

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

WILLIAM DOUGLAS FULGHUM, *et al.*,

Plaintiffs,

v.

EMBARQ CORPORATION, *et al.*,

Defendants.

Civil Action No. 07-CV-2602 (KHV/JPO)

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS  
THE FIRST, THIRD, FOURTH, FIFTH, SIXTH AND SEVENTH CLAIMS  
FOR RELIEF IN PLAINTIFFS' AMENDED COMPLAINT**

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## I. INTRODUCTION

Plaintiff's Opposition does not rebut the central contention of Defendants' Motion to Dismiss – that the well-pled factual allegations of the Amended Complaint do not as a matter of law state an ERISA wrongful denial of benefits claim. Plaintiffs were required to establish by reference to clear and express plan language a vested, unchangeable right to the claimed Welfare Plan benefits. This they have failed to do. The Supreme Court, addressing the very provisions of ERISA that are at issue in this case, repeatedly has held that plan sponsors are free, at any time and for any reason, “to adopt, modify, or terminate welfare plans.” Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995). Consistent with this binding authority, the Tenth Circuit repeatedly has rejected claims identical to those of Plaintiffs here, *i.e.*, that the Plans' “coverage” provisions amount to a clear expression of a contractual right to “forever unalterable” welfare benefits, even though there is “reservation of rights” language plainly reserving the right to change the Plans. In an effort to maintain their claims against the controlling authority, Plaintiffs ignore the reservation of rights language that bars their vesting claim, and they distort the applicable law.

Moreover, Embarq's coordination of retiree medical benefits with the federal Medicare program does not violate the ADEA – a position adopted by the EEOC and confirmed by the only Circuit Court of Appeals to consider the issue. Plaintiffs' attempted invocation of the “disparate impact” theory of age discrimination to automatically vest life insurance benefits is no more viable than their disparate treatment claims and would turn ERISA on its head.

In a last-ditch attempt to save their claims, Plaintiffs contend that it is “premature” to decide whether the allegations of the Amended Complaint state a cognizable claim. However, a Rule 12(b)(6) motion must be decided based solely on the Complaint's well-pled factual allegations and there is no question that Plaintiffs' Amended Complaint is subject to Rule

12(b)(6). Furthermore, whether ERISA plan documents contain “clear and express language” is a legal question for the Court to decide, not one requiring any discovery or additional proceedings. Accordingly, this Court should grant Defendants’ motion.

## **II. LEGAL ARGUMENT**

### **A. The Court Should Dismiss The First And Third Claims For Relief Because Plaintiffs Cannot Allege That Their Welfare Plan Benefits Were Vested.**

#### **1. The Amended Complaint Is Ripe For Dismissal.**

As an initial matter, this Court may interpret the Plan documents at the pleading stage. Kerber v. Qwest Group Life Ins. Plan, 544 F. Supp. 2d 1187, 1194-95 (D. Colo. 2008) (dismissing claims brought by class of retirees challenging the reduction of life insurance benefits provided under an ERISA plan on a Rule 12(b)(6) motion, where plan contained clear reservation of rights provision permitting such reduction). Indeed, “[t]he issue of vesting is one of contract interpretation.” Conkin v. CNF Transp., Inc., No. 03-1058, 2004 U.S. Dist. LEXIS 15434, \*21 (D. Wyo. May 2, 2004) (holding that plan language did not vest disability benefits; the “express language of the plans reserved the express right to terminate, modify or amend the plan at any time, although it was expected that the plans would continue to provide benefits in the future.”). “In interpreting the terms of an ERISA plan, the Court examines the plan documents as a whole and, if they are unambiguous, construes them as a matter of law.” Shields v. Cont’l Cas. Co., 209 F. Supp. 2d 1167, 1178 (D. Kan. 2002) (citing Chiles v. Ceridian Corp., 95 F.3d 1505, 1511 (10th Cir. 1996) (citing Kemmerer v. ICI Ams. Inc., 70 F.3d 281, 288-89 (3d Cir. 1995)). Only if the plan is ambiguous may the court consider extrinsic evidence of the parties’ intent. Deboard v. Sunshine Mining and Refining Co., 208 F.3d 1228, 1240 (10th Cir. 2000). Courts give “the language its common and ordinary meaning as a reasonable person in the position of the [plan] participant, not the actual participant, would have understood the words

to mean.” Blair v. Metro. Life Ins. Co., 974 F.2d 1219, 1221 (10th Cir. 1992) (emphasis omitted).

