CASE NO. 08-1387

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD J. KERBER,
NELSON B. PHELPS,
JOANNE WEST,
NANCY A. MEISTER,
THOMAS J. INGEMANN, JR.,
Individually, and as Representative of plan participants and plan beneficiaries of the Qwest Pension Plan,

Plaintiffs-Appellants,

vs.

QWEST PENSION PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE, QWEST PENSION PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado
Civil Action No. 05-cv-00478-BNB-KLM
The Honorable Magistrate Judge Boyd Boland, Presiding

OPENING BRIEF OF PLAINTIFFS – APPELLANTS

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INTRODUCTION

This appeal involves a challenge pursuant to the Employee Retirement Income Security Act ("ERISA") contesting a decision made in December 2003 by Qwest Communications International, Inc. ("Qwest") to eliminate a death benefit component of the retirement package for retirees. For over 40 years, the benefit in question, known as the "Sickness Death Benefit" or "Pension Death Benefit" or "Pensioner Death Benefit" (hereinafter "PDB"), was paid to survivors of employees who retired on a service pension. U S WEST, the former Plan sponsor, made the PDB an integral part of an early retirement benefit, a single sum form of benefit. The single sum early retirement benefit, which included the value of the PDB, was given to thousands of employees immediately upon termination of employment. All other persons who took retirement status received a monthly annuity service pension, and the PDB was made payable to "mandatory beneficiaries" upon the death of the retiree. In general, the PDB equaled the employee's final annual wages.

In December 2003, Qwest amended the pension plan to eliminate the PDB for service pension eligible employees ending employment on or after January 1, 2004. At that time, Qwest announced it intended to eliminate the PDB for all other retirees who then were receiving a monthly pension annuity. Naturally, Qwest's

announcement resulted in a massive outcry by retirees who considered the promised PDB to be a protected benefit, especially since during at least 8 years (1990 and 1997-2003) U S WEST and Qwest gave thousands of employees a choice of either receiving immediate reduced payment of the PDB upon termination of employment or delaying full payment of the PDB until after death occurred. Litigation ensued after internal claims procedures were exhausted.

Appellants are five retirees. Two retirees, Edward Kerber and Nelson Phelps, when retiring in 1990, had the choice of receiving either an immediate single sum early retirement benefit with the value of the PDB or a monthly service pension annuity with the PDB paid after death to a mandatory beneficiary. Both Mr. Kerber and Mr. Phelps chose to receive the annuity form of pension benefit. Three retirees, Joanne West, Nancy Meister and Thomas Ingemann, were service pension eligible in December 2003 when Qwest changed the pension plan and removed the PDB component from the formula for the early retirement single sum payment. Those three retirees ended employment after January 2004 and their respective pension benefits do not include the value of the PDB. Appellants sought to represent the interests of all Plan participants but their motion for class certification was not addressed by the District Court, and no class was certified.

After formal discovery, the District Court granted Defendants-Appellees a

summary judgment on all claims. Appellants timely commenced this appeal.

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals concerning the parties' dispute.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. §1331. The District Court had jurisdiction of the underlying claims for relief based upon the civil enforcement provisions of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), 1132(a)(3), 1132(e)(1), and 1132(f).

The Tenth Circuit Court of Appeals has appellate jurisdiction under 28 U.S.C. § 1291, as the District of Colorado entered a final and appealable judgment granting Defendants-Appellees a summary judgment on all claims with prejudice.

The order of dismissal was entered on October 5, 2006. (App. at 390-402). The summary judgment order was filed on September 19, 2008. (App. at 1188-1221). Final judgment entered on September 23, 2008. (App. at 1223-1224). The Notice of Appeal was timely filed on October 15, 2008. (App. at 1225-1226).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in failing to determine the pension plan document's reservations of rights clause (ROR) was ambiguous and served as a private anti-cutback clause?
   [Issued raised by Appellants - See App. at 827-829, 831-833].

2. Did the District Court err in not interpreting the ROR in an ordinary and popular sense as would a person of average intelligence and experience?
   [Issued raised by Appellants - See App. at 827-829, 831-833].

3. Did the District Court err by not finding Appellants' cumulative evidence proved the Plan sponsor intended to confer unalterable and irrevocable Pensioner Death Benefits on retired Plan participants? [See evidence presented and argued by Appellants in App. 820-848].

4. Did the District Court err by concluding the Pan sponsor's removal of an integral component of an early retirement benefit did not violate the anti-cutback rule of ERISA Section 204(g), 29 U.S.C. § 1054(g) and Plan terms?
   [Issue raised by Appellants - See App. at 836-840].

5. Did the District Court err in not considering Appellants' evidence and arguments in support of their Count III's claim for a declaration of their rights to future benefits that the Plan sponsor had not properly amended the Plan so as to "freeze the PDB to the value of the Plan participant's annual wage rate as of March 1, 1993?
   [Issues re: no formal plan amendment - See App. at 840-841].

6. Did the District Court err in granting a summary judgment for Defendants on all claims, including the equitable estoppel claim?
   [Issues re: ERISA equitable estoppel claim raised by Appellants - See App. at 845-846].

STATEMENT OF THE CASE

After internal claims procedures were exhausted, this case was commenced. Pursuant to 28 U.S.C. § 636(c), Fed.R.Civ.P. 73, and D.C.COLO.LCivR 72.2, the parties elected to proceed with this case before a Magistrate Judge. (App. at 129-130). The case was then referred to The Honorable Magistrate Judge Boyd Boland for all purposes pursuant to 28 U.S.C. § 636(c). (App. at 131-133).

The Second Amended Complaint ("SAC") (the controlling pleading) alleges six separate claims under ERISA within four counts. Count I includes a claim for breach of fiduciary (based on misrepresentations about the nature of the PDB) as well as a claim for equitable estoppel. Appellants contend Qwest's current position about the PDB is completely contrary to U S WEST's position to treat the PDB as an entitlement and a protected benefit and contrary to U S WEST's representations about the PDB. (App. at 57-60, ¶¶ 149-165; App. at 528-532). Count II claims Plan Amendment 2003-5 violates ERISA's anti-cutback provision, 29 U.S.C. § 1054(g), violates the ROR's restraint which prohibits an amendment which "diminish" accrued benefits, and violates IRC § 420 which required all accrued benefits to be fully vested due to transfers of pension assets to pay retiree health care benefits during years 1998-2000. Appellants seek to have Plan Amendment 2003-5 stricken and the Plan reformed to reinstate the PDB for persons retiring after January 1, 2004. (App. at 60-65, ¶¶ 166-188; App. at 532-

538). Count III seeks, pursuant to ERISA Section 502(a)(1)(B), a declaration of Appellants' rights to benefits. Appellants contend the PDB should be declared a protected benefit and they further requested, pursuant to ERISA Section 502(a)(3), Plan Amendment 2003-5 be declared invalid because it violated ERISA's anti-cutback provision (App. at 65-66, ¶¶ 189-192; App. at 538-539). Count IV alleges breach of fiduciary duty (for issuing incorrect plan documents) and, pursuant to ERISA Sections 502(a)(2) and (a)(3), seeks equitable and remedial relief for the benefit of the Plan as a whole requiring Appellees to correct plan documents to conform with past fiduciary commitments about the PDB. (App. at 66-67, ¶¶ 193-198; App. at 539-541).

Early on in this case, the District Court entered an Order of dismissal and dismissed two Appellants, Mr. Kerber and Mr. Phelps, from pursuing Count II which attacked the validity of Plan Amendment 2003-5.

After formal discovery proceedings ended, Defendants-Appellees moved for a summary judgment on all claims for relief, and the parties fully briefed that motion. On September 24, 2007, the District Court entered an order denying the motion without prejudice to refile. (App. at 561-565). Then, Appellees submitted another motion for summary judgment taking a different attack against all of the claims. After that motion was fully briefed, supplemental authority was submitted to the District Court.

On September 19, 2008, the District Court fully granted the revised summary judgment motion filed by Defendants-Appellees. (App. at 1188-1221). As a result of that order, the District Court declared Appellants' pending motion for class certification to be moot (App. at 1187). On September 23, 2008, the final Judgment which incorporated the Order of dismissal and the Order of summary judgment was entered. (App. at 1223-1224). On October 15, 2008, Appellants timely filed a Notice of Appeal. (App. at 1225-1226).

STATEMENT OF FACTS

1984 Management Plan and Reservation of Rights Course of Dealings

1. In 2000, Qwest acquired and merged with U S WEST. As a result of the merger, Qwest became and remains to this day the plan sponsor of the Qwest Pension Plan ("Plan"), which is the successor to U S WEST's pension plans. (App. at 542, ¶¶ 1-2). The "Qwest Employee Benefit Committee" is the Plan's "named fiduciary". (App. at 542, ¶ 3). The "Qwest Pension Plan Design Committee" has authority to make amendments to the Plan. (*Id.*).

2. Years before its acquisition by Qwest, U S WEST established two pension plans, effective January 1, 1984, as successors to the Bell System Pension Plans: the U S WEST Pension Plan (the "Occupational Plan") and the U S WEST Management Pension Plan (the "Management Plan"). (App. at 543, ¶ 11).

3. The Management Plan existing when Appellants Kerber and Phelps,

both U S WEST management employees, took early retirement stated:

> The U S WEST Management Pension Fund *shall be* held by a trustee or trustees or an insurance company or companies as permitted by law *for pension and death benefit purposes only* and shall be disbursed as directed by the Company. . . The Company undertakes to preserve the integrity of the U S WEST Management Pension Fund as a fund held in trust or by an insurance company or companies as permitted by law *to be applied solely to pension and death benefit purposes* and to take such action as may be necessary and appropriate to insure the application of the entire fund to such purposes.

(emphasis added) (App. at 911).

4. The Management Plan contained a reservation of rights ("ROR") labeled "Changes in Plan," which stated in pertinent part:

> The Committee, with the consent of the Chairman of the Board. . . may from time to time make changes in the Plan as set forth in the document, and the Company may terminate said Plan, but such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder.

(App. at 46, ¶ 96; App. at 93, ¶ 96). This ROR language existed from January 1, 1984 until changed when U S WEST executed a restated master plan document on December 29, 1994. (*Id.;* App. at 46, ¶ 105; App. at 93, ¶ 105).

5. The Management Plan did not expressly give the Plan Administrator power to make interpretative decisions about Plan terms. (App. at 900-910).

6. Former U S WEST Chief HR Officers, Barbara Doherty and Richard Remington, who also served as Chairpersons of the Employee Benefits Committee, the named fiduciary for the pension plans, explained U S WEST's course of

dealings with the PDB in view of the aforesaid ROR. Ms Doherty testified, in part:

> When I served on the EBC, it was the official position of the Committee that the "CHANGE IN PLAN" provision precluded any amendment to the pension plans that would be adverse to the benefits package given to retirees. The Committee interpreted and understood the Pension Death Benefit, like the service pension, could not be reduced or eliminated after a person retired. Therefore, one of the Committee's responsibilities was to make sure there was always sufficient funding to pay out the service pensions and Pension Death Benefits earned by persons who were service pension eligible. It was unheard of to even consider making any negative changes to service pensions or Pension Death Benefits after a person retired.

(App. at 1086, ¶ 7.). Mr. Remington testified, in part:

> When I served as Chairman of EBC. . . [t]he EBC's official position was that the package of benefits outlined and stated to the retiree upon his or her retirement was a commitment that could not be changed to make the retiree worse off. Therefore, the EBC understood the Pension Death Benefit, like the service pension, could not be reduced or eliminated after a person retired.
>
> * * *
>
> . . . the EBC acting through U S WEST HR management personnel routinely advised persons who were making retirement decisions that they would always be entitled to the Pension Death Benefit.
>
> * * *
>
> In the course of administering the U S WEST pension plans, U S WEST, both as plan sponsor and plan administrator, acting through the EBC and designated Human Resources management personnel, consistently manifested an intention and recognition that the Pension Death Benefit payable to the qualified beneficiaries of retirees who were receiving service pensions was a fixed element of the retirees' pension package, rather than a welfare benefit that could be taken away at the will of the company. This

> implied contract was manifested in various ways, such as funding the Pension Death Benefit on an actuarial basis, paying the death benefit out of pension plan assets, providing within the pension plan documents that the Pension Death Benefits would survive a plan termination and be given priority over certain deferred vested benefits, and advising in the SPD that the Pension Death Benefit was part of a defined benefit pension plan.

(App. at 1090-1091, ¶¶ 5, 6 and 9.).

1990 Special Retirement Offer - "5+5"

7. In 1990, U S WEST made a special early retirement offering, commonly known as the "5+5", to thousands of management employees, including Mr. Kerber and Mr. Phelps. (App. at 922, ¶ 2; App. at 926, ¶ 2). To implement the 5+5 early retirement offering, the Management Plan was amended to add an additional five years to each eligible Plan participant's age and term of employment for calculating the pension benefit. (App. at 235, 5B.5 Minimum Benefit.(B)). In addition, the Management Plan was amended to provide "for those employees who elect the lump sum payout option, the present value of the Death Benefit Plan benefit." (App. at 236, 5B.6. 1990 Special Window.).

8. When accepting the 5+5 early retirement offer, Appellants Kerber and Phelps had the choice of taking either a traditional monthly annuity or a lump sum payment including the present value of the PDB. (App. at 421, Response Interrog. 1; App. at 430, Response to Interrog. 7). Both Appellants elected to receive a monthly annuity and retired effective February 28, 1990. (App. at 543, ¶¶ 5, 6).

July 1989 SPD and Representation Made to Appellants Kerber and Phelps

9. The Summary Plan Description (SPD) issued to Appellants Kerber and Phelps when they retired was the July 1989 version which stated:

> If you should die after retirement while receiving a service or disability pension, a benefit equal to one year's pay at retirement *will be paid* to the mandatory beneficiary (if any).
>
> Mandatory beneficiaries for this benefit are:
>
> * your spouse if living with you at the time of your death, or
>
> * your unmarried, dependent children up to age 23, or age 23 and over if disabled and incapable of self-support, or
>
> * a dependent parent living with you or in a separate household that you provide.

(emphasis added) (App. at 20, ¶ 83; App. at 91, ¶ 83; App. at 717). The SPD did not contain a reservation of rights to eliminate or make changes to benefits. (App. at 1214 "the SPD is silent regarding the right to amend.").

10. The July 1989 version SPD was created when Richard Remington was Chief Human Resources Officer and served as Chairperson of the Employee Benefits Committee, the named fiduciary for the pension plans. Mr. Remington testified:

> In July 1989, near the end of my term on the EBC, an updated Summary Plan Description (SPD) was sent out to all U S WEST employees and retirees explaining the revisions that had been made in January 1989. The July 1989 SPD gave reassurances that the Pension Death Benefit was an entitlement for someone who was survived by a spouse, dependent children or dependent parents under certain

> circumstances. Note the use of the word "will" in the SPD when explaining the Sickness Death Benefit, the Pension Death Benefit. Also, at that time, the only reservation of right U S WEST set forth in the SPD was the right to terminate the entire pension plan, if that need arose. Throughout my U S WEST employment, U S WEST never issued a SPD or other publication to employees or retirees that would indicate the Pension Death Benefit was a potential take-a-way benefit. That was never a consideration. Therefore, the SPD issued while I was on the EBC did not contain any reservation of rights to reduce or eliminate the Pension Death Benefit.

(App. at 1091, ¶ 10).

11. Appellant Phelps testifies that he relied upon the July 1989 SPD:

> That SPD stated straightforward: *"If you should die after retirement while receiving a service or disability pension, a benefit equal to one year's pay at retirement* ***will be paid*** *to your mandatory beneficiary (if any)*." Also, that SPD did not state U S WEST retained any right to change, reduce or takeaway the PDB after I became service pension eligible. I relied upon that SPD in making my retirement decisions wherein I elected not to receive a lump sum payout which would have included a reduced present value PDB.
>
> * * *
>
> Because of the representations and provisions for the PDB, I declined the survivor option for the payment of my service pension and that election became irrevocable upon my retirement.

(emphasis original) (App. at 926-927, ¶¶ 6 and 8).

12. Appellant Kerber testifies that he, too, detrimentally relied upon the July 1989 version SPD when making his retirement decision. (App. at 922-923, ¶¶ 5 and 7). Appellant Kerber elaborated further, as follows:

> The third time I was told my benefits were guaranteed was when I had to make the decision to retire with the 5+5 early retirement program in 1990. Mr. Jack Shea and practicality every senior management

> person I talked with said the benefits listed were promised to stay with me for the rest of my life and that I must choose carefully between taking a lump sum and taking the annuity. By taking the lump sum the death benefit would be less than the full amount my spouse would receive when I died -- even if I was to die two months after retiring. So, if I took the reduced lump sum amount and died right away, we were stuck with that decision. Therefore, I chose to protect the full Pension Death Benefit for my spouse and I based my decisions on what had been promised over the years and the advice I received at the time of my retirement.

(App. at 422, response to Interrog. 1).

13. To confirm Appellants Kerber and Phelps had been accepted for the 5+5 early retirement, Plan Administrator Jack Shea, on behalf of the Employee Benefits Committee, the named fiduciary, issued them a letter dated March 26, 1990 stating:

> Congratulations on your recent retirement. The Employees' Benefit Committee has authorized a pension payable to you. . .
>
> * * *
>
> A benefit equal to one year's pay immediately prior to your retirement **will be paid** under the U S WEST Management Pension Plan to any "qualified" beneficiar(ies) you may have at the time of your death. The death benefit is paid in addition to benefits paid under the Group Life Insurance Program.

(emphasis added). (App. at 1122).

U S WEST's Classification of the PDB

14. In every SPD issued by U S WEST during 1984 through at least 1999 the Plan sponsor deliberately chose to classify the PDB as a defined benefit plan,

not a welfare benefit, and the following representation was made:

> **Type of Plan.** The Plan is classified as both a pension plan and a welfare plan under the definitions of ERISA. It is a "defined benefit plan" for service and deferred vested pension purposes and for payment of certain sickness death benefits upon the death of a Pension Plan participant.[1] The Plan is a "welfare plan" for purposes of providing disability pensions and other death benefit payments.

(App. at 1033-1060 - compilation of SPDs "Classification of Benefits").

15. When U S WEST was Plan sponsor, the Plan administrator under penalty of perjury confirmed in Form 5500 reports submitted to the U.S. Department of Labor and the Internal Revenue Service that *vested benefits* included the PDB liability for service pension Plan participants. (App. at 1077-1078, Defts' Response to Interrogs. 9-10; App. at 967, Tr. at 196:4-197:19). [2]

16. After Mr. Kerber and Mr. Phelps retired, the Occupational Plan and

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[1] Under a defined-benefit plan, "the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Ala. Power Co. v. Davis*, 431 U.S. 581, 593 n. 18, 97 S.Ct. 2002 (1977).

[2] Sections 102 and 103(a)(1)(A) of ERISA, 29 U.S.C. §§ 1022, 1023(a)(1)(A), require plans to issue both SPDs and Annual Returns (Form 5500s). They are an integral part of compliance with ERISA's statutory scheme and constitute binding, controlling documents under which plan benefits are characterized for statutory purposes. During at least a 10 year period, the "Instructions for Schedule B (Form 5500) Actuarial Information" consistently required an entry in a column to disclose "the current liability attributable to vested benefits." (App. at 1094, 1096-1097). For as far back as Form 5500 records could be found, Defendants concede that the PDB was included in the "vested" benefits column.

the Management Plan were merged into a single plan effective January 1, 2003. (App. at 544, ¶ 12). On December 29, 1994, a restated master Plan document was executed and entitled "U S WEST PENSION PLAN amended and restated, effective January 1, 1993." (App. at 199-311) (hereinafter "1993 Restated Master Plan Document"). [3]

17. The 1993 Restated Master Plan Document reflects that U S WEST considered certain post-retirement welfare benefits were "accrued." It stated: ". . . the use of Excess Assets to fund previously accrued post-retirement medical and life insurance benefits for Plan participants shall not be deemed a direct or indirect reversion to U S WEST or any other Participating Company. . .). (App. at 257-258, § 11.5(b)).

18. The 1993 Restated Master Plan Document states:

> 7.11 Termination of Death Benefits. . . **Individuals who have a Term of Employment that includes any period prior to March 1, 1993**, including individuals who are re-employed on or after March 1, 1993 and whose Term of Employment is bridged so that it includes periods before March 1, 1993, **shall be entitled to a frozen [Pension Death] benefit** under this Article VII as of February 28, 1993."

(emphasis and bracketed portion added) (App. at 250, § 7.11).

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[3] It is not disputed that this master restated document was executed on December 29, 1994 (See App. at 266) and made effective as of January 1, 1993. Since it was created in 1994, Appellants referred to it as a 1994 document in the trial court proceedings. The District Court refers to it as a 1993 document. Hereinafter, Appellants will refer to it as the "1993 Restated Master Plan Document."

19. The January 1994 SPD issued to Appellants Kerber and Phelps after they retired and after the 1993 Restated Master Plan Document was created states:

> . . . As a retiree with a TOE [meaning term of employment] [4] date of February 28, 1993 or earlier, your eligible beneficiaries are **eligible** to receive this benefit. If your TOE date is February 28, 1993 or earlier, your eligible beneficiaries are **entitled** to this benefit.

(emphasis added) (App. at 44, ¶ 89; App. at 92, ¶ 89).

20. The January 1996 SPD issued by U S WEST repeated the same mantra:

> . . . As a retiree with a TOE date of February 28, 1993 or earlier, your eligible beneficiaries are **eligible** to receive this benefit. If your TOE date is February 28, 1993 or earlier, your eligible beneficiaries are **entitled** to this benefit.

(emphasis added) (App. at 44, ¶ 90; App. at 92, ¶ 90).

1997 Creation of Early Retirement Benefit - the Single Sum Payment

21. Effective January 1997, management employees at U S WEST were given the permanent option of receiving an early retirement benefit in the form of a single sum payment, also known as a "Defined Lump Sum" upon ending employment:

> 6.5 Lump Sum Options (a) (1) . . . each Participant who is an Active Management Participant on or after January 1, 1997. . . may elect a lump sum benefit.

---

[4] Both Appellants Kerber and Phelps had a term of employment date (TOE) before February 28, 1993.

(App. at 853, Section 6.5(a)(1)). The formula for the single sum payment mandated that the actuarial present value of the PDB be included:

> 7.3 Death After Retirement. (c) Special Rules for Certain Participants Eligible for a Service Pension who elect a Lump Sum. If a Participant. . . elects a lump sum (or a partial lump sum) benefit at his retirement, then ***the lump sum paid*** to the Participant ***shall be increased by the DLS Equivalent of the Death Benefit*** described in Section 7.3(a). For this purpose only, the DLS Equivalent shall include an assumption that the Participant will be survived by a Beneficiary. . . If such an increase is paid, no other Death Benefit shall be payable pursuant to this Article VII at any time, including the Participant's death or at the time of any subsequent termination if the Participant is reemployed.

(emphasis added) (App. at 855, Section 7.3(c)).[5]

22. The early retirement lump sum payment was first confined to eligible management employees from 1997 through part of year 2001. Later in year 2001, Qwest amended the Plan to allow non-management or Occupational Plan participants to select, immediately upon employment termination, the single sum early retirement benefit which included the "DLS Equivalent of the Death Benefit". (App. at 853, § 6.5(a)(2), ". . each Applicable Occupational Participant may elect a lump sum benefit. . . ".).

23. Since the early retirement lump sum benefit was first offered in 1997, thousands of participants, upon employment termination, chose that option over the traditional annuity service pension. (See App. at 115, ¶ 25 confirming that

[5] "DLS Equivalent" means a benefit having the same value as the benefit that such DLS Equivalent replaces. (App. 852, Section 1.12B)

after Qwest became Plan sponsor more than 8,200 participants received the lump sum payment. This figure does not include the number of persons who received the same early retirement benefit when U S WEST was Plan sponsor.).

Qwest's Actions as the Successor Plan Sponsor

24. During 1998-2001, the Plan sponsor made IRS Section 420 transfers of pension monies to pay retiree health care expenses. (App. at 61, ¶ 170). Defendants-Appellees concede in their argument that "[a]ll IRC section 420 requires is that accrued benefits be fully vested; . . " (App. at 193).

25. After Qwest became Plan sponsor and effective January 1, 2001, the U S WEST Pension Plan was renamed the "Qwest Pension Plan". (App. at 544, ¶ 14). In December 2002, Qwest executed a revised master plan document effective as of January 2001 (hereinafter "2001 Plan"). (App. at 851, 859).

26. The 2001 Plan governs the pension rights of Appellants West, Meister and Ingemann. The 2001 Plan has the following ROR:

> 11.4 Amendment by the Company. The Company expects this Plan to be permanent, but as future conditions cannot be foreseen it reserves the right to amend the Plan at any time, without prior notice to anyone. . . . Amendments may modify the rights and interests of Employees who are Participants in the Plan at the time thereof as well as future Participants but **amendments may not diminish the accrued benefit (as defined in Section 411(d)(6) of the Code) of any Participant as of the effective date of such amendment.**

(emphasis added) (App. at 607, § 11.4).

27. In 2002, when Qwest spun off a portion of its business called "Qwest Dex", the total Plan assets transferred to the new owners included actuarially determined funds to cover the $25 million total cost of PDBs for all service pension eligible transferred workers. (App. at 1106).

28. In April 2003, Qwest issued a new SPD explaining the early retirement lump sum benefit as follows:

> **What happens if I am service pension eligible and elect a lump sum (or partial lump sum) pension benefit?** If you are a Participant with a TOE of February 28, 1993 or earlier, qualify for a service pension (or meet the Modified Rule of 75), and elect a lump-sum or annuity/lump-sum distribution of your pension benefit at termination of employment, the present value (based on certain assumptions set forth in the Plan) of the Sickness Death Benefit is paid as part of the lump-sum distribution. For this purpose, the lump sum equivalent uses a factor that assumes that the participant will be survived by a qualified beneficiary. No further Sickness Death Benefit is payable at the time of death or if you are reemployed.

(bold emphasis original, underlined emphasis added) (App. at 786).

Plan Amendment 2003-5 Cuts back the Early Retirement Benefit and Partially Eliminates the PDB

29. In December 2003, Qwest Plan Design Committee executed Amendment 2003-5 which eliminated the PDB for all employees retiring after January 1, 2004. The amendment also eliminated the DLS Equivalent of the Death Benefit as a component of the single sum early retirement benefit. The amendment states in relevant part:

> Section 7.3(e) is added to read as follows:
>
> (e)(1) Notwithstanding any other provision of this Article VII, no Death Benefits shall be made under Section 7.3(a), (b) or (d) with respect to a Former Participant who Terminates on or after January 1, 2004. Accordingly, no Death Benefit shall be paid under Section 7.3 (or otherwise) with respect to any Former Participant who Terminates on or after January 1, 2004 and who dies on or after January 1, 2004.
>
> (2) Notwithstanding any other provision of this Article VII, **no lump sum payments shall be made under Section 7.3(c) on or after January 1, 2004**, except to the extent the Participant Terminates prior to January 1, 2004 and meets the conditions for a payment under Section 7.3(c) (other than an election of a lump sum or partial lump sum) prior to January 1, 2004, provided that the Participant elects a lump sum or partial lump sum with respect to his regular pension benefit during the Special Election Period as specified in Section 6.5 (as amended by Amendment 2003-2). Accordingly, no lump sum shall be paid under Section 7.3(c) to any Participant who Terminates on or after January 1, 2004.

(emphasis added) (App. at 545, ¶ 19; App. at 800-802). In a Summary of Material Modification ("SMM") dated December 2003, Qwest explained how the early retirement benefit was being reduced:

> Similarly, participants who terminate on or after January 1, 2004 and elect a lump sum or partial lump sum with respect to their regular pension will not receive a lump sum attributable to the Sickness Death Benefit even if they qualify for a service pension.

(App. at 545, ¶ 20; App. at 784).

30. When Plan Amendment 2003-5 was adopted, Appellants West, Meister and Ingemann were each service pension eligible and met all pre-amendment prerequisites for the early retirement benefit. (App. at 543).

31. On February 11, 2004, Appellant Joanne West retired after about 35 years of service and she received the early retirement lump sum payment but it did not include the value of the PDB she seeks. (App. at 543, ¶ 8).

32. On February 11, 2004, Appellant Nancy A. Meister retired after over 25 years of service and she received the early retirement lump sum payment but it did not include the value of the PDB she seeks. (App. at 543, ¶ 9).

33. On March 2, 2005, Appellant Thomas J. Ingemann, Jr., retired after over 35 years of service and he began receiving an annuity service pension. (App. at 543, ¶ 6).

34. Appellants Kerber and Phelps individually exhausted their administrative remedies. (App. at 546, ¶ 21).

35. The Plan does not provide Appellants West, Meister and Ingemann an internal administrative claim process to overturn Plan amendments. (App. at 546, ¶ 22.).

STANDARD OF REVIEW

On the issue of standing, this Court reviews legal conclusions de novo. *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008). This Court "review[s] the grant of a summary judgment motion de novo, applying the same standards as the district court." *Proctor v. United Parcel Serv*., 502 F.3d 1200, 1205 (10th Cir. 2007). Summary judgment is appropriate when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the district court's decision, the appellate court draws all justifiable inferences in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *Trujillo v. PacificCorp*., 524 F.3d 1149, 1154 (10th Cir. 2008).

SUMMARY OF THE ARGUMENT

The District Court erred when declaring Appellants Kerber and Phelps had no legal standing to challenge Plan Amendment 2003-5 and, accordingly, dismissing them from pursuing Count II. Mr. Kerber and Mr. Phelps have constitutional and statutory standing to sue for the requested injunctive and equitable relief for the benefit of the Plan and all participants and beneficiaries in order to correct statutory and fiduciary violations.

The District Court erred in its summary judgment ruling concerning Appellants' challenge to Plan Amendment 2003-5 which they contend violated

ERISA's anti-cutback rule. Plan Amendment 2003-5 cut out the "DLS Equivalent of the Death Benefit" from the long standing formula for calculating an early retirement benefit. In addition, Plan Amendment 2003-5 eliminated the PDB for persons ending employment and commencing retirement status as of January 1, 2004. After the District Court concluded the PDB was a welfare benefit that could be reduced or eliminated, the District Court erroneously granted summary judgment against Appellants. The District Court failed to address Appellants' challenge that Plan Amendment 2003-5 be stricken because the plan amendment either impermissibly eliminated an early retirement-type subsidy or impermissibly reduced an early retirement benefit.

When addressing Appellants Kerber's and Phelps's claim for a declaration of their future rights to the PDB, the District Court erred in ruling that the applicable ROR in effect when Mr. Kerber and Mr. Phelps retired was unambiguous, since reasonable persons disagree as to its meaning. In addition, when addressing Appellant's claim that the PDB should be declared a vested benefit, the District Court erred in ruling that Appellants had not met their burden of proof because Appellants had not proven vesting by clear and convincing plan language. In this case, Appellants met their burden by presenting evidence of deliberate *action* reflecting Plan sponsor U S WEST's intent to vest the PDB.

The District Court erred when granting summary judgment dismissal of

Appellants' ERISA equitable estoppel claim.

In short, Appellees have viable claims and the District Court ruled incorrectly to dismiss the action with prejudice. *Kerber v. Qwest Pension Plan*, 2008 WL 4377562 (D. Colo. September 19, 2008).

ARGUMENT

A. When Addressing the Summary Judgment Motion With Respect to Counts II and III, the District Court Failed to Correctly Rule Plan Amendment 2003-5 Violates ERISA's Anti-cutback Rule.

1. Plan Amendment 2003-5 Cutback a Retirement-Type Subsidy.

Plan Amendment 2003-5 which Qwest implemented to partially eliminate the PDB is the primary target of Appellant's challenge in this case. Appellants contend the plan amendment should be declared illegal and stricken because it violates ERISA Section 204(g), 29 U.S.C. Section 1054(g), also known as the "anti-cutback provision." The District Court erroneously did not find Plan Amendment 2003-5 to be in violation of ERISA 204(g). The District Court's summary judgment order is heavily based on the conclusion that the PDB adversely affected by Plan Amendment 2003-5 is a welfare benefit, not protected by ERISA. The District Court missed the mark. The District Court failed to note how Plan Amendment 2003-5 not only partially eliminated the PDB for persons retiring after January 1, 2004 but also impermissibly cut-back an early retirement-

type subsidy, the "DLS Equivalent of the Death Benefit."

In arriving at the summary judgment ruling, the District Court adopted the Third Circuit's ruling in *In re Lucent Death Benefits ERISA Litigation,* 541 F.3d 250 (3d Cir. 2008).[6] In both *Lucent* and *Chastain v. AT&T,* Slip Op., 2007 WL 3357516 (W.D. Okla. November 8, 2007)[7], two cases which concern a Pensioner Death Benefit provided by a Bell System successor, the courts dismissed the cases after determining the Pensioner Death Benefit was a welfare benefit that never obtained ERISA protected status.

Appellants urged the District Court to see the major difference between this case and the *Lucent* and the *Chastain* cases. In this case, the PDB administered by Plan sponsor U S WEST obtained protected status when the PDB was made an integral part of the formula for calculating the single sum payment, an early retirement benefit. Neither Lucent nor AT&T ever made their respective Pensioner Death Benefit part of an early retirement lump sum benefit. Indeed, those companies have only provided their employees with a traditional annuity form of pension payment with the Pensioner Death Benefit paid after death.

The day the *Lucent* appellate ruling was published, Appellants' counsel

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[6] *In re Lucent Death Benefits ERISA Litig.*, (hereinafter "*Lucent*") was a consolidation of several cases appealed to the Third Circuit. The lead case was *Foss v. Lucent Technologies, Inc.,* 2006 WL 3437586 (D. NJ November 27, 2006).

[7] *Chastain* is on appeal before this Court as Case No. 07-6288.

promptly invited Appellees' counsel to file a joint motion submitting *Lucent* as supplemental authority and proposed each side comment within the joint motion on *Lucent*'s application to this case. (App. at 1159). But, Appellees' preferred that Appellants file a separate position statement concerning *Lucent*. (App. at 1181, "If you feel more needs to be said (which perhaps is understandable given the Third Circuit's disposition), you can file your own views on your own."). Accordingly, Appellees submitted *Lucent* as supplemental authority (App. at 1150-1152), and Appellants promptly filed their unopposed position statement explaining the significant differences between *Lucent* and this case. (App. at1153-1157). However, without stating a reason, the District Court denied Appellants' unopposed motion. (App. at 1187, "the *Unopposed* Motion. . . is DENIED".). Appellants contend that denial was an abuse of discretion. Appellants' unopposed filing explaining *Lucent's* irrelevance to the facts and claims in this case would have helped the District Court avoid error when applying *Lucent* to the pending summary judgment motion in this case.

The District Court erred by endorsing the *Lucent* ruling and declaring the PDB, just like the Pensioner Death Benefit in *Lucent*, to be an unprotected and unvested welfare benefit. In this case, Appellants presented cumulative sufficient evidence that the PDB became protected by virtue of former Plan sponsor U S WEST's actions. Moreover, Appellants contended Plan Amendment 2003-5 which

removed the DLS Equivalent of the Death Benefit from the formula for the early retirement benefit - a single sum payment - violates ERISA Section 204(g), 29 U.S.C. § 1054(g) which protects early retirement benefits and retirement-type subsidies.

Before 1984, ERISA did not protect early retirement benefits or retirement-type subsidies because they were not considered to be accrued benefits. See *Bencivenga v. Western Pa. Teamsters and Employers Pension Fund*, 763 F.2d 574, 577 (3d Cir.1985). In 1984, Congress amended 29 U.S.C. § 1054(g) and 26 U.S.C. § 411(d)(6) by adding paragraph (2) to each subsection, and it did so for the purpose of protecting early retirement benefits.[8] The plain language of 29 U.S.C. § 1054(g)(2) and 26 U.S.C. § 411(d)(6)(2) states that a plan amendment which has the effect of eliminating or reducing either an early retirement benefit or retirement-type subsidy (as defined in regulations) or eliminating an optional form of benefit will be treated as reducing accrued benefits with respect to benefits

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[8] ERISA's anti-cutback rule states in pertinent part: "(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section §302(d)(2) [i.e., approved by the Secretary of Treasury] or 4281 [benefits under certain terminated plans]. (2) For purposes of paragraph (1), a plan amendment which has the effect of— (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits...." 29 U.S.C. Section 1054(g). This ERISA provision is essentially identical to IRC Section 411(d)(6), 26 U.S.C. § 411(d)(6).

attributable to service before the amendment. Congress did not define the term "retirement-type subsidy" when it added subsection (2) to ERISA Section 204(g). Legislative history reflects that the term is to be defined by Treasury regulations. S. Rep. No. 98-575, at 30 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2547, 2576.

In the absence of a Treasury Department definition of "retirement-type subsidy", courts that have struggled to determine what benefit meets the test. A majority of appellate courts have declared it to mean a benefit that adds more value than any reasonable actuarial equivalent of the pension plan's normal retirement benefit. See *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1521 n. 6 (3d Cir.1988) (following *Bencivenga*); *Costantino v. TRW, Inc*., 13 F.3d 969, 972 (6th Cir.1994).

In *Steiner Corp. Retirement Plan v. Johnson & Higgins of California*, 31 F.3d 935 (10th Cir. 1994), *cert. denied*, 513 U.S. 1081, 115 S.Ct. 732 (1995) this Court, after noting the Treasury Department had not yet defined the term "retirement-type subsidy", opted to be guided by remarks in legislative history expressing the Congressional Committee's intent that a subsidy that continues after retirement is generally to be considered a retirement-type subsidy. *Id*. at 940. Therefore, this Court expressed disagreement with *Bencivenga* and *Costantino* and concluded that in order to be a retirement-type subsidy the benefit must be a benefit that continues beyond normal retirement. *Id.*

However, the Treasury Department has since provided a definition of "retirement-type subsidy" essentially in agreement with the 'excess value' reasoning of *Bencivenga*, and *Costantino*. In a regulation adopted on August 12, 2005, the Treasury Department defined "retirement-type subsidy" as follows:

> The term retirement-type subsidy means the excess, if any, of the actuarial present value of a retirement-type benefit over the actuarial present value of the accrued benefit commencing at normal retirement age or at actual commencement date, if later, with both such actuarial present values determined as of the date the retirement-type benefit commences. Examples of retirement-type subsidies include a subsidized early retirement benefit and a subsidized qualified joint and survivor annuity.

Treas. Reg. § 1.441(d)-3(g)(6)(iv), 26 C.F.R. § 1.441(d)-3(g)(6)(iv). Notably, the Treasury Department' definition does not require a subsidy to continue after age 65 in order to constitute a retirement-type subsidy.

Since *Steiner* strongly implies a Treasury Department definition matters most,[9] the clarifying definition should be applied to the facts of this case. The DLS Equivalent of the Death Benefit, a key component of the pre-amendment early retirement benefit should be declared to be a bona fide retirement-type subsidy.

Defendants-Appellees might contend the clarifying definition should not be applied to this case, but that would be a change in legal position. In their first

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[9] Reorganization Plan No. 4 of 1978, § 101, 43 Fed. Reg. 47714 (1978), 92 Stat. 3790, gives the Secretary of the Treasury the ultimate authority to interpret both § 1054(g) and Internal Revenue Code's parallel anti-cutback rule, 26 U.S.C. § 411(6)(d).

effort at obtaining summary judgment, Appellees advocated for application of the new treasury regulations arguing that, "[r]ecent regulations restate existing law, clearly confirming that a death benefit that is not an optional form of benefit is an ancillary benefit that is not protected by anti-cutback rules." (App. at 172). Appellees further argued that recent regulations confirm that a death benefit that is not directly related to a retirement benefit is an ancillary benefit, not an accrued benefit and can be amended by the plan sponsor. (App. at 186). Since Appellees previously advocated reliance on recent regulations, they cannot claim prejudice by this Court's application of the recent regulations to this case as guidance in determining the true character of the DLS Equivalent of the Death Benefit.

The Supreme Court has stated courts should look to the views of the federal agencies responsible for interpreting ERISA, in determining what benefits qualify as accrued benefits. *Mead Corp. v. Tilley*, 490 U.S. 714, 726, 109 S.Ct. 2156, 2164 (1989) ("For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to "embar[k] upon a voyage without a compass.").

By applying the Treasury Department's guidance to the facts of this case, this Court will be fulfilling the true intent of ERISA's anti-cutback rule which is "to prevent employers from 'pulling the rug out from under' employees participating in a plan." *Williams v. Cordis Corp*., 30 F.3d 1429, 1431 (11th

Cir.1994). Properly decreeing the DLS Equivalent of the Death Benefit is a protected retirement-type subsidy will comport with ERISA's objective of "protecting employees' justified expectations of receiving the benefits their employers promise them." *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743, 124 S.Ct. 2230, 2235 (2004).

2. Plan Amendment 2003-5 Reduced an Early Retirement Benefit.

In the alternative, should this Court not consider the DLS Equivalent of the Death Benefit to be a retirement-type subsidy, it was nevertheless an integral part of the early retirement lump sum benefit protected against reduction by virtue of ERISA Section 204(g). Before Amendment 2003-5, the early retirement benefit consisted of the accrued service benefit first reduced to present value and then enhanced by the DLS Equivalent of the Death Benefit. By removing the enhancement, Qwest effectively reduced the early retirement benefit. Before there was a Treasury Department definition of what constitutes an early retirement benefit, there was universal agreement by the courts. "Early retirement benefits are generally benefits that become available upon retirement at or after a specified age which is below the normal retirement age, and/or upon completion of a specified period of service." *Ross v. Pension Plan for Hourly Employees of SKF Indus.*, 847 F.2d 329, 333 (6th Cir.1988). ERISA Section 3(24), 29 U.S.C. § 1002(24),

provides that normal retirement age is 65. The lump sum early retirement benefit was made available for employees under age 65.

Appellants contend that once a participant met the conditions for receiving the early retirement benefit, the Plan sponsor could not amend the Plan to reduce the participant's early retirement benefit. See *Cattin v. General Motors Corp*., 955 F.2d 416, 423-24 (6th Cir.1992).

As of December 2003, Appellants West, Meister and Ingemann were service pension eligible Plan participants who met the Plan's requirements for receiving the single sum early retirement benefit. The calculation for the single sum was automatic, meaning any eligible Plan participant electing to receive the lump sum payment had to receive the present value of the PDB. There was nothing treated as a supplemental payment. In order to receive the DLS Equivalent of the Death Benefit, Appellants West, Meister and Ingemann did not have to meet additional conditions, such as a certain age in years or more employment service. It is undisputed that the single sum payment was an early retirement benefit.

On August 12, 2005, the Treasury Department adopted the following definition which agreed with the prevailing view of the appellate courts on what constitutes an early retirement benefit:

> The term early retirement benefit means the right, under the terms of a plan, to commence distribution of a retirement-type benefit at a particular date after severance from employment with the employer and before normal retirement age. Different early retirement benefits

result from differences in terms relating to timing.

Treas. Reg. § 1.441(d)-3(g)(6)(i), 26 C.F.R. § 1.441(d)-3(g)(6)(i). It is beyond dispute that Plan Amendment 2003-5 reduced the preferred early retirement benefit which was available to employees before age 65.

The early retirement benefit single sum payment was the very benefit Appellants West and Meister elected to receive. Since Plan Amendment 2003-5 reduced or eliminated the optional early retirement benefit, the amendment had to allow Appellants West, Meister and other employees who remained employed by Qwest to "grow into" the benefit. Appellate courts that have ruled on an employee's right to "grow into" early retirement benefits have uniformly held that as long as an employee satisfies, or will be able to satisfy, eligibility requirements of the early retirement benefit in effect prior to the amendment, ERISA Section 204(g) protects the benefit. *Ahng v. Allsteel, Inc*., 96 F.3d 1033, 1036-37 (7th Cir.1996); *Hunger v. AB*, 12 F.3d 118, 120 (8th Cir.1993), *cert. denied*, 512 U.S. 1206, 114 S.Ct. 2676, (1994); *Gillis v. Hoechst Celanese Corp*., 4 F.3d 1137, 1143-46 (3d Cir.1993), *cert. denied*, 511 U.S. 1004, 114 S.Ct. 1369, (1994); *Harms v. Cavenham Forest Indust., Inc*., 984 F.2d 686, 692 (5th Cir. 1993), *cert. denied*, 510 U.S. 944, 114 S.Ct. 382, (1993). Here, the challenged plan amendment did not provide that opportunity to either Appellants West, Meister, Ingemann or any others.

In summary, this Court should rule the District Court erred by not properly addressing Appellants' challenge to Plan Amendment 2003-5 on the grounds it violated ERISA's anti-cutback rule because the plan amendment impermissibly either eliminated an early retirement-type subsidy or reduced an early retirement benefit, the very benefit Appellants West and Meister elected to receive. When ruling the DLS Equivalent of the Death Benefit component of the early retirement benefit is protected by ERISA Section 204(g), it is axiomatic that Plan Amendment 2003-5 must be stricken, thus, returning the parties and the PDB to the status quo before the amendment.

3. Plan Amendment 2003-5 Violated Plan Terms Prohibiting Amendments Which "Diminish" Accrued Benefits.

Appellants contended Plan Amendment 2003-5 violated Plan terms. (App. at 839). When successor Plan sponsor Qwest adopted Plan Amendment 2003-5 which served to reduce the early retirement lump sum payment benefit by cutting out the DLS Equivalent of the Death Benefit, Qwest not only violated ERISA's anti-cutback rule, but also violated the ROR set forth in the 2001 Plan. The ROR for the 2001 Plan states in pertinent part:

> 11.4. Amendment by the Company. . . amendments may not diminish the accrued benefit (as defined in Section 411(d)(6) of the Code) of any Participant as of the effective date of such amendment.

(emphasis added) (App. at 607, § 11.4). The key word here is "diminish," which

is an express limitation on Qwest's rights under the latest revised ROR clause. See *Chiles v. Ceridian Corp.,* 95 F.3d 1505, 1512 (10th Cir.1996) (discussion regarding express restraint on a ROR). The restraint should be read to mean the Plan sponsor may not diminish or reduce any of the forms of benefits protected by ERISA Section 204(g)(2) and IRC Section 411(d)(6)(2).

ERISA's anti-cutback provision does not prohibit a reduction or diminishment of an optional form of retirement benefit. ERISA Section 204(g)(2) prohibits elimination of an optional form of benefit. 29 U.S.C. § 1054(g)(2). However, the 2001 Plan's ROR does prohibit diminishment of an optional form of retirement benefit. In *Call v. Ameritech Management Pension Plan*, 475 F.3d 816 (7th Cir. 2006), *cert. denied, AT & T Pension Ben. Plan v. Call*, __ U.S. __, 128 S.Ct. 2900 (2008), the pension plan contained a provision stating, "no amendment will reduce a Participant's accrued benefit to less than the accrued benefit that he would have been entitled to receive if he had resigned [from Ameritech] on the day of the amendment." The Seventh Circuit ruled that plan provision was a private anti-cutback provision, "designed to prevent cutbacks by amendment that are not covered by the statutory anti-cutback rule" *Id*. at 820. The appellate court rejected the defendant's interpretation of the plan's ROR because "its interpretation would leave participants with no more protection than the statutory anti-cutback rule would give them, making the section superfluous." *Id* at 821. The court ruled

the provision should be interpreted as preserving benefits ERISA would otherwise permit to be curtailed. *Id.*

When Plan sponsor Qwest reduced the formula for calculating the single sum payment - an optