judgment with respect to these SPDs because the named Plaintiffs and selected class members cannot demonstrate an intent to provide vested benefits because: (1) these SPDs do not state that retirees' life

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[88] SPDs 11, 12, and 19 do not contain this language.

insurance benefits are forever unalterable, and (2) these SPDs contain provisions allowing for termination of the policy. Plaintiffs contend that unqualified promissory language indicates an intent to provide vested benefits, and the reservation of rights language only allows Defendants to terminate or amend the plan for business necessity or financial hardship which Defendants fail to demonstrate.

(a) The SPDs do not contain affirmative, lifetime language

Plaintiffs assert that the following provisions in the SPDs are unqualified promises of vested, lifetime benefits for retirees: (1) "[a]ll benefits currently offered to active employees *will continue* after retirement," and (2) "you *will be insured* for the same benefits currently offered to regular employees." The Court will first address the "will continue" language.

The Tenth Circuit, and several other circuits, have addressed similar language and have determined that the language is not indicative of vested benefits. In *Deboard*, the Tenth Circuit considered language in a plan providing that employees "would be allowed to continue participation in the Group Dental Plan at company expense" and that employees "would also be covered for $10,000 life insurance on [themselves] and $5,000 on [their spouse(s)] with

Security Connecticut, with the premiums for these coverages also paid by the Company.[89] Despite the language that the employees' benefits "would be allowed to continue" and that the employees "would be covered" for [38] a certain amount, the Tenth Circuit found that "[n]othing in this language suggests an intent on the part of defendants to create vested rights in dental and life insurance coverage."[90]

In *Sengpiel* v. *B.F. Goodrich Co.*, the Sixth Circuit considered a SPD which stated that "if you retire and are eligible for a pension you *shall continue* to have the same health coverage."[91] The Sixth Circuit determined that "such language neither expressly guarantees lifetime benefits nor creates an ambiguity as to whether such benefits are vested."[92] Other language in the plan provided that "a retiree's spouse *will continue* to receive benefits after the retiree dies 'until death or remarriage.'"[93] Although the Sixth Circuit found that this language was more persuasive, it still fell "far short of expressing a clear intent to render such benefits 'forever unalterable.'"[94]

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[89] 208 F.3d at 1234, 1242. As noted above, the Tenth Circuit determined that a letter sent to the retiring employees constituted the new benefit plan in which benefits for employees were established and looked to the language in that letter when determine [sic] whether, and what type of benefits, were vested.

[90] *Id.* at 1242.

[91] 156 F.3d at 668 (emphasis added).

[92] *Id.*

[93] *Id.* (emphasis added).

[94] *Id.*

Similarly, in this case, the Court finds that the "will continue" language does not promise lifetime benefits nor establish an intent to provide vested, unalterable benefits. With respect to the language "you will be insured for the same benefits currently offered to regular employees," Plaintiffs emphasize the "will be insured" language. This language, however, must be read in the context of the entire sentence, and it is simply explaining the type of benefits available to retirees after their retirement.[95] It does not state, nor imply, that benefits are forever unalterable once an individual retires.

[39] In sum, the language Plaintiffs identify as unqualified promises of lifetime benefits do no such thing. The language does not establish an intent to provide lifetime, unalterable benefits. Nor is the language ambiguous as to whether the company intended to provide vested benefits.

(b) The SPDs contain a ROR clause and termination provisions

Furthermore, SPDs 10 through 12 and 19 contain an express ROR provision. It provides that the

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[95] This language is unlike the plan language in *Devlin* which provided that individuals who had completed twenty years of service *will be insured.* 274 F.3d at 75. In that case, there was no qualifier to the "will be insured" language, and it simply provided that the individuals would be insured.

company expects to continue the plan for the foreseeable future, but it reserves the right to amend, discontinue, or terminate the plan, for reasons of business necessity or financial hardship. Both parties rely upon the Tenth Circuit's opinion in *Chiles* v. *Ceridian Corporation* when interpreting the meaning of this ROR clause. Defendants contend that the ROR clause is similar to the ROR clause in *Chiles*, and it gives Defendant almost unlimited authority to terminate or amend the plan. Plaintiffs contend that the ROR language contains a more rigorous standard for amending or terminating the plan than the one the Tenth Circuit considered in *Chiles.*

In *Chiles*, the ROR clause provided that the company intended to continue the plan indefinitely, but it reserved the right to change or discontinue it if it became necessary.[96] In discussing this ROR clause, the Tenth Circuit found that "the termination clause retained almost unlimited discretion in [defendant] to change the plan * * * * The term 'if necessary,' found in the SPDs of all four Control Data plans, is not conditioned on any event or circumstance. Thus its meaning cannot fairly imply, as plaintiffs suggest, that the plans can only be amended if necessary to their fiscal survival."[97]

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[96] 95 F.3d at 1509, 1513.

[97] *Id.* at 1513. *See also Hughes* v. *3M Retiree Med. Plan*, 281 F.3d 786, 792-93 (8th Cir. 2002) (finding that plaintiffs did not meet their burden of proving vesting language when a plan contained no specific vesting language and contained a reservation

(Continued on following page)

[40] In this case, the ROR clause does appear to impose a higher standard than the "if necessary" standard in *Chiles* because it is premised on "business necessity" or "financial hardship." But the "business necessity" standard is only slightly more stringent because Defendants could amend the plan for business necessity.[98] In any event, it is important to note that the issue before the Court is whether there is a question of fact as to whether the plan language indicates an intent to provide Plaintiffs with vested lifetime insurance benefits. The fact that these SPDs contain an express ROR clause allowing the company to discontinue or terminate the plan, even premised on the basis of business necessity, indicates that Defendants did not intend to provide unalterable, vested benefits.[99] In contrast, the ROR language indicates that the company contemplated amending or terminating the plan.

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of rights clause allowing the company to discontinue benefits "if necessary").

[98] The Court disagrees with Plaintiffs' assertion that "business necessity" has a financial aspect because of its close proximity to the term "financial hardship." The use of the word "or" indicates that the company reserved the right to amend or terminate benefits on the basis of either business necessity *or* financial hardship.

[99] *See Hughes*, 281 F.3d at 792-93 ("It is plain and unambiguous that the word 'intends' does not indicate finality. To hold otherwise would render the words 'reserves the right to change or discontinue it if necessary' meaningless.").

Furthermore, these SPDs contain several termination provisions throughout the SPDs. All of these SPDs include a provision stating that "your insurance ends when * * * the group policy ceases."[100] In addition, a section entitled "Cessation of Benefits" provides that "no benefits (including any extended benefits) will be paid under the plan * * * incurred on or after * * * the date the Group Policy ceases." Finally, SPD 10 contains an express termination provision stating that CT&T can change or terminate the policy.[101] For the reasons set forth above in Section I(C)(4)(b)(2)(b) of this Order, the Court finds that these termination provisions indicate that [41] Plaintiffs' benefits were not vested and unalterable. When considering the SPDs as a whole, the Court cannot find questions of fact as to whether Defendants intended to provide vested benefits. Nor can the Court find that these SPDs are ambiguous. Accordingly, the Court grants Defendants' motion for summary judgment with respect to those Named Plaintiffs and Selected Class Members covered by SPDs 10 through 12 and 19.

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[100] These termination provisions are similar to the termination provisions in SPDs 7 through 9.

[101] SPD 10's provision is similar to SPD 9's termination provision.

d. The Fourth Group of SPDs (13 through 15 and SPDs 20 through 23)

The fourth group of SPDs relate to life insurance benefits. Language in these seven SPDs is substantially similar. Named Plaintiffs Betty and Kenneth Carpenter contend that their life insurance benefits vested under SPD 13.[102] Named Plaintiff Somdahl alleges that his life insurance benefits vested under the terms of SPD 14.[103] A total of 360 selected class members retired while SPDs 13 and 14 were in effect. SPDs 20 through 23 are substantially similar to SPDs 13 and 14. An additional 306 class members retired while SPDs 20 through 23 were in effect. Named Plaintiff King contends that his life insurance benefits vested under SPD 15.

1. Language in these SPDs

All of these SPDs contain charts showing the amount of contributory life insurance depending on the employee's annual compensation. In the "Notes" section of all of these SPDs, except SPD 15, it provides:

> If you have at least five years of service with United Telephone System on the date you

[102] An additional 314 class members retired while SPD 13 was in effect.

[103] An additional 46 class members retired while SPD 14 was in effect.

> retire, your Basic Contributory Life Benefits *will be reduced* by 50 percent. Such insurance will not be more than $13,000.[104]
>
> [42] * * *
>
> If you retire after age 65, your Life Benefits will not be less than the Life Benefits you would be entitled to if you retired prior to age 65.

SPD 15 includes the following provision:

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

All of these SPDs include the following language:

> When Insurance Ends

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[104] Emphasis added.

> Your insurance ends when any of the following events occurs:
>
> 1. You leave our employ.
> 2. You are no longer eligible.
> 3. The group policy ceases.

On the last pages of these SPDs, entitled the Certificate of Insurance, additional information about ERISA rights are set forth. The last provision on "Future Plan Benefits" provides that "[t]he Company expect [sic] to continue the plan for the foreseeable future. However, the company reserves the right to amend, discontinue or terminate the plan, for reasons of business necessity or financial hardship."

[43] ***2. Discussion of these SPDs***

Defendants and Plaintiffs assert the same argument that they asserted with respect to SPDs 10 through 12. That is, Defendants argue that they are entitled to summary judgment because the named Plaintiffs and selected class members cannot demonstrate an intent to provide vested benefits because: (1) these SPDs do not state that retirees' life insurance benefits are forever unalterable, and (2) these SPDs contain express provisions allowing for termination of the policy. Plaintiffs again contend that unqualified promissory language indicates an intent to provide vested benefits, and the reservation of rights language only allows Defendants to terminate or amend the plan for business necessity or financial hardship which Defendants fail to demonstrate.

(a) The SPDs do not contain affirmative, lifetime language

Plaintiffs identify the following language in SPDs 13, 14, and 20 through 23, as unqualified, promissory language of lifetime benefits: "If you have at least five years of service with United Telephone System on the date you retire, your Basic Contributory Life Benefits *will be reduced* by 50 percent." With respect to SPD 15, Plaintiff Somdahl contends that the following language is indicative of lifetime benefits:

> Your basic Contributory Life Benefits *will be reduced* by 50% when you retire * * * * Any excess amount over the basic $13,000 *will be payable* only to a surviving spouse. If there is no surviving spouse or if the employee so designates, it *will be payable* to a minor or dependent child or children as defined in our group health and medical insurance plan. This excess amount over $13,000 will be paid as a survivor's insurance and *will be paid* in equal monthly installments.[105]

Plaintiffs contend that the "will be reduced" language demonstrates Defendants' intent to provide vested benefits. This language does not promise

[105] Emphasis added.

lifetime benefits nor state the duration of [44] life insurance benefits. Instead, the language merely sets forth the amount of life insurance benefits and how it will be reduced. Furthermore, there is no other language in these SPDs indicating the duration of these benefits.[106] Thus, the Court finds no affirmative language indicating an intent to provide vested, unalterable benefits.

(b) The SPDs contain a ROR clause and termination provisions

In addition, these SPDs contain (1) a ROR provision identical to the ROR provision contained in SPDs 10 through 12; and (2) a section entitled "When Your Insurance Ends" similar to the "When Your Insurance Ends" section in SPDs 10 through 12. With respect to the ROR provision and termination provisions in SPDs 13 through 15 and 20 through 23, the Court adopts the reasoning set forth above in Section I(C)(4)(b)(2)(b) of this Order.

When considering these SPDs in their entirety, there is no express language indicating an intent to provide vested, lifetime benefits nor language

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[106] The Court also notes that this language is similar to the language contained in SPDs 7 through 9 which provided that "the amount of your life insurance * * * *will be* an amount equal to the amount of your Life Insurance on the day preceding your retirement." The reasons set forth above in section I(C)(4)(b)(2)(a) are applicable here as well.

indicating an ambiguity as to whether Defendants intended to provide lifetime benefits. Thus, there are no questions of fact, and the Court grants Defendants' motion for summary judgment with respect to those named Plaintiffs and selected class members covered by SPDs 13 through 15 and SPDs 20 through 23.

e. Named Plaintiff Clark's Claim (SPDs 16 and 17 and the 1974 CBA)

The final two SPDs, 16 and 17, are only applicable to named Plaintiff Clark.[107]

[45] ***1. Language in these SPDs and language in the CBA***

SPD 16 relates to medical benefits and provides that "[i]nsurance coverage for you and your dependents can be continued after retirement." SPD 17 addresses life insurance benefits. It provides under the "Eligibility" section that "[r]egular life insurance, but not Accidental Death and Dismemberment, is continued for employees after retirement." It also provides under the section of "Limitation of Benefits:"

> Regular life insurance, but not Accidental Death and Dismembership, is continued for employees after retirement if they have been

[107] No other class members rely on these SPDs. Furthermore, Defendants do not identify any other SPDs containing similar language to SPDs 16 and 17.

> insured the entire time they were eligible after age forty-five. On the fifth anniversary of retirement, the amount of the insurance is reduced by fifty percent (50%) and remains at that figure for lifetime.

Both SPD 16 and 17 contain the following provisions:

> *Termination of Benefits*
>
> Insurance coverage will automatically terminate if your active full time employment in the classes eligible for insurance terminates, or if the provisions of the group policy under which you are covered terminate.
>
> *Collective Bargaining Agreement*
>
> This plan, as applicable to union represented employees, is maintained pursuant to a collective bargaining agreement. Benefits under the plan for employees covered under the bargaining agreement will depend on the terms of the agreement.

When Clark retired in 1976, CT&T and the CWA were parties to a CBA effective June 29, 1974. Clark testified that as an hourly employee, he was covered by this CBA. This 1974 CBA provides:

> The insurance programs of the Company, including group life insurance, dependent life insurance, basic hospitalization insurance and extraordinary medical expense plan, shall remain in force during the term of the Agreement * * * *

> [46] The Company reserves the right to charge individual employees with any increases in premium costs beyond those in effect for all insurance programs on the date of this Agreement.

Article 36, Section 1 of the 1974 CBA, "Duration of Agreement," provides that "[t]his agreement becomes effective at 12:00 noon on June 29, 1974 and shall remain in full force and effect until 12:00 noon on June 29, 1977 * * * * " Section 3 provides:

> This Agreement shall continue in full force and effect after June 29, 1977 unless either party gives the other party sixty (60) days written notice to cancel, revise or modify part of the Agreement. In the event agreement is not reached within sixty (60) days after such notice of cancellation, the Agreement shall in all respects be voided and terminated. Extensions may be agreed to by written agreement between the parties.

2. Discussion

Defendants provide no evidence that this CBA expired and do not address whether the CBA remains in effect. Thus, Defendants cannot demonstrate the absence of a genuine issue of material fact. Accordingly, the Court denies Defendants' Motion for Summary Judgment as to named Plaintiff Clark.

f. Conclusion

In sum, the Court grants in part Defendants' Motion for Summary Judgment on Named Plaintiffs' Contractual Vesting Claims. The Court grants it with respect to all named Plaintiffs except Plaintiffs Britt and Clark. With respect to these two named Plaintiffs, the Court denies the motion. The Court grants Defendants' Motion for Summary Judgment on Selected Class Members Contractual Vesting Claims in full.

[47] **D. Defendants' Motion to Decertify Class Action (Doc. 285)**

Defendants also bring a Motion to Decertify Class Action. In this motion, they argue that individual questions predominate over common questions of fact. Since Defendants filed the motion, multiple events have occurred. First, as noted above, Judge O'Hara entered a sanction order precluding class members from taking a position in the litigation inconsistent with Defendants' document-to-class-member mapping. Thus, the remaining class members cannot identify additional CBAs or documents relevant to their claim of contractual vesting and are bound to the documents Defendants identified. Accordingly, there may not be the voluminous amount of documents for the Court to consider.

Next, only two named Plaintiffs remain with respect to the contractual vesting claims because the Court granted in part Defendants' Motion for

Summary Judgment.[108] Both of these Plaintiffs rely on a different CBA and different SPDs. Because the remaining class members cannot rely on the same CBAs as Plaintiff Britt and Plaintiff Clark, these class members do not appear similar to the two remaining named Plaintiffs.

The Court notes that Defendants only brought summary judgment on some of the SPDs and the class members covered by those SPDs. The Court is unclear as to how many SPDs and class members remain in the case. Because of these factors, the Court cannot determine whether other class members are similarly situated or whether the remaining SPDs contain similar language applicable to numerous class members. Accordingly, the Court denies Defendants' Motion to [48] Decertify Class Action without prejudice to refiling the motion based on the current factual circumstances of the case.

II. Breach of Fiduciary Duty Claim under ERISA

Plaintiffs' second claim is a breach of fiduciary duty claim under 29 U.S.C. § 1132(a)(3). This statute provides that "a civil action may be brought by a

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[108] The Court notes that Defendants argue in their Motion to Decertify Class Action that individual issues predominate over common questions while simultaneously asserting in their Motions for Summary Judgment that the Court can determine the question of contractual vesting for numerous class members.

participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this subchapter or the terms of the plan." Plaintiffs assert that Defendants breached their fiduciary duty by misrepresenting the terms of the plans by affirmatively telling Plaintiffs that their medical and life insurance benefits were lifetime benefits. Plaintiffs also contend that Defendants failed to inform them that their benefits could change.

A. Factual Background

The seventeen named Plaintiffs bring this claim.[109] Defendants for this claim include Embarq, the Employee Benefits Committee of Embarq, Sprint Nextel, Embarq Mid-Atlantic, CT&T, and Randall Parker. With respect to the evidence that the parties

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[109] When Plaintiffs sought certification of the ERISA class for claims one and three (contractual vesting claims), they also sought the Court's certification of the first three elements of their breach of fiduciary duty claim. The Court denied their request because it appeared that individualized inquiries predominated common questions of fact. *See* Doc. 199 in Case No. 07-2602. In late 2011, approximately 920 of the ERISA class members in this case filed *Abbott* v. *Sprint Nextel Corporation*, Case No. 11-2572, in the District of Kansas. *See* Case No. 11-CV-2572-EFM-GLR, Doc. 1. They assert a breach of fiduciary duty claim. Case No. 11-2572 is stayed pending the resolution of the summary judgment motions in this case.

presented,[110] the Court will only give a broad view. Most of the seventeen named Plaintiffs worked for the company for approximately thirty-five years. The seventeen Plaintiffs retired from Defendant between 1976 [49] through 2003.[111] Fifteen of these seventeen Plaintiffs effectuated their retirement prior to December 28, 2007. All of these Plaintiffs received medical benefits and were entitled to life insurance benefits until Embarq announced a change to those benefits in 2007.[112]

Benefits Supervisor Gayle Phillips worked for the company for thirty years in the benefits arena. Phillips counseled thousands of retirees and managers, face to face and in group meetings, and did not tell them that the company was reserving its right to terminate the benefits. Phillips had her staff create checklists to be distributed to retirement-eligible employees, and she expected employees to rely upon these checklists.

An example of a portion of a checklist is as follows. It states:

> Life insurance (2x) will be continued at no cost to the retiree. The provisions for accidental

[110] Both parties object to the majority of the other party's "uncontroverted" facts.

[111] Named Plaintiff Clark retired in 1976, and named Plaintiff Barnes retired in 2003.

[112] Clark received these benefits without interruption from 1976 through 2007.

> death and dismemberment are excluded for retired personnel. On the fifth anniversary of your retirement, insurance will be reduced by 50% and will remain at this figure for the remainder of the retiree's lifetime.

In addition, the checklist has language regarding medical insurance. One version of the checklist states: "If the retiree is participating in the group medical care and dental insurance plans, insurance may be continued after retirement provided the monthly premium (if applicable) is paid * * * The premium (if applicable) will automatically be deducted from the retiree's pension check." Another version of the checklist states: "Medical care insurance will be continued at no cost for the retiree and their dependent(s)." Seven of the named Plaintiffs contend that they were given a version of these checklists. Phillips also spoke with several of the named Plaintiffs regarding their retirement benefits.

[50] In late 2001, E.J. Holland, Jr., CT&T's Vice-President in charge of Compensation, Benefits, and Labor Relations, sent a letter to several of the named Plaintiffs describing a new benefit program, Sprint Healthcare Annual Retiree Election ("SHARE"), to be implemented in 2002. This letter briefly summarized how benefits would work if an employee retired in 2001 or if an employee retired in 2002 or later. One individual testified that human resources representatives told employees concerned about the new SHARE program that they had to retire by the end of 2001 to retain their grandfathered life insurance and

FlexCare medical insurance for the remainder of their lives. Several employees were forced to waive vacation time to keep this lifetime coverage.[113]

In November 2005, Sprint announced that the prescription drug benefits for participants and beneficiaries who were eligible for Medicare Part D coverage would be modified such that each participant and beneficiary would receive $41.67 a month, or $500 a year, effective January 1, 2006.

In July 2007, prior to Embarq's announcement of the medical care and life insurance benefit changes, the human resources staff created a question and answer memorandum to assist representatives in answering questions about the changes. One of the questions stated: "I have a letter that states I will receive medical and life insurance benefits for life." The answer to be provided: "Please send us a copy of that letter to the following address: * * * We will research our records and you will be provided with a written response within 60 days."

On July 26, 2007, Embarq announced that (1) company-sponsored medical coverage and the prescription drug subsidy provided to Medicare-eligible retirees and Medicare-eligible dependents of retirees would be eliminated effective January 1, 2008; (2) basic life insurance coverage would be eliminated for

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[113] Named Plaintiff Bullock testified that she had to waive twenty-five days of vacation in order to keep the grandfathered life insurance benefits.

retirees who were participants in the CT&T VEBA effective September 1, 2007; [51] and (3) basic life insurance coverage would be capped at $10,000 for all other retirees effective January 1, 2008.

B. Defendants' Motion for Summary Judgment on Breach of Fiduciary Duty Claim (Doc. 338)

Plaintiffs contend that Defendants breached their fiduciary duty to them by making misrepresentations in SPDs, other written documents, and in oral statements that they were entitled to lifetime medical and life insurance benefits when, in fact, they were not. Defendants argue that the Court should grant summary judgment because (1) the SPDs contain no misrepresentations or omissions, (2) the other written documents do not contain actionable misrepresentations or omissions, (3) the oral statements fail as a matter of law and cannot override the written language in the SPDs, (4) some of the oral statements were not made on behalf of the fiduciary, (5) Plaintiffs' reliance on the alleged misrepresentations or omissions was not reasonable, and (6) Plaintiffs' claims are barred by the statute of repose. Plaintiffs disagree with all of these contentions.

1. ERISA Fiduciary Law

A fiduciary has a duty to act "solely in the interest of the participants and beneficiaries."[114] To date, the Tenth Circuit has not set forth a definitive test for a breach of fiduciary duty claim based on a misrepresentation under ERISA.[115] In a previous Order in this case, the Court relied on a test articulated by the Third Circuit and set forth these four elements: "(1) the defendant's status as an ERISA fiduciary acting as a fiduciary; (2) a misrepresentation on the part of the defendant: (3) the [52] materiality of that misrepresentation; and (4) detrimental reliance by the plaintiff on the misrepresentation."[116]

2. Discussion

The Court will first address Defendants' statute of repose argument because it is dispositive of most of Plaintiffs' breach of fiduciary duty claims.[117] There is

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[114] *See Horn* v. *Cendant Operations*, *Inc.*, 69 F. App'x 421, 427 (10th Cir. 2003) (citing 29 U.S.C. § 1104(a)(1)(A)).

[115] *See Kerber*, 647 F.3d 950, 968 (10th Cir. 2011) (noting that the Circuit had not adopted a test and determining that it need not determine which version of the test to adopt in the case before it).

[116] Doc. 199, p. 5. The Court relied on *Romero* v. *Allstate Corp.*, 404 F.3d 212, 226 (3d Cir. 2005). The Court notes that the parties now dispute whether detrimental reliance is an element of a breach of fiduciary duty claim. The Court will discuss this contention in more detail below.

[117] The statute of repose argument is not applicable to named Plaintiffs Barnes and Dillon. Plaintiff Barnes retired in

(Continued on following page)

only one limitations period in ERISA, and it is for breach of fiduciary duty claims. ERISA section 413 provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not

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2003, and she contends that misrepresentations were made to her immediately prior to her retirement.

Although Defendants contend that the statute of repose argument is applicable to named Plaintiff Dillon, the Court cannot so conclude. It is unclear as to when Dillon retired as both parties assert different dates. Defendants assert both that Dillon retired in December 2002 and that he retired prior to December 28, 2001. Plaintiffs assert that Dillon was told that he would receive lifetime benefits if he retired prior to 2002 but that he effectuated his retirement in 2003. Thus, there is a question of fact as to Plaintiff Dillon's retirement date and whether the alleged misrepresentations he received in 2002 and 2003 were prior to or after his retirement date.

> later than six years after the date of discovery of such breach or violation.[118]

"As a statute of repose, § 413 serves as an absolute barrier to an untimely suit."[119]

[53] All Plaintiffs contend that Defendants breached their fiduciary duty by making misrepresentations that they were entitled to lifetime benefits. Plaintiffs contend that had they known their benefits could be terminated, they would have made different retirement and post-retirement decisions. Defendants argue that to the extent there was a breach of fiduciary duty, it was complete no later than the date Plaintiffs either stopped working or made the decision to retire. Because most of the Plaintiffs made the decision to retire at least six years before commencing this suit, Defendants assert that Plaintiffs' breach of fiduciary duty claim is barred by the six-year statute of repose.

Plaintiffs disagree and first argue that their claims are tolled by the statute's "fraud or concealment" provision because their breach of fiduciary duty claim is based on misrepresentations. Thus, Plaintiffs contend that the statute does not begin to

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[118] 29 U.S.C. § 1113.

[119] *Radford* v. *Gen'l Dynamics Corp.*, 151 F.3d 396, 400 (5th Cir. 1998). *See also Ranke* v. *Sanofi-Synthelabo*, 436 F.3d 197, 205 (3d Cir. 2006) (recognizing that § 413(1)'s general six-year limit is a statute of repose).

run until Plaintiffs discovers [sic] the wrong.[120] "With rare exceptions, the courts of appeals have interpreted the final clause of § 413's as incorporating the federal doctrine of fraudulent concealment: The statute of limitations is tolled until the plaintiff in the exercise of reasonable diligence discovered or should have discovered the alleged fraud or concealment."[121]

Although the Tenth Circuit has not addressed this specific issue, other circuits have done so. For the fraud or concealment provision to be applicable, the Third Circuit stated

> [W]hen a lawsuit has been delayed because the defendant itself has taken steps to hide its breach of fiduciary duty, the limitations period will run six years after the date of the claim's discovery. The relevant question is therefore not whether the [54] complaint "sounds in concealment," but rather whether there is evidence that the defendant took affirmative steps to hide its breach of fiduciary duty.[122]

In a later case, the Third Circuit noted that

> [I]f all that a plaintiff can show is that a counselor represented to him that he had

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[120] Plaintiffs do not identify when they "discovered" the underlying fraud.

[121] *Kurz* v. *Philadelphia Elec. Co.*, 96 F.3d 1544, 1552 (3d Cir. 1996) (collecting cases and noting five other circuits' applications of tolling in the case of fraudulent concealment).

[122] *Id.* (citations omitted).

> guaranteed lifetime health benefits or failed to give him accurate advice knowing that he believed he had such benefits, the fraud or concealment clause is inapplicable. In such cases, [defendant] cannot be said to have taken affirmative steps, either as part of the original breach of duty or thereafter, to cover up its breach.[123]

In this case, the fraud or concealment provision is inapplicable because there is no evidence that Defendants actively concealed their alleged breach of fiduciary duty. Indeed, Plaintiffs do not assert this proposition. Instead, they contend that Defendants' underlying misrepresentations were the "fraudulent" acts. Because the Court concludes that there is no evidence of affirmative steps of fraud or concealment, the six year limitation period for the discovery of fraud or concealment is inapplicable.[124]

Because tolling by fraudulent concealment is inapplicable in this case, the relevant limitation period is contained in § 413(1), which provides the

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[123] *In re Unisys Corp. Retiree Medical Benefits "ERISA" Litigation* (*Unisys III*), 242 F.3d 497, 503 (3d Cir. 2001).

[124] Even if the "fraud or concealment" provision of the statute cannot be read as a fraudulent concealment "tolling" provision, the provision remains inapplicable. The Court cannot categorize Plaintiffs' breach of fiduciary duty allegations as a fraud or concealment claim because it was not alleged as such. Fraud must be plead with particularity. Fed. R. Civ. P. 9(b). And Plaintiffs failed to provide fraud with particularity in the Amended Complaint or in the Pretrial Order.

limitation period of "six years after (A) the date of the last action which constituted a part of the breach or violation."[125] The parties disagree as to "the date of the last action which constituted a part of the breach." They disagree, in part, because they dispute whether detrimental reliance or harm is the final element of Plaintiffs' breach of [55] fiduciary duty claim. Defendants contend that the last action occurred when Plaintiffs detrimentally relied upon the alleged misrepresentations, i.e, when Plaintiffs made the decision to retire. Plaintiffs, however, contend that the United States Supreme Court's decision in *CIGNA Corp.* v. *Amara*[126] eliminated the element of detrimental reliance in breach of fiduciary duty claims. Plaintiffs therefore argue that the last action occurred when Defendants reduced or terminated the benefits because that is when the harm occurred.[127] Plaintiffs, however, do not claim that Defendants breached their fiduciary duty by changing or terminating their benefits—they contend that Defendants breached their fiduciary duty by misrepresenting the longevity of those benefits. And although they contend that they were harmed when the benefits were taken away, the misrepresentation of lifetime benefits did not cause the resulting harm.[128] As the Third

[125] Neither party asserts that § 413(2) is applicable here.

[126] 131 S.Ct. 1866 (2011).

[127] Plaintiffs use the date that Defendants terminated the prescription drug plan which was effective January 1, 2006.

[128] The Court notes that in the Pretrial Order, Plaintiffs specifically state that an element of their breach of fiduciary

(Continued on following page)

Circuit noted in *Unisys III*, "the alleged breach of fiduciary duty here concerned the counsel allegedly given or not given, and there is no causal nexus between that counsel and the denial of [benefits.]"[129]

[56] Furthermore, the termination of the plan is a non-fiduciary act.[130] Thus, it cannot be considered a part of the breach of fiduciary duty,[131] and the date that benefits were terminated cannot be considered the "last action which constituted a breach" under § 413(1).

In addition, even if Plaintiffs are correct that harm is the final element of their breach of fiduciary duty claim, some circuits have determined that it is unnecessary for actual harm to occur before the statute of limitations can begin to run. In *Ziegler* v.

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duty claim requires that "[h]e or she was harmed and suffered injury *as a result* of the material misrepresentations." Doc. 295, p. 31 (emphasis added).

[129] *Unisys III*, 242 F.3d at 506.

[130] *See Curtiss-Wright*, 514 U.S. at 78 (stating that under ERISA, employers and other plan sponsors are generally free to modify or terminate welfare plans at any time and do not act in a fiduciary capacity in making those amendments or terminations). *See also Amara*, 131 S. Ct. at 1877 (noting that the plan's sponsor (the employer) and the plan's administrator (a trustee-like fiduciary) perform different roles and although the same entity may fulfill both roles, "ERISA carefully distinguishes these roles."); *Unisys III*, 242 F.3d at 506 (finding that the employer had the right to terminate coverage, "and it exercised that right in a non-fiduciary capacity.").

[131] *See Unisys III*, 242 F.3d at 506 (finding that denial of coverage was not an element of the plaintiffs' claim).

Connecticut General Life Insurance Co., the Court of Appeals for the Ninth Circuit stated that when considering ERISA's statute of limitations, it was necessary to isolate the underlying violation that the plaintiff claimed to be the breach of fiduciary duty.[132] In that case, the court found that the breach occurred in the making of the contract.[133] Although the actual harm was only hypothetical and would not occur until a distribution occurred under the contract (several years later), the court found that the breach occurred at the time the parties made the contract.[134] Thus, the court found that the plaintiff "need never have suffered an actual harm for its ERISA cause of action to have accrued."[135] Furthermore, in *Larson* v. *Northrop Corp.*, the Court of Appeals for the District of Columbia found that a plaintiff [57] did not have to suffer actual harm before the statute of limitations begins to run.[136] The court found that the last action constituting a part of the defendant's breach of fiduciary duties occurred when the defendant purchased an allegedly deficient contract—approximately four years before the plaintiff was "harmed" and more

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[132] 916 F.2d 548, 550-51 (9th Cir. 1990). The Court notes that a different subsection of the statute of limitations, § 413(2), was at issue in *Ziegler.*

[133] *Id.* at 551.

[134] *Id.*

[135] *Id.*

[136] 21 F.3d 1164, 1170 (D.C. Cir. 1994). This case addressed § 413(1).

than six years before the plaintiff brought suit.[137] Thus, the court found that the statute of limitations contained in § 413(1) barred the plaintiff's suit.[138]

In this case, the Court finds that the relevant inquiry under § 413 as to the "last action which constituted a part of the breach or violation" is the date the alleged misrepresentations were made. As noted by the Third Circuit, "ERISA's general six-year statute of limitations is triggered by a fiduciary's action, not a beneficiary's discovery of the breach."[139] This suit was filed on December 28, 2007. Thus, the Court must determine whether any of Defendants' alleged misrepresentations occurred between December 28, 2001, and December 28, 2007.

As noted above, Defendants contend that the relevant date for the "date of the last action which constituted a breach" is the date of detrimental reliance—the date that Plaintiffs decided to retire. And the Court is cognizant that the Third Circuit, in *Unisys III*, found the retirement date to be the relevant date because that was the last date the plaintiffs detrimentally relied upon the defendant's alleged

[137] *Id.* at 1171.

[138] *Id.*

[139] *Ranke*, 436 F.3d at 205. "Starting the running of the statute of limitations on the date of discovery of the breach, absent 'fraud or concealment,' would prevent the fiduciary from being able to recognize a firm cutoff date for future breach of duty claims, which is inconsistent with a statute of repose." *Id.*

misrepresentations.[140] Although the Court finds the appropriate date to be the [58] date of Defendants' misrepresentations, Plaintiffs' retirement dates are still relevant. Fifteen Plaintiffs made the decision to retire prior to December 28, 2001. Thus, the alleged misrepresentations which caused Plaintiffs to retire necessarily had to occur prior to this date.[141] Accordingly, fifteen of the seventeen named Plaintiffs' breach of fiduciary duty claims are barred by the six year statute of limitations.

These Plaintiffs, however, argue that their action remains timely because although they retired prior to December 28, 2001, they each identify an action (or forbearance to act) that he or she took during the six years preceding suit.[142] With respect to Plaintiffs' alleged post-retirement acts of reliance, subsequent acts of reliance do not "reset the clock" if the plaintiff's claim has already accrued.[143] Thus, Plaintiffs'

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[140] *Unisys III*, 242 F.3d at 506. In *Unisys III*, the parties also agreed that the date of detrimental reliance (retirement date) and the date of the last misrepresentation were the same date. *Id.* at 506, n. 8.

[141] Although Plaintiffs dispute that detrimental reliance is an element of their breach of fiduciary duty claim, they alternatively argue that they present sufficient evidence of detrimental reliance because they made the decision to retire, which was to their detriment, based upon Defendants' misrepresentations.

[142] For example, one Plaintiff contends that he made house remodeling decisions based on the alleged misrepresentation of lifetime benefits.

[143] *See Ranke*, 436 F.3d at 203.

later acts of reliance would not allow Plaintiffs' claim to fall within the statute of limitations either.

Accordingly, the Court grants in part Defendants' Motion for Summary Judgment on Plaintiffs' Breach of Fiduciary Duty Claim with respect to fifteen of the seventeen named Plaintiffs, and denies it with respect to Plaintiff Barnes and Dillon.

III. Age Discrimination Claims

Plaintiffs originally set forth disparate treatment and disparate impact claims under the ADEA; however, Plaintiffs only proceed on their disparate impact theory. Plaintiffs claim that Defendants discriminated against Plaintiffs "on the basis of age when it reduced or terminated retiree [59] life insurance benefits * * * because that action had a discriminatory adverse impact based on age."[144] Specifically, Plaintiffs contend that the reduction or elimination of retiree life insurance benefits disparately impacted older retirees more harshly than younger retirees.[145] Plaintiffs' state law age discrimination claims are identical to Plaintiffs' ADEA claim.

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[144] *See* Pretrial Order, Doc. 295, p. 28.

[145] Plaintiffs also claim that the elimination and reduction of medical and prescription drug benefits was discriminatory under the ADEA. The Court, however, previously dismissed this portion of the claim because the ADEA claim failed as a matter of law "because federal regulation expressly permits reduction in such benefits for Medicare-eligible retirees." *See* Doc. 45, p. 22.

A. The Parties

1. Plaintiffs and the Collective Class

The ADEA claims are brought by seventeen named Plaintiffs, as well as by approximately 750 retirees referred to in Plaintiffs' Third Amended Complaint as the "Individual Age Discrimination Plaintiffs." More than 8,000 individuals have opted in and agreed to have their ADEA claims tried in this collective action. The ADEA class is defined as: "All persons, including all plan participants and all eligible spouse and dependent plan beneficiaries, whose rights to retiree life insurance benefits have been adversely affected by the terminations, reductions and changes in retiree life insurance benefits which were announced by Defendant Embarq Corporation on July 26, 2007."[146] In addition, three sub-classes under Fed. R. Civ. P. 23(b)(1)(B) and (b)(2) were certified with respect to Plaintiff's Fifth Claim (violation of Ohio's age discrimination statute), Sixth Claim (violation of Oregon's age discrimination statute), and Seventh Claim (violation of Tennessee's age discrimination statute) (collectively, the "state age discrimination claims"). If a Plaintiff's last place of employment was in one of these three states, he or she is a member of one of the three sub-[60]classes. In addition, there is the VEBA sub-class which includes individuals who were participants in CT&T's Voluntary Employee Benefits Association ("VEBA") plan.

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[146] Doc. 210-1.

2. Defendants

The defendants with respect to Plaintiffs' ADEA claim are Embarq Corporation, CT&T, and Embarq Mid-Atlantic Management Service Company (collectively, "Embarq"). The sole defendant with respect to Plaintiffs' state age discrimination claims is Embarq Corporation.

B. Factual Background[147]

Employees who retired from Defendants prior to 2004 received company-subsidized basic life insurance benefits. The amount of those benefits varied depending upon the time, and the company from which, an employee retired. The benefits ranged from a maximum of two times a retiree's last annual pay rate to less than $5,000, with the most frequent amounts being between $10,000 and $25,000.

CT&T non-bargaining unit employees and bargaining unit employees represented by certain local unions participated in the CT&T VEBA plan. This plan provided for a retirement death benefit equal to one times the retiree's last annual pay. Retiree participants in the VEBA plan also received basic life

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[147] In accordance with summary judgment procedures, the Court sets forth the uncontroverted facts given to the Court in Defendants' Motion for Summary Judgment on Plaintiffs' Age Discrimination Claims and Plaintiffs' response to that motion.

insurance coverage in addition to the VEBA retirement death benefit.

Embarq spun off from Sprint effective May 17, 2006. Randall Parker, Director of Benefits for Embarq,[148] averred Embarq needed to manage its cost structure to remain competitive and [61] maintain profitability, in part because revenues from its core business, traditional "landline" telephone service, were steadily shrinking. Parker also averred that Embarq wanted to reduce costs in ways that would not jeopardize customer service or the company's revenues and believed a way to do this was to reduce retiree life insurance benefits. Embarq's post-retirement life insurance program was costly to maintain. As of June 2007, approximately 76% of retiree life insurance coverage was underwritten through a fully-insured contract, and Embarq funded the remaining 24% liability through a self-insured arrangement. Embarq's share of retiree life insurance costs was $9 million in cash annually, and resulted in an $11.3 million annual expense charge to its income statement and an accrued balance sheet liability of $169.5 million.

At a meeting on June 27, 2007, financial projections provided to Embarq's Employee Benefits

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[148] In Mr. Parker's affidavit, he averred that he was responsible for the design, development, pricing, communications and overall administration of the companies' benefit plans, including the companies' health care and other welfare benefit plans.

Committee ("EBC") showed that: (a) eliminating CT&T VEBA retirees' basic life insurance benefits would result in annual cash savings of $1.6 million, annual expense reductions of $4 million, and a reduction in accrued balance sheet liabilities of $31 million; (b) capping non-VEBA retiree life insurance benefits at $10,000 would result in annual cash savings of $2.5 million, annual expense reductions of $5.4 million, and a reduction in accrued balance sheet liabilities of $41.4 million; and (c) taking both of these steps would result in annual cash savings of $4.1 million, annual expense reductions of $9.4 million, and a reduction in accrued balance sheet liabilities of $72.4 million. Embarq changed retiree life insurance benefits in 2007 in part to achieve these projected cost savings.[149]

[62] EBC was also provided with data from a Watson Wyatt 2005-2006 Benefits Database of 1,150 companies. This data showed: (a) 73% of all companies, and 85% of non-manufacturing companies,

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[149] Plaintiffs attempt to controvert several of Defendants' facts relating to its decision to reduce benefits by objecting that Randall Parker's affidavit contains "self-serving and conclusory statements." They do not, however, dispute that Parker has personal knowledge of the facts, and they do not present any evidence controverting Parker's assertions. Instead, Plaintiffs merely contend that inferences should be drawn in their favor. Although inferences are to be drawn in Plaintiffs' favor, Plaintiffs must present specific evidence to demonstrate that a statement is genuinely disputed. For that reason, the Court deems several of Defendants' facts uncontroverted although Plaintiffs attempt to controvert these facts.

provided no life insurance benefits to retirees; and (b) of the companies that provided life insurance benefits, 45% of all companies and 31% of non-manufacturing companies provided coverage of $10,000 or less.

At this meeting on June 27, EBC voted to eliminate company-sponsored basic life insurance for retirees who were participants in the CT&T VEBA plan effective September 1, 2007. Although company-sponsored basic life insurance benefits for VEBA retirees were eliminated, those retirees still receive a company-provided death benefit, an amount that equals the retiree's final annual salary, or one year of wages. EBC also voted to reduce the maximum amount of basic life insurance coverage to $10,000 for non-VEBA participating retirees effective January 1, 2008. Embarq made the announcement on July 26, 2007.

The market for purchasing life insurance is inherently more costly for older persons than younger persons because life expectancy is a function of age. None of the approximate 8,000 ADEA Plaintiffs have purchased insurance to replace the life insurance that Embarq reduced or eliminated.

C. Defendants' Motion for Summary Judgment on Plaintiffs' Age Discrimination Claims (Doc. 329)

Plaintiffs allege that Defendants discriminated against them when they reduced or eliminated retiree life insurance benefits because that action disparately impacted older retirees more harshly than younger retirees. Plaintiffs contend that the amount that they will have to pay in premiums to [63] replace the reduced or terminated life insurance benefits are significantly greater than it is for those who are ten years younger.

Defendants argue that they are entitled to summary judgment on Plaintiffs' ADEA and state law age discrimination claims for four reasons: (1) Plaintiffs' disparate impact claim is not cognizable; (2) even if Plaintiffs' claim is cognizable, it fails because Plaintiffs cannot establish a prima facie case of disparate impact; (3) even if Plaintiffs could establish that Defendants' action disparately impacted class members, Defendants took the action based on "reasonable factors other than age"; and (4) the ADEA's equal cost/equal benefit safe harbor applies to Defendants' decision. Although Defendants present numerous arguments as to why they are entitled to summary judgment, the Court will only address those arguments that the Court finds most meritorious.

1. Plaintiffs Cannot Establish a Prima Facie Case

Disparate impact claims are cognizable under the ADEA.[150] The scope of disparate impact liability under the ADEA, however, is narrower than under Title VII.[151] 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."[152] "To establish a prima facie case of disparate impact discrimination, plaintiffs must show that a specific identifiable employment practice or policy caused a significant disparate impact on a protected group."[153]

[64] Plaintiffs fail to establish a prima facie case because they do not present any relevant statistical evidence. "Statistical evidence is an acceptable, and common, means of proving disparate impact. The statistics must, however, relate to the proper population. For example, when the claim is disparate

[150] *Smith* v. *City of Jackson, Miss.*, 544 U.S. 228 (2005).

[151] *Id.* at 240; *see also Pippin* v. *Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1200 (10th Cir. 2006) (noting that the "reasonable factor other than age" defense in the ADEA "significantly limits an employer's potential liability for disparate impact under ADEA.").

[152] *Smith*, 544 U.S. at 239 (quoting *Teamsters* v. *United States*, 431 U.S. 324, 335-36 n. 15 (1977)).

[153] *Pippin*, 440 F.3d at 1200 (quoting *Ortega* v. *Safeway Stores, Inc.*, 943 F.2d 1230, 1242 (10th Cir. 1991)).

impact in hiring, the statistics should be based on data with respect to persons qualified for the job."[154]

In this case, Plaintiffs attempt to demonstrate a disparate impact by comparing the impact on persons within the protected group (*i.e.*, age 40 and above) to the impact on hypothetical persons who are also within the protected group (*i.e.*, age 40 and above). Specifically, Plaintiffs compare their actual selves with younger versions of themselves.[155] This comparison, however, does not have any significance in determining whether Defendant's decision to reduce or eliminate life insurance had a disparate impact on the class members because Plaintiffs do not identify appropriate comparators. Plaintiffs do not direct the Court to, and the Court is unable to find, any authority allowing a disparate impact claim to be shown by

[154] *Carpenter* v. *Boeing Co.*, 456 F.3d 1183, 1196 (10th Cir. 2006) (citations omitted).

[155] Plaintiffs do not compare whether there was a disparate impact between an actual 70-year old class member and an actual 60-year old class member. Instead, Plaintiffs attempt to compare the impact between the actual 70-year old class member and a younger version of himself (60 years old). Plaintiffs' designated expert, Mr. Terry Long, opined about the present value of lost death benefits for all VEBA and non-VEBA class members. Mr. Long made his calculations by determining the amount of the present value of the lost death benefits versus the comparable value of the lost death benefits had each of the class members been ten years younger. Defendants have a Motion to Exclude Mr. Long's Report and Testimony which will be discussed below. For purposes of this Order, the Court only considers Mr. Long's "comparator" group to make the determination of whether the comparator group is an appropriate one.

comparing actual individuals affected by the alleged discriminatory practice to hypothetical younger versions of themselves. Thus, Plaintiffs do not provide any relevant statistical evidence.

[65] Furthermore, as noted above, the disparate impact must fall more harshly on the protected group.[156] Plaintiffs compare themselves to hypothetical individuals *within the same protected group.* To be sure, life insurance premiums increase as an individual ages, but 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. Plaintiffs present no relevant statistical evidence that the impact fell more harshly on the protected group than a non-protected group. Accordingly, Plaintiffs do not establish a

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[156] *See Teamsters*, 431 U.S. at 335 n. 15; *see also EEOC* v. *McDonnell Douglas Corp.*, 191 F.3d 948, 950-51 (8th Cir. 1999) (refusing to recognize claims involving subgroups in a disparate impact case); *Smith* v. *Tenn. Valley Auth.*, 1991 WL 11271, at *4 (6th Cir. 1991) (finding that the comparison in a disparate impact case must be between members of the protected class and members of the non-protected class); *Lowe* v. *Commack Union Free School Dist.*, 886 F.2d 1364, 1371 (2d Cir. 1989) (requiring plaintiffs to compare the disparate impact between individuals above the age of 40 and individuals under 40 years of age), *abrogated on other grounds*, 42 U.S.C. § 2000e-2(k)(1)(B)(i). *But see Karlo* v. *Pittsburgh Glass Works, LLC*, ___ F. Supp. 2d. ___, 2012 WL 1621265, at *6-8 (W.D. Pa. May 9, 2012) (recognizing subgroup claims under the ADEA for disparate impact claims).

prima facie case of disparate impact age discrimination.

2. Defendants Demonstrate That They Made Their Decision on Reasonable Factors Other Than Age

Even if Plaintiffs could establish a prima facie case of disparate impact age discrimination, the evidence demonstrates that Defendants' decision to reduce retiree benefits was based on a reasonable factor other than age ("the RFOA defense"). 29 U.S.C. § 623(f)(1) provides that "[i]t shall not be unlawful for an employer * * * to take any action otherwise prohibited under subsection[ ](a) * * * where the differentiation is based on reasonable factors other than age * * * " The RFOA defense is an affirmative one, and Defendants bear the burden of both production and persuasion in showing that the action taken was based on reasonable factors.[157]

[66] Defendants state that their reason to reduce or eliminate retiree's life insurance benefits was to (1) reduce costs, and (2) align its retiree benefits more closely with those benefits provided by other companies. Plaintiffs assert three arguments against Defendants' RFOA defense, all of which fail. First, Plaintiffs argue that Defendants waived this affirmative defense because they failed to plead it with

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[157] *Meacham* v. *Knolls Atomic Power Lab.*, 554 U.S. 84, 101 (2008).

particularity and failed to include it in the Pretrial Order. Plaintiffs cite to no authority that Defendants must plead the RFOA defense with particularity.[158] Even if Plaintiffs believed that Defendants' defense was insufficiently pled, they should have raised the issue long ago.[159] Plaintiffs' argument that Defendants did not preserve the defense in the Pretrial Order is similarly baseless. It is clearly set forth in that Order.[160] Thus, Plaintiffs' argument that Defendants waived the RFOA defense fails.

Next, Plaintiffs argue that Defendants' decision to reduce or eliminate life insurance benefits is not based on a reasonable factor other than age because Defendants do not produce evidence that its decision was based on "significant cost considerations." Plaintiffs rely on 29 C.F.R. § 1625.10(a)(1) for support, which provides, in part, that reductions in employee

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[158] The Tenth Circuit has not addressed the issue as to whether the *Twombly/Iqbal* standard applies to affirmative defenses. The District of Kansas, however, has determined that it does not. *See Bennett* v. *Sprint Nextl Corp.*, 2011 WL 4553055, at *2 (D. Kan. Sept. 29, 2011).

[159] *See* Fed. R. Civ. P. 12(f)(2) (providing that a "court may strike from a pleading an insufficient defense * * * on motion made by a party * * * within 21 days after being served with the pleading."). Plaintiffs have been on notice of Defendants' ROR defense for years. *See* Defendants' Answer, Doc. 160, p. 42 (asserting that its actions were based on reasonable factors other than age).

[160] *See* Pretrial Order, Doc. 295, pp. 40-41 (setting forth the essential elements of Defendant's sixth affirmative defense, RFOA).

benefit plans are permitted "where such reductions are justified by significant cost considerations." This regulation, however, is inapplicable to Defendants' RFOA defense. 29 C.F.R. § 1625.10 relates to § 623(f)(2)(B) of the ADEA—whether an employer's bona fide employee benefit plan is compliant [67] with the ADEA.[161] It does not address the RFOA provision contained in § 623(f)(1). Indeed, the RFOA provision is the subject of another EEOC regulation, 29 C.F.R. § 1625.7.[162] Plaintiffs 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. Instead, as the United States Supreme Court and the Tenth Circuit have noted, the inquiry is based on reasonableness.[163] Unlike the business

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[161] *See* 29 C.F.R. § 1625.10 (discussing costs and benefits of employee benefit plans with respect to section 4(f)(2) of the ADEA). Section 4(f)(2), 29 U.S.C. § 623(f)(2), of the ADEA provides, in part, that it shall not be unlawful for an employer to observe the terms of an employee benefit plan as long as it is compliant with certain requirements.

[162] *See* 29 C.F.R. § 1625.7 (discussing "differentiations based on reasonable factors other than age" as it relates to section 4(f)(1) of the ADEA). Section 4(f)(1), 29 U.S.C. § 623(f)(1), of the ADEA provides, in part, that it shall not be unlawful for an employer to take any action otherwise prohibited under the ADEA if the differentiation is based on reasonable factors other than age.

[163] *See Meacham*, 554 U.S. at 96 (stating that "[t]he focus of the defense is that the factor relied upon was a 'reasonable' one for the employer to be using."); *see also Pippin*, 440 F.3d at 1200 (noting that the inquiry is on the reasonableness of the action).

necessity test under Title VII, which requires an employer to demonstrate that "there are other ways for the employer to achieve its goals that do not result in a disparate impact, the reasonableness inquiry includes no such requirement."[164] Imposing a "significant cost consideration" requirement would effectively heighten the inquiry beyond "reasonableness" and make it more akin to the "business necessity" test of Title VII which would be in contravention of the United States Supreme Court's statement that the reasonableness test is not the business necessity test.[165] Thus, Plaintiffs' contention that Defendants must produce evidence that its decision was based on significant cost considerations is in error.

[68] Third, Plaintiffs contend that Defendants fail to meet the standards of 29 C.F.R. § 1625.7. This regulation includes specific considerations that are relevant when determining whether an employer's practice is based on a reasonable factor other than age. Plaintiffs argue that Defendants did not consider any of the factors set forth. Plaintiffs' reliance on this regulation is also in error. Although this regulation relates to the RFOA defense, it only became effective on April 30, 2012. Defendants made the decision to reduce life insurance benefits in June 2007—approximately five years prior to the enactment of the

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[164] *Smith*, 544 U.S. at 243.

[165] *See*, *e.g.*, *Meacham*, 554 U.S. at 97 (stating that "the business necessity test should have no place in ADEA disparate-impact cases.").

regulation. "[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result."[166] There is no indication in the statute that this regulation should be given retroactive effect. Thus, it is not applicable here.

The appropriate inquiry when determining whether an employer can establish an RFOA defense is the reasonableness of the employer's action. In *Pippin* v. *Burlington Resources Oil & Gas Co.*, the Tenth Circuit determined that even if the plaintiff had established a prima facie case of disparate impact age discrimination, the defendant was entitled to summary judgment on its RFOA defense.[167] In *Pippin*, the defendant implemented a reduction in force, and the plaintiff was one of the individuals who lost his job.[168] The Tenth Circuit noted that "[c]orporate restructuring, performance-based evaluations, retention decisions based on needed skills, and recruiting concerns are all reasonable business considerations."[169] Thus, the court determined that the defendant had set forth a valid RFOA defense. Although the court did not specifically address cost-cutting measures, [69] the court's reasoning that corporate restructuring in a reduction-in-force case is a reasonable factor other than age suggests that it would similarly find

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[166] *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[167] 440 F.3d at 1201.

[168] *Id.*

[169] *Id.*

cost-saving considerations reasonable. Furthermore, Defendants direct the Court to 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.[170]

Here, Defendants put forth evidence that they needed to reduce costs to remain competitive and maintain profitability. They sought to reduce costs in

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[170] *Aldridge* v. *City of Memphis*, 404 F. App'x 29, 41 (6th Cir. Dec. 14, 2010) (upholding district court's grant of summary judgment because the defendant's employment action of "demoting employees of a particular seniority status for cost-saving and operational considerations surely qualifies" as a RFOA defense), *cert. denied*, 131 S. Ct. 2932 (2011); *Allen* v. *Highlands Hosp. Corp.*, 545 F.3d 387, 405 (6th Cir. 2008) (affirming the district court's order granting summary judgment in favor of defendant for three reasons, one of which determined that the defendant's RFOA defense of lowering employee costs was valid); *Allen* v. *Sears Roebuck & Co.*, 803 F. Supp. 2d 690, 698 (E.D. Mich. 2011) (granting summary judgment and finding that reducing operating costs by eliminating paid time off and business expense reimbursements was a reasonable factor other than age); *Doyle* v. *City of Medford*, 2011 WL 4894077, at *4 (D. Or. Oct. 13, 2011) (finding that the evidence demonstrated that defendant's decision "saved hundreds of thousands of dollars and reduced the premiums paid by management employees" and thus was a reasonable factor other than age which entitled the defendant to summary judgment); *Walker* v. *City of Cabot*, *Arkansas*, 2008 WL 4816617, at *4 (E.D. Ark. Nov. 4, 2008) (finding that eliminating redundant positions and lowering expenses constituted a valid RFOA defense); *Townsend* v. *Weyerhaeuser Co.*, 2005 WL 1389197, at *14 (W.D. Wis. June 13, 2005) (discussing that the termination of an employee to eliminate the burden of paying a high salary would be a reasonable factor other than age).

ways that would not affect their customer service. Defendants projected that the reduction of retiree life insurance costs would result in annual cash savings of approximately $4 million, annual expense reductions of $9.4 million, and a reduction in accrued balance sheet liabilities of $72.4 million. Defendants also put forth evidence that they wanted to align themselves more closely to other companies' retiree life insurance benefit options. Plaintiffs fail to controvert this evidence. The Court finds that Defendants' decision to reduce costs and align their benefits more closely to other companies' benefits is a reasonable factor other than age. Accordingly, the Court finds that Defendants are entitled to summary judgment on the ADEA claim.

[70] **D. Defendants' Motion to Decertify Collective Action (Doc. 287), Defendants' Motions to Exclude Terry Long and David Crawford Testimony (Docs. 325, 327), Plaintiffs' Motion for Advisory Jury (Doc. 333)**

The Court's resolution of Defendants' summary judgment motion disposes of Plaintiffs' age discrimination claims. Thus, it renders Defendants' Motion to Decertify moot. It also renders Defendants' Motions to Exclude Expert Testimony on the ADEA claims as moot. Finally, because Plaintiffs no longer have their age discrimination claims, the Court denies Plaintiffs' Motion for Advisory Jury as moot.

E. Plaintiffs' Request for Oral Argument on Defendants' Motions for Summary Judgment (Doc. 392)

The parties thoroughly briefed the issues with respect to their positions on Plaintiffs' ERISA and ADEA claims. Accordingly, the Court finds it unnecessary to hear oral argument and denies Plaintiffs' Request for Oral Argument.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment on Named Plaintiffs' First and Third Claims for Relief (Doc. 323) is hereby **GRANTED IN PART** and **DENIED IN PART**. It is granted with respect to all named Plaintiffs except Plaintiffs Britt and Clark.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment on Selected Class Members' First and Third Claims for Relief (Doc. 332) is hereby **GRANTED**.

IT IS FURTHER ORDERED that Defendant's Motion to Exclude Report and Testimony of Professor Gail Stygall (Doc. 321) is hereby **GRANTED**.

IT IS FURTHER ORDERED that Defendant's Motion to Decertify Class Action (Doc. 285) is hereby **DENIED WITHOUT PREJUDICE TO REFILING**.

[71] **IT IS FURTHER ORDERED** that Defendants' Motion for Summary Judgment on Plaintiffs' Second Claim for Relief (Breach of Fiduciary Duty)

(Doc. 338) is hereby **GRANTED IN PART** and **DENIED IN PART**. It is granted with respect to all named Plaintiffs except Plaintiff Barnes and Plaintiff Dillon.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment on Plaintiffs' Fourth, Fifth, Sixth, and Seventh Claims for Relief (Age Discrimination Claims) (Doc. 329) is hereby **GRANTED**.

IT IS FURTHER ORDERED that Defendants' Motion to Decertify Collective Action (Doc. 287) is hereby **DENIED AS MOOT**.

IT IS FURTHER ORDERED that Defendants' Motion to Exclude the Report and Testimony of Terry Long (Doc. 325) is hereby **DENIED AS MOOT**.

IT IS FURTHER ORDERED that Defendants' Motion to Exclude the Report and Testimony of David L. Crawford (Doc. 327) is hereby **DENIED AS MOOT**.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Advisory Jury (Doc. 333) is hereby **DENIED AS MOOT**.

IT IS FURTHER ORDERED that Plaintiffs' Request for Oral Argument on Defendants' Motions for Summary Judgment (Doc. 392) is hereby **DENIED**.

IT IS SO ORDERED.

Denied this 14th day of February, 2013.

/s/ Eric F. Melgren
ERIC F. MELGREN
UNITED STATES
DISTRICT JUDGE

PUBLISH

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, vs. EMBARQ CORPORATION, et al., Defendants-Appellees. -- SECRETARY OF LABOR, Amicus Curiae.	No. 13-3230 (D.C. No. 2:07-CV-02602-EFM) (D. Kan.)

ORDER

[Filed Apr. 27, 2015]

Before **LUCERO**, **MURPHY**, and **BACHARACH**, Circuit Judges.

This matter is before the court on appellees' *Petition for Rehearing and Rehearing En Banc,* as well as on the appellants' *Petition for Rehearing and Rehearing En Banc.* We also have responses from the parties to both petitions.

Upon consideration, the requests for panel rehearing are granted to the extent of the amendments made in the attached revised opinion. The clerk is directed to file the new decision effective the date of this order.

Both petitions, the responses, as well as the revised opinion, were also circulated to all of the judges of the court in regular active service who are not recused. As no judge on the panel or the court requested that a poll be called, the requests for en banc rehearing are both denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

29 U.S.C. § 1113. LIMITATION OF ACTIONS

No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—

> **(1)** six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> **(2)** three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, et al., Plaintiffs,	)	CASE NO. 07-CV-2602 (EFM/JPO)
vs.	)	
EMBARQ CORPORATION, et al., Defendants.	)	

VIDEOTAPED DEPOSITION OF
LAUDIE COLON MCLAURIN, JR.
[Volume 1]
(Taken by Defendants)
Greenville, North Carolina
Friday, June 4, 2010

Reported in Stenotype by
Dorothy J. M. McGrath, RPR, Shorthand Reporter
Transcript Produced by Computer-aided Transcription

APPEARANCES

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Also Present: Sharon Rudow, Video Technician

* * *

[Continuation of Mr. McLaurin's answer]

[46] And Mr. Clark, he took part in most of this. Then there was monetary gift that the company presented. Someone had to make that decision, but I don't know who did that, and I don't even know how they come up with the – the – the money figures when they started figuring. But there was a monetary gift of – I don't know – 500-some few dollars. Then somewhere along the way, I received a brown telephone with a plaque on it, you know, that kind of stuff.

[BY MS. GOROKHOVICH]

Q. A telephone –

A. And a clock. I believe I got a – a – a – mantle – yeah, I did. I got a mantle clock. I think I could choose two or three things, you know, and different ones too, steps I took part in it. So I can't tell you who all – Mr. Clark, I guess, was the – the – the main one.

Q. Other than what we've discussed, did you have any other conversations about your retirement benefits with anyone at the company before you left the company?

A. It seemed like I had a brief discussion with – with Willie Dorman at that time, and he was division plant manager in Fayetteville. We are lifetime friends. We grew up in the same hometown. [47] We sort of grew up in the telephone business together. Of course, he went on ahead of me, but we grew up together.

And I recall because I had called and invited him to come to my dinner that we were having, and we talked about it then, you know, and he confirmed that what I had been told about my benefits was true and that I would receive these benefits for the rest of my life and that he was sorry he couldn't come. He had another commitment on a higher level with the telephone company he had to attend, so he was not able to come. But he did call me and talk with me, and we discussed it in general. Super great guy.

Q. When did you talk to Mr. Dorman?

A. Prior to, I guess, a couple of days or so before I had my retirement party.

Q. When was your retirement party?

A. I think it was in the second or third week of December of '88.

Q. And at that time had you completed all of your retirement paperwork?

A. Yes, as far as I know, I had.

Q. Did you talk to Mr. Dorman about your benefits at any time prior to making your decision

* * *

[Continuation of Mr. McLaurin's answer]

[50] company but the – the president. He was – he was employee oriented and customer oriented, and they were good to the employees, and I appreciate it.

[BY MS. GOROKHOVICH]

Q. Did this common knowledge that the benefits worked for life come from the understanding that CT&T would always take good care of its employees?

A. Yeah –

MR. FISHER: Object – object to the form of that.

BY MS. GOROKHOVICH:

Q. What was the basis for your belief that your medical and life insurance were for life at the time of your retirement?

A. That's what I was told.

Q. Told by whom?

A. My manager, Mr. Donald E. Clark.

Q. Did Mr. Clark specifically use the words "for life"?

A. Yes.

Q. When did he use the words "for life" specifically?

A. When he was telling me what my benefits would be.

Q. Was that during the meeting we discussed [51] earlier?

A. No, that was at a later time.

Q. Okay. When did Mr. Clark specifically use the words "for life"?

A. That's when he confirmed what my pension would be. He knew that the insurance situation was for life, and then when he found out exactly what my pension would be, then he told me, you know, the whole nine yards.

Q. But when did you have that conversation with Mr. Clark?

A. I can't remember. I don't know.

Q. What season was it?

A. Probably – probably the summer – summer of '88.

Q. Is that conversation after you had completed all of your retirement paperwork?

A. I don't think so.

Q. But it was after you had decided to retire in the spring of '88; is that correct?

MR. FISHER: Object, object to form.

THE DEPONENT: I'm not sure.

BY MS. GOROKHOVICH:

Q. Was the conversation with Mr. Clark where he specifically used the words "for life" in person

* * *

[57] BY MS. GOROKHOVICH:

Q. What did you say to Mr. Clerk immediately after he made the quoted statement?

MR. FISHER: Object to form.

THE DEPONENT: I don't recall.

BY MS. GOROKHOVICH:

Q. Can you quote anything else Mr. Clark said during that conversation?

A. No.

Q. Can you quote anything else you said during that conversation – withdraw that.

Can you quote anything you said during that conversation?

A. No.

Q. Did either you or Mr. Clark reference any written documents during that conversation?

A. No.

Q. Did you ever receive any documents from the company that said any of your benefits would be for life?

A. Not to my knowledge.

Q. Other than the conversations we've already discussed, did you have any other conversations with anyone at the company prior to your retirement about your retiree benefits?

* * *

[60] [MS. GOROKHOVICH]: please read back the question.

THE DEPONENT: I lost it somewhere.

(THE REQUESTED PORTION OF THE RECORD READ)

MR. FISHER: Object to form.

THE DEPONENT: After I retired? I don't know anything I could have done after I retired.

BY MS. GOROKHOVICH:

Q. Did you make any decisions during your retirement that you might have done differently if you'd realized back then that, the company had reserved its right to terminate or amend –

A. Sure. I would not have retired.

Q. After you retired, did you make any decisions that you would have made differently if you had understood that the company had reserved its right to terminate or amend the retiree medical and life insurance –

A. Not to – Not to my knowledge.

Q. While you were employed at the company, did anyone ever make any other oral statements to you regarding retiree medical or life insurance benefits that we have not yet covered during this deposition?

A. No.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIAM DOUGLAS FULGHUM, et al., Plaintiffs, vs. EMBARQ CORPORATION, et al., Defendants.	)	CASE NO. 07-CV-2602 (EFM/JPO)

DEPOSITION OF JAMES WOODIE BRITT, SR.
(Taken by Defendants)
Greenville, North Carolina
Monday, June 7, 2010

Reported in Stenotype by
Dorothy J. M. McGrath, RPR, Shorthand Reporter
Transcript Produced by Computer-aided Transcription

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Also Present: Mark Goodwillie, Video Technician
William Howard Games

* * *

[BY MR. WALSH]

[105] Q. Are you aware of a statute, a law called the Employee Retirement Income Security Act?

A. Yes, uh-huh.

Q. And that's sometimes also known as ERISA, E-R-I-S-A?

A. Yes, uh-huh.

Q. So if we're talking about ERISA, do you understand we're speaking about the law that's called the Employment Retirement Income Security Act [sic]?

A. Right.

Q. Do you – do you recall receiving any documents from the company regarding the enactment of ERISA?

A. No.

Q. No. You can set that document aside. Thank you. Mr. Britt, did you ever receive any document that described for you what your benefits would be in retirement?

A. I – I don't recall that I did.

Q. And you said that you were a member of the union Communication Workers of America; is that correct, Mr. Britt?

A. Yes.

Q. Is your claim in this lawsuit based upon

* * *

[Continuation of Mr. Britt's answer]

[149] I think, 50 percent of my pay, and – and then – I forget now exactly how it was worded, but anyway, my wife would have – if I passed away before she did, she would have lifetime benefits.

[BY MR. WALSH]

Q. Okay. And when – when you met with the HR representative from Tarboro, she came to New Bern; is that correct?

A. Yes.

Q. How much – how long after you sent in your letter in March did the representative come to New Bern?

MR. FISHER: Object to the form of that question. Object to leading the witness.

MR. WALSH: Okay.

BY MR. WALSH:

Q. Do you understand my question, Mr. Britt?

MR. FISHER: Object to the form.

MR. WALSH: Your objection's already on the record, Mr. Fisher.

THE DEPONENT: Now, would you rephrase – rephrase that?

BY MR. WALSH:

Q. Sure. You said you met with an HR representative from Tarboro. Is that correct?

A. Yes.

[150] Q. When did you meet with her?

A. It was either February or March. I don't recall the times – exact time.

Q. Was it before you sent the letter to Mr. Monroe and – on March 19?

A. No, I think it was after.

Q. And how long after –

A. A short – a very short time after, but I don't remember the exact time.

Q. Could it have been in April of 1985?

A. I don't have no idea, no recollection of it.

Q. You're not really sure when the meeting took place?

A. No, huh-uh.

Q. Mr. Fisher objected to my question as leading. Do you have an understanding of what the objection to leading means, Mr. Britt?

A. No.

Q. Does hearing Mr. Fisher object to leading affect the way that you will answer any question that I ask you, Mr. Britt?

A. The only I think I know – I don't understand the legal terminologies, but not – in other words, I've – I think I need to ask you to

* * *

[Continuation of Mr. Walsh's question]

[158] or terminate these benefits, is that inconsistent with your understanding of the company's right with respect to retiree benefits?

A. Says consistent with what I was told by the human resources.

Q. Okay. And that was the human resources person from Tarboro?

A. Yes, uh-huh.

Q. And have you recalled that – that person's name, Mr. Britt?

A. No, I – I cannot recall a name.

Q. What did the human resources person from Tarboro tell you about your retirement benefits?

A. The company will continue to pay my medical benefits, but I'd have to pay for my dental, mine and my wife's dental benefits. And so I asked her for how long would this be. And she said, as long as you live, said that medical benefits was as long as you and your wife lived.

Q. And prior to meeting with the HR representative from Tarboro, did you have any understanding about how long the company would pay the premium for – for medical insurance?

A. I don't think I'd ever been discussed about that.

[159] Q. And you had already made your decision to retire before you met with the HR representative –

A. Yeah, right –

MR. FISHER: Object to form.

BY MR. WALSH:

Q. That's correct, Mr. Britt?

A. Yes.

Q. Mr. Britt, did – did you ask the representative from Tarboro whether the company had a right to change the benefits in any way after you retired?

A. No, I didn't ask.

Q. Did the representative from Tarboro explain to you that the company had a right to change the benefits after you retired?

A. No.

Q. Did the – did the representative from Tarboro say to you that the company could not change the benefits after you retired?

A. No.

Q. Was anyone else present at the meeting that you had with the representative from Tarboro, Mr. Britt?

A. I don't believe anybody else being there.

Q. Where – where did the meeting take place?

* * *

[Continuation of Mr. Walsh's question]

[169] pension check?

A. No.

Q. Did you have any discussion was Milford Lamb regarding –

A. No.

Q. Did you have any discussion with anyone regarding your first pension check?

A. No.

Q. Mr. Britt, do you have any recollection that in August of 1985 you didn't receive a pension check?

A. No. I don't remember that.

Q. And at the top of this Exhibit Number 10, Mr. Britt, the word "Britt," and then I believe your Social Security number is written at the top. Is that your handwriting, Mr. Britt?

A. No.

Q. Aside from the HR representative from Tarboro whose name you cannot recall – and have you recalled her name?

A. No.

Q. Aside from the HR representative from Tarboro, did you speak with anyone else regarding retiree medical benefits?

A. No.

[170] Q. And aside from that representative from Tarboro, did you speak with anyone else regarding retiree life insurance benefits?

A. No.

Q. No? In fact, did – did you speak with the representative from Tarboro about retiree life insurance benefits?

A. No, I don't recollect I did.

Q. While you were employed with CT&T, aside from the representative from – from Tarboro who you had a discussion with, did you speak with anyone else regarding retiree medical benefits, anyone at all?

A. No.

Q. And aside from the representative from – from Tarboro – Tarboro, at any time during your employment did you speak with anyone else with the company regarding retiree life insurance benefits?

A. I don't – don't recall.

Q. Mr. Britt, do you contend in this lawsuit that the company made any misrepresentations to you regarding retiree life insurance benefits?

A. Yes.

Q. And what misrepresentations do you contend the company made to you regarding retiree life

* * *

[BY MR. WALSH]

[173] Q. Do you contend, Mr. Britt, that you received anything in writing from the company that misrepresented the company's right to change or terminate retiree life insurance benefits?

A. No.

Q. Mr. Britt, do you contend that the company misrepresented anything to you with respect to retiree medical benefits?

A. Yes.

Q. Okay. And what – what misrepresentations did the company make with respect to retiree medical benefits?

A. That the medical benefit would be for life. I don't know I was advised that they had the option to terminate.

Q. And when was that misrepresentation made to you?

A. I didn't know – I'm not for sure when there was a misrepresentation.

Q. You're not sure that it was a misrepresentation?

A. Right, uh-huh. I was under the impression this was it and it was what it was going to be.

Q. And you received – and you received that information from the representative from Tarboro?

[174] A. Yes.

Q. And that's the only person that you spoke with regarding retiree medical benefits, correct, Mr. Britt?

A. Yes.

Q. And that representative said that the company would pay your medical premiums –

A. Uh-huh.

Q. – is that correct?

A. Yes.

Q. All right. And how long – and – and she said that she – the company would pay for as long as you lived; is that correct?

A. Yes, as long as I lived.

Q. Did she say anything else with respect to the – the medical benefits?

A. Not that I recollect.

Q. And you had already made your decision to retire at the time you met with the HR representative, correct, Mr. Britt?

A. Yes.

MR. FISHER: Object to form.

BY MR. WALSH:

Q. Mr. Britt, would you have done anything differently if, for instance, the HR representative

* * *