**2. Welfare Benefits Vest Only If The Plan States The Plan Sponsor’s Intent To Do So In “Clear And Express” Terms.**

As discussed in Defendants’ Opening Brief, “[c]ontractual vesting is a narrow doctrine” and “is not to be inferred lightly.” Chiles, 95 F.3d at 1513. Congress specifically exempted welfare benefit plans from ERISA’s vesting requirements and, therefore, “[e]mployers or other plan sponsors 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). In order to rebut the strong presumption that a plan sponsor has not agreed to waive its statutory right to alter, amend, or terminate welfare benefits, a plaintiff is required to identify “clear and express language” incorporated into the written plan documents demonstrating as much. Chiles, 95 F.3d at 1513. In the Amended Complaint, Plaintiffs merely assert in a conclusory fashion that the retiree medical benefits and life insurance benefits were vested. (Am. Compl. ¶¶ 107-08). Even in their Opposition, Plaintiffs’ assertions regarding vesting are extremely thin. Plaintiffs focus exclusively on the “coverage” section of the SPDs – and completely ignore the reservation of rights clauses that qualify all of the terms of the SPDs and which were prominently displayed at the front of the SPDs. Plaintiffs’ myopic approach to ERISA plan interpretation is not supported by Tenth Circuit precedent.

**3. The “Coverage” Provision Of The SPDs Is Not A “Clear And Express” Statement Of Embarq’s Intent To Vest Benefits By Waiving Its Inherent Right To Modify Or Terminate Welfare Benefits.**

In their Opposition, Plaintiffs belatedly assert that their contractual vesting claim is based on the “coverage” provisions of the SPDs. (Pl. Opp. at 11-12 (“Your coverage under the Retiree

Medical Plan ends . . . when you die.”) (quoting 1991 SPD, Pl. Exh. 4)).<sup>1</sup> The Tenth Circuit has flatly rejected an attempt to establish contractual vesting through reference to nearly identical language. In Welch v. Unum Life Ins. Co. of Am., 382 F.3d 1078 (10th Cir. 2004), the Tenth Circuit held that the plaintiff could not establish contractual vesting by “clear and express” language where the plan contained both a coverage provision “promising” benefits until death and also a reservation of the sponsor’s right to amend or terminate the plan. The relevant plan language at issue in Welch provided:

- Disability benefits will cease on the earliest of:
1. the date the insured is no longer disabled;
  2. the date the insured dies;
  3. the end of the maximum benefit period;
  4. the date the insured’s current earnings exceed 80% of his indexed pre-disability earnings;
  5. the date the insured receives retirement benefits under the employer’s retirement plan due to his voluntary election to receive such benefits.

Id. at 1085-86. The court noted that on a separate page the plan also advised that “[t]his policy may be changed in whole or in part.” Id. at 1086 (citation omitted).

In Welch, the Tenth Circuit held that

There is no language in the LTD plan that provides for the vesting of claims for benefits upon disability or at the end of the elimination period, and the plan specifically reserves UNUM’s right to change the plan. ***We cannot read a vesting requirement into the contract.*** . . . Therefore, we hold that Ms. Welch’s benefits did not vest upon her attaining disability or at the conclusion of the elimination period.

Id. at 1086 (emphasis added). In a footnote in the Opposition, Plaintiffs claim that the Welch court “did not decide whether the termination provision was sufficient to vest benefits.” (Pl. Opp. at 18 n. 5). Given the quoted language above, it is not clear upon what basis Plaintiffs

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<sup>1</sup> Defendants and Plaintiffs have attached to their filings excerpts from the formal Plan documents and SPDs. At the informal request of Plaintiffs’ counsel, Defendants produced to Plaintiffs complete copies of the Plans and SPDs on May 13, 2008.

make this representation. Indeed, the Tenth Circuit again summarized its holding in another section of the opinion:

As detailed in the foregoing discussion, *we hold that Ms. Welch's benefits were not vested under the LTD plan.* Accordingly, we hold that it was not improper for UNUM to retroactively apply Amendment 23 to Ms. Welch's claims, because it did not deprive her of vested benefits.

Id. at 1086 (emphasis added).<sup>2</sup>

In addition to attempting to side-step controlling law, Plaintiffs have not cited any Tenth Circuit authority that supports the proposition that the language of the coverage provisions is sufficiently "clear and express" to trump the general rule that "[u]nless an employer contractually cedes its freedom, it is generally free under ERISA, for any reason at any time, to adopt, modify, or terminate its welfare plan." Inter-Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry. Co., 520 U.S. 510, 515 (1997) (internal quotations and citations omitted); Curtiss-Wright Corp., 514 U.S. at 78 (1995).

Rather, Plaintiffs' entire vesting argument is premised on their misinterpretation of four cases – Hammond, SIPCO, Deboard, and Chiles. In Hammond v. Eighth Dist. Elec. Benefit Fund, 36 Fed. Appx. 369 (10th Cir. 2002), an unpublished opinion, the court did not consider either a "coverage" provision or a reservation of rights clause. There, the court considered a "flat contradiction" between two statutes of limitations provisions. Id. at 373. Thus, Hammond does

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<sup>2</sup> The "undeveloped vesting theory" Plaintiffs confusingly summarize in their footnote actually pertains to an unrelated provision of "Amendment 23," which amended the plan that was the subject of the dispute in that case. In contrast to Plaintiffs, the District Court, on remand, accurately summarized the Circuit Court's holding:

On appeal, *the Tenth Circuit reversed, concluding that Plaintiff's benefits under the old plan were not vested* and that the old plan was amended, not terminated, by the enactment of the new plan--Amendment 23. On remand, the Tenth Circuit directed this Court to apply the arbitrary and capricious standard to UNUM's benefit determination for Ms. Welch and "to consider the evidence and arguments of the parties regarding UNUM's determination that fibromyalgia falls into the self-reported symptoms limitation."

Welch v. Unum Life Ins. Co. of Am., No. 00-1439, 2007 WL 4374219, \*1 (D. Kan., Dec. 13, 2007) (citing Welch, 382 F.3d at 1085-88) (emphasis added).

not shed any light on the plan language at issue here.

In Jensen v SIPCO, 38 F.3d 945 (8th Cir. 1994), the Eighth Circuit held that the plan’s reservation of rights language was ambiguous and concluded that extrinsic evidence would be permitted to construe a predecessor employer’s intent to vest medical benefits. Critically, there were two conflicting reservation of rights clauses. In the first clause, the formal plan document provided that any “amendments shall not be applicable to persons who are receiving pensions hereunder prior to the effective date of such amendment.” Id. at 949. The subsequent employer inserted a second, broader reservation of rights clause in the SPD, which created a conflict with the plan document. Id. at 948. The SIPCO court first acknowledged that “a reservation-of-rights provision is inconsistent with, *and in most cases would defeat*, a claim of vested benefits.” Id. at 950 (emphasis added). Under the facts presented, however, the court found that it was unclear whether the company reserved the right to amend or terminate the benefits of “already retired pensioners, or only the right to make prospective changes for those covered by the Plan but not yet retired.” Id.

Here, there is no conflict between the terms of the formal Plan document and the SPDs. The reservation of rights clause in the Welfare Plans and SPDs does not limit its effect only to participants currently receiving benefits, as did the reservation in the plan document in SIPCO. Moreover, the earliest that any of the ERISA Plaintiffs retired was 1993.<sup>3</sup> Embarq and its predecessors have included in the SPD and the formal plan document a broad and unambiguous reservation of rights provision since the inception of the Plan in 1991 – two years *before* any of the ERISA Plaintiffs retired. See, e.g., Appx. to Defs. Open. Br., Exh. 4, 1991 SPD.

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<sup>3</sup> Plaintiffs impermissibly attempt to shift their burden of pleading (and proof) by claiming that Defendants did not attach as exhibits plan documents pre-dating 1990. As an initial matter, Plaintiffs have the burden to plead the existence of a plan and, specifically, the clear and express vesting language in the plan. Chiles, 95 F.3d at 1511-13. Moreover, as set forth in the Amended Complaint, the ERISA Plaintiffs retired, at the earliest, in 1993. (Am. Compl. ¶¶ 9-18).

The court's decision in Deboard v. Sunshine Mining and Refining Co., 208 F.3d 1228 (10th Cir. 2000) is inapposite. There, the Tenth Circuit held that a letter sent to inform employees of certain welfare benefits offered in connection with an early retirement program created a "new plan." Id. at 1238. However, the "new plan" did not contain a reservation of the company's right to amend or terminate the plan and the letter did not incorporate by reference any of the prior company's existing welfare plans. Id. at 1232-33. To confound matters, the court held that even if the new plan incorporated the reservation of rights clause from a pre-existing plan, the pre-existing plan's language was ambiguous because the clause appeared under a section of the SPD describing the "Insurer" of the plan. Id. at 1240. Thus, the court reasoned that the provision applied to the Insurer only, and not the company. Id.

Simply put, Deboard is not on point. The Plan documents at issue here explicitly reserved the Company's (Embarq's and its predecessors') right to amend or terminate the Plan. Those clauses appear in the formal Plan document and SPDs dating back to at least 1991 and are placed conspicuously at the front of each SPD. Moreover, Plaintiffs do not claim that any of the early retirement programs/incentives referenced in the Amended Complaint created a "new plan" – nor could they make such an allegation. In fact, in Deboard, the Tenth Circuit observed that a reservation of rights provision such as the one in Embarq's Welfare Plans would have clearly reserved the plan sponsor's right to amend or terminate plan. Id. at 1240 n. 7 (citing with approval Sprague v. Gen. Motors Corp., 133 F.3d 388, 401 (6th Cir. 1998) (en banc) (holding that retiree medical benefits were not vested under terms of a plan in which the SPD "reserved the right to amend, change or terminate the Plans and Programs described in this booklet.")).

In Chiles, the Tenth Circuit held as a matter of law that the plan sponsor "retained the right to change the benefits of all LTD plan participants – including those who had already

qualified for long-term disability.” Id. at 1512. The court rejected the plaintiffs’ attempt to distinguish the reservation of rights clause “from those in which amendment and termination controlled the promise of vested rights.” Id. at 1513.<sup>4</sup> Furthermore, the Chiles court held that the reservation of rights clause “retained almost unlimited discretion [in the employer] . . . to change the plan.” Id. at 1513 (citing Musto v. Am. Gen. Corp., 861 F.2d 897, 904 (6th Cir. 1988) (upholding plan amendment where the SPD stated that “the company fully intends to continue the plan indefinitely and to meet any foreseeable situations that may occur. However, the company does . . . reserve the right to change the plan and, if necessary, discontinue it.”)).<sup>5</sup>

Thus, Plaintiffs’ reliance on Hammond, SIPCO, Deboard, and Chiles is misplaced. The governing Plan documents and SPDs do not suggest, in any way, that Embarq intended to render the Welfare Benefits “forever unalterable.” Therefore, even if Plaintiffs had included in their Complaint every new contention they raise in their Opposition Brief, *they would still fail to state a claim*. See Kerber, 544 F. Supp. 2d at 1195 (“Plaintiffs have failed to state a claim . . . because they have failed to plead sufficient facts to establish by clear and express language that the welfare benefit rights were vested and not subject to change by the unambiguous terms of the 1998 Plan Documents.”); Sears v. Union Cent. Life Ins. Co., No. 06-3616, 222 Fed. Appx. 474, 479-80 (6th Cir. March 8, 2007) (affirming dismissal of plaintiffs’ claims challenging amendment to severance pay plan on defendants’ Rule 12(b)(6) motion); Tackett v. M & G

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<sup>4</sup> Plaintiffs suggest that Welch, and presumably Chiles, are inapposite because they dealt with disability benefits and a disability is not necessarily permanent. The question, however, is not whether retirement or disability is a “permanent condition” (Pl. Opp. at 18 n. 5); the question is whether the Welfare Plans, through “clear and express language,” granted the ERISA Plaintiffs a vested, contractual right to veto any change to the Plans’ medical and life insurance benefits. Chiles, 95 F.3d at 1513 (“A reasonable person in the position of an LTD Plan participant could read the termination provision in the SPD only as allowing Control Data to modify or terminate the plan when it deems necessary[.]”). The permanence of retirement or disability simply is not relevant.

<sup>5</sup> In Chiles, the court “recognize[d] that the weight of case authority supports the Unisys 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.” 95 F.3d at 1512 n. 2. The court did not need to employ the Unisys approach, however, because there, as here, it was clear that the plan sponsor “retained the right to change the benefits” of all participants. Id. at 1512.

Polymers, 523 F. Supp. 2d 684, 692-93, 696 (S.D. Ohio 2007) (dismissing retirees' ERISA section 502(a)(1)(b) claim attacking changes to their retiree medical benefits after reviewing the terms of the relevant collective bargaining agreement to find that the benefits were not vested).

Thus, Defendants' Motion is ripe for decision, and the Court should dismiss the First and Third Claims for Relief.<sup>6</sup>

**B. Plaintiffs' Third Claim For "Declaratory Relief" Should Be Dismissed.**

Plaintiffs contend that the Court should ignore two Tenth Circuit cases that have held that when a plaintiff seeks a remedy under section 502(a)(1)(B), he may not challenge the same alleged violation under section 502(a)(3). (Pl. Opp. at 21 (citing Lefler v. United Healthcare of Utah, Inc., 72 Fed. Appx. 818, 826 (10th Cir. 2003); Moore v. Berg Enters., Inc., 201 F.3d 448, 1999 WL 1063823, \*2 n. 2 (10th Cir. 1999)). In support of this dubious contention, Plaintiffs assert, without citing any authority, that certain relief, including "an order declaring that the benefits must be restored," might not be available under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). (Id.). This is a particularly strange assertion, given that Plaintiffs titled the First Claim for Relief "*Restoration of Benefits Pursuant to ERISA 502(a)(1)(B)*, 29 U.S.C. § 1132(a)(1)(B)." (Am. Compl., First Claim for Relief) (emphasis added). ERISA section 502(a)(1)(B) provides an adequate and complete remedy for the alleged denial of benefits. Accordingly, Plaintiffs' request for relief pursuant to section 502(a)(3) in the Third Claim must be dismissed. Moore, 201 F.3d 448, 1999 WL 1063823, \*2 n. 2 (holding that plaintiff is not entitled to "repackage his ... 'denial of benefits' claim [under Section 502(a)(1)(B)] as a claim for 'breach of fiduciary duty [under Section 502(a)(3)]'" (quoting Varity Corp. v. Howe, 516 U.S.

<sup>6</sup> Plaintiffs take Defendants to task for requesting that the Court dismiss "so much of the Second Claim for Relief that challenges the sufficiency of the applicable Summary Plan Descriptions." (Defs. Open. Br. at 1 n. 1; 12 n. 9; 22). When Plaintiffs amended the Complaint, they added to the Second Claim a broad and vague conclusion that the SPDs did not adequately disclose Embarq's reserved rights. (Am. Compl. ¶ 115). Defendants' request merely notes that if the Court, in dismissing the First Claim, finds that the SPDs disclosed the reservation of rights, then that part of the Second Claim that attacks the reservation of rights must also fail.

489, 513 (1996)).

Similarly, Plaintiffs do not dispute that the Court's resolution of the First Claim will render Plaintiffs' claim for declaratory relief moot, whether brought under the Declaratory Judgment Act ("DJA") or ERISA. (Defs. Open. Br. at 15). Instead, Plaintiffs argue incorrectly that Defendants hold the "view that an ERISA action can never include a claim under the DJA." (Pl. Opp. at 23). However, Defendants have never espoused this "view." Rather, Defendants explained that this Court should decline to exercise its discretion to hear the DJA claim. In this regard, Plaintiffs' DJA claim does not survive the "Mhoon" test set forth in the Opposition. The DJA is merely a procedural statute and does not create substantive rights. ERISA provides the substantive remedy *and* the procedural device to seek declaratory relief. See 29 U.S.C. § 1132(a)(1)(B) (permitting participants to bring suit to "clarify [their] rights to future benefits" as well as to "enforce [their] rights" and "recover benefits"). Accordingly, the DJA serves no "useful purpose in clarifying the legal relations at issue" in this case. State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 983 (10th Cir. 1994), quoted in Pl. Opp. at 22.

**C. The Fourth Claim For Relief Should Be Dismissed Because The Plan Amendments Are Permitted By The ADEA And The State-Law Claims In The Fifth, Sixth And Seventh Claims Are Completely Preempted By ERISA.**

**1. Plaintiffs Cannot Proceed With Their Age Discrimination Claims Regarding The Elimination Of Certain Life Insurance Benefits Under A Disparate Impact Theory.**

In their Opposition, Plaintiffs claim that the Supreme Court's decision in Smith v. City of Jackson, 544 U.S. 228 (2005), supports their disparate-impact discrimination claim under the ADEA. (Pl. Opp. at 25). Plaintiffs are incorrect. As an initial matter, Plaintiffs have not opposed Defendants' motion to dismiss their disparate treatment claim. Accordingly, the Fourth Claim for Relief, at a minimum, should be dismissed insofar as it purports to assert such a claim.

Indeed, Plaintiffs' entire argument with respect to life insurance benefits consists of a

single paragraph in which they cite City of Jackson, a case that does not involve an ERISA plan and therefore is far from “controlling” the analysis of this claim. (Pl. Opp. at 25). Tellingly, Plaintiffs fail to address the EEOC regulation that controls this issue, 29 C.F.R. § 1625.10 – a regulation that elsewhere in their Opposition, Plaintiffs declare was “codified into the [ADEA]” and which they attached to their brief as Appendix B. Compare Pl. Opp. at 27 n. 9 and Appx. B with Defs. Open. Br. at 20 (quoting 29 C.F.R. § 1625.10(a)(2)) and (Pl. Opp. at 25).<sup>7</sup>

The reason for Plaintiffs’ obfuscation is simple: The EEOC regulation, as applied to the facts presented here, requires the dismissal of Plaintiffs’ ADEA claim – whether framed as a disparate impact claim or a disparate treatment claim. The EEOC regulation provides, in pertinent part, that

Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section 4(a), [29 U.S.C. § 623(a)], and accordingly the practice does not have to be justified under section 4(f)(2) [29 U.S.C. § 623(f)(2)].

29 C.F.R. § 1625.10(a)(2). Thus, as explained by the Tenth Circuit in Bozner v. Sweetwater County Sch. Dist., 110 F.3d 73 (10th Cir. 1997), a case that Plaintiffs conveniently ignore in the Opposition, if an employer offers the same level of benefits to retirees, regardless of age, “there is no violation of the general prohibition against age discrimination” contained in section 4(a) of the ADEA. Id., 110 F.3d 73, 1997 WL 165168, \*3 (applying 29 C.F.R. § 1625.10(a)(2) and holding that severance plan did not violate the ADEA); see also New York 10-13 Ass'n v. City of New York, No. 98-1425, 1999 WL 177442, \*\*7-8 (S.D.N.Y. March 30, 1999) (dismissing plaintiffs' disparate impact claims under the ADEA bona fide employee benefits plan exemption

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<sup>7</sup> Instead of addressing the applicable law, Plaintiffs created a “straw house,” claiming that “Defendants’ challenge to the claim regarding life insurance benefits . . . appears to rely on a recent EEOC regulation regarding health insurance benefits. . . .” (Pl. Opp. at 25-26) (emphasis in original). A cursory review of pages 19-20 of Defendants’ Opening Brief confirms the only regulation cited by Defendants in the discrete section that addresses life insurance benefits is 29 C.F.R. § 1625.10(a)(2). (Defs. Open. Br. at 20, section III.D.1).

– 29 U.S.C. § 623(f)(2)(B)(i)) – where the benefits under the plans at issue were provided on an age neutral basis).

In the Complaint’s “Statement of Facts,” Plaintiffs concede that the two modifications to the life insurance benefits were based on *non-discriminatory factors*: (1) “eliminating the Grand-fathered Life Insurance benefit and all other life insurance benefit[s] for retirees participating in the VEBA plan”, and (2) implementing an across-the-board cap on life insurance benefits for all other retirees, setting a maximum benefit of \$10,000. (Compl. ¶ 102). As discussed in Defendants’ Opening Brief, neither of these criteria implicates the age of retirees – *i.e.*, retirees of *all ages are subject to the same eligibility requirements*, and, therefore, all “younger” retirees are provided the same level of benefits as “older” retirees. (Defs. Open. Br. at 19-20). Accordingly, Plaintiffs cannot state a disparate impact claim because “there is no violation of section 4(a)” in the first instance or, in the alternative, the Plan, by Plaintiffs’ own allegations, satisfies the statutory exemption.<sup>8</sup> See 29 U.S.C. § 623(f)(2)(B)(i); 29 C.F.R. § 1625.10(a)(2); Bozner, 110 F.3d at 73.

Moreover, Plaintiffs’ proposed disparate impact claim would undo years of ERISA precedent. Under Plaintiffs’ far-flung theory, employers would always be prohibited from reducing or eliminating *any* retiree welfare benefits. This would include, as Plaintiffs suggest, any “cancellation or limitation of medical, prescription drug and life insurance benefit[],” (Pl.

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<sup>8</sup> The Supreme Court has held that a disparate impact claim may only be brought under section 4(a)(2) of the ADEA. See City of Jackson, 544 U.S. at 236 n. 6 (stating that there are “key textual differences between § 4(a)(1), which does not encompass disparate impact liability, and § 4(a)(2).”). Regardless, because Embarq’s modification of the life insurance benefits does not violate section 4(a), it cannot, *a fortiori*, violate *any* of the three subsections of that provision. Moreover, Plaintiffs have not satisfied the pleading requirements for a disparate impact claim. “[I]t is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact.” Id. at 241; Meacham v. Knolls Atomic Power Lab., \_\_\_ U.S. \_\_\_, 2008 WL 2445207, \*9 (June 19, 2008) (“the requirement has bite: one sufficient reason for rejecting the employees’ challenge was that they “had done little more than point out that the pay plan at issue was relatively less generous to older workers than to younger workers,” and “had not identified any specific test, requirement, or practice within the pay plan that had an adverse impact on older workers.”) (quoting City of Jackson, supra at 241) (brackets omitted). Yet, at most, this is all that Plaintiffs have done. (See Am. Compl. ¶ 125).

Opp. at 25), even though a plan amendment was not based on age. Under Plaintiffs' theory, these benefits, which do not automatically vest under ERISA, see, e.g., Curtiss-Wright Corp., 514 U.S. at 78, would *automatically vest under the ADEA* because elimination of the benefits allegedly would adversely impact older retirees. Such a rule turns ERISA (and the ADEA) on its head and ultimately would result in fewer employers providing welfare benefits – just the opposite of what Congress intended when it enacted ERISA.

**2. Plaintiffs' Claims Regarding The Coordination Of Retiree Medical Benefits With Medicare Eligibility Should Fail, As A Matter Of Law, Because This Practice Is Authorized Under Federal Regulations Governing The ADEA.**

The EEOC has promulgated regulations that explicitly allow an employer to coordinate retiree medical benefits with Medicare eligibility. 29 C.F.R. § 1625.32. Contrary to Plaintiffs' assertion, the EEOC acted within its express authority to exempt this practice from the ADEA's prohibitions on age discrimination. The only circuit to have addressed whether section 9 of the ADEA grants sufficient authority to the EEOC to promulgate this regulation has upheld the regulation, and the Supreme Court denied certiorari. See Am. Ass'n of Retired Persons ("AARP") v. Equal Employment Opportunity Comm'n, 489 F.3d 558 (3d Cir. 2007), cert denied, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1733 (2008). Plaintiffs' attacks on the Third Circuit's decision misinterpret the Third Circuit's holding and the applicable jurisprudence.

**a. The Third Circuit Correctly Focused Its *Chevron* Analysis On Section 9 Of The ADEA.**

Plaintiffs attempt to obscure the statutory question that must be resolved by this Court. That question is *not* whether the coordination of retiree medical benefits with Medicare eligibility is prohibited under the ADEA. Rather, the threshold question is whether Congress gave the EEOC authority under section 9 of the ADEA to exempt "otherwise prohibited"

conduct under the ADEA.<sup>9</sup> See 29 U.S.C. § 628.

As Plaintiffs correctly state, the Chevron analysis requires the Court to determine whether Congress directly spoke to the precise question at issue. Hackworth v. Progressive Cas. Ins., 468 F.3d 722, 727 (10th Cir. 2006). “If congressional intent is clear *on the precise question at issue*, our analysis ends and the congressional intent is given effect.” Id. (emphasis added). In the ADEA, Congress directly spoke to the issue. That is, Congress expressly granted the EEOC authority to exempt “any and all” practices that would be “otherwise prohibited” by the Act. Under Chevron, the Court’s analysis must focus on *that* statutory grant of authority and determine whether the administrative agency adhered to the limitations placed on that authority when granting an exemption. See Roth v. Perseus LLC, 522 F.3d 242, 248 (2d Cir. 2008).

For example, in Roth, the Second Circuit held that the Securities and Exchange Commission (“SEC”) did not exceed its exemption authority under section 16(b) of the Securities Exchange Act, when it exempted certain transactions from section 16(b)’s prohibitions on insider trading. Section 16(b) provided that “it shall ‘not be construed to cover . . . any transaction or transactions which the Commission by rules and regulations may exempt *as not comprehended within the purpose of this subsection.*’” Id. (emphasis added). In conducting its Chevron analysis, the court stated: “The question for us is whether the transaction exempted by Rule 16b-3(d) are ‘comprehended within the purpose of Section 16(b).’” Id. After noting that Congress explicitly delegated to the SEC policymaking authority to exempt certain transactions from section 16(b), the Second Circuit gave “*Chevron* deference to the SEC’s opinion on whether the transactions exempted by Rule 16b-3(d) are comprehended within the purpose of

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<sup>9</sup> Defendants assume for the purpose of this motion only that such coordination of benefits is “otherwise prohibited” under the ADEA.

Section 16(b).” Id. at 249.<sup>10</sup>

The Third Circuit correctly began its Chevron analysis by questioning whether Congress directly spoke to the issue before it, and the issue presently before this court – whether Section 9 of the ADEA granted the authority to the EEOC to exempt the practice of coordinating retiree medical benefits with Medicare eligibility. AARP, 489 F.3d at 563. The Third Circuit held that the express language of “Section 9 clearly and unambiguously grants the EEOC the authority to provide, at least, narrow exemptions from the prohibitions of the ADEA.” Id. The Court further held that “[b]y stating that ‘*any or all provisions*’ may be subject to exemptions, Congress made plain its intent to allow limited practices not otherwise permitted under the statute, so long as they are ‘reasonable’ and ‘necessary and proper in the public interest.’” Id. (emphasis in original).

Having defined the scope of the EEOC’s “clear and unambiguous authority,” the Court turned its focus to whether the exemption satisfied the limitations placed on the EEOC’s authority – i.e., whether the regulation was reasonable and necessary and proper in the public interest. The Third Circuit held that the exemption promulgated by the EEOC was a “reasonable, necessary and proper exercise of its section 9 authority, as over time it will likely benefit all retirees.” Id.

**b. Plaintiffs’ Argument Concerning The Significance Of The OWBPA To The Court’s *Chevron* Analysis Ignores The Nature Of The Authority Granted To The EEOC And Is Directly Contradicted By The Terms Of The ADEA.**

Plaintiffs unconvincingly argue that the OWBPA “explicitly barred the EEOC from

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<sup>10</sup> The case cited by Plaintiffs is inapposite. In Lee v. Gallup Auto Sales, Inc., 135 F.3d 1359, 1361-62 (10th Cir. 1998), the court invalidated an exemption under the Vehicle Information and Cost Savings Act (“VICSA”) promulgated by the Secretary of the National Highway Traffic Safety Administration. In contrast to the ADEA, the VICSA did not expressly grant exemption authority to the Secretary. Id. at 1361.

altering the meaning and force” of the OWBPA’s amendment to the ADEA. (Pl. Opp. at 28). Plaintiffs then attempt to explain that this “explicit” constraint on the EEOC’s exemption authority can be found in the OWBPA’s incorporation of a prior EEOC regulation “as in effect in 1989.” *Id.* However, there is nothing at all in the OWBPA, or ADEA as amended, that “explicitly” (or even implicitly) suggests that Congress intended subsection 4(f)(2)(B)(i) to restrict the exemption authority granted to the EEOC in section 9. Compare 29 U.S.C. § 623(f)(2)(B)(i) with 29 U.S.C. § 628.

Section 9 of the ADEA provides:

In accordance with the provisions of subchapter II of chapter 5 of title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from *any or all* provisions of this chapter as it may find necessary and proper in the public interest.

29 U.S.C. § 268 (emphasis added). In enacting the OWBPA, Congress could have, but did not, place any limitations on the EEOC’s distinct authority to make reasonable exemptions under section 9 of the ADEA. Thus, if any congressional intent can be gleaned from the enactment of the OWBPA, it is that Congress did not intend any portion of the OWBPA to interfere with the EEOC’s authority to exempt “any or all” practices that would be “otherwise prohibited” by the ADEA.<sup>11</sup>

**c. It Is Wholly Irrelevant That The Plan Amendments Were Announced Prior To The Effective Date Of The EEOC Regulation.**

Plaintiffs argue that because disparate treatment claims under an anti-discrimination law accrue when an employee receives notice of an adverse employment action, Embarq’s alleged

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<sup>11</sup> Ironically, despite Plaintiffs’ heavy reliance on the canons of statutory interpretation, Plaintiffs’ proffered interpretation of the ADEA, as modified by the OWBPA, attempts to render meaningless the “any or all” language in section 9.

violation of the ADEA took place on the date the plan amendments were announced. To support this proposition, Plaintiffs rely upon cases interpreting the administrative filing deadlines for discrimination actions under Title VII: Ledbetter, v. Goodyear Tire & Rubber Co., \_\_\_ U.S. \_\_\_, 127 S. Ct. 2162 (2007) and Delaware State Coll. v. Ricks, 449 U.S. 250 (1980). Plaintiffs' reliance on Ledbetter and Ricks is misplaced. Where, as here, ADEA disparate treatment claims attack an allegedly facially discriminatory policy, the claims accrue when the policy is applied, not when plaintiffs receive notice of it. See Equal Employment Opportunity Comm'n v. Ky. State Police Dep't, 80 F.3d 1086, 1094 (6th Cir. 1996) (holding that ADEA claims challenging a mandatory retirement age policy that "facially discriminates between troopers . . . becomes ripe when the statute is applied, e.g. when the trooper is mandatorily retired."); see also Cohn v. A.E. Staley Mfg. Co., 734 F. Supp. 832, 834 (N.D. Ill. 1990) (holding that plaintiff's ADEA claim did not ripen when he entered into a facially discriminatory employment agreement with his employer, but rather when he was denied benefits under the terms of the agreement).

Thus, the alleged discriminatory action would have occurred, if at all, when the Plan amendment became effective and actually affected Plaintiffs' medical benefits. As the amendment became effective after the EEOC's exemption became effective, Plaintiffs' retroactivity argument fails. Further, the Appendix to the regulation (which Plaintiffs cited in their Opposition at p. 26 n. 8) explains that "[t]he exemption applies to all retiree health *benefits* that coordinate with Medicare . . ., whether those benefits are provided for in an existing or newly created employee benefit plan." See Appendix to 29 C.F.R. § 1615.32, Q6 (emphasis added). The fact that the regulation applies to existing welfare plans does not mean that there has been a "retroactive" application of the law. The earliest that any Plaintiff experienced a change in *benefits* (and thus the earliest date on which a Plaintiff can claim any damage from the

alleged breach of the Plans' terms) is January 1, 2008 – 4 days *after* the regulation became effective. See 72 Fed. Reg. 72938.

**3. Plaintiffs' State-Law Age Discrimination Claims Must Be Dismissed Under The Supreme Court's Holding In *Shaw*.**

Plaintiffs have failed to make any arguments in response to Defendants Motion to Dismiss that would justify allowing their state law discrimination claims to survive dismissal of their ADEA claims. Indeed, Plaintiffs agree that the Supreme Court's decision in Shaw v. Delta Airlines, Inc, 463 U.S. 85 (1983), controls the disposition of their state law claims. (Pl. Opp. at 32 (“under ERISA § 514(a), 29 U.S.C. §144(a), state employment laws are preempted only *insofar as they prohibit practices that are lawful under federal law.*”) (emphasis added)). As Plaintiffs agree that their state-law claims will be preempted by ERISA to the extent these state laws might prohibit lawful practices under the ADEA, this Court should dismiss Plaintiffs' state-law claims.

**III. CONCLUSION**

For the foregoing reasons, and the reasons set forth in their Opening Brief, Defendants respectfully request that the Court dismiss with prejudice the First, Third, Fourth, Fifth, Sixth and Seventh Claims for Relief in Plaintiffs' Amended Complaint in their entirety, and so much of the Second Claim for Relief that challenges the sufficiency of the applicable Summary Plan Descriptions.

Respectfully submitted,

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I hereby certify that on the 23rd day of June, 2008, I electronically filed the foregoing document using the CM/ECF system, which will send notice of electronic filing to the following:

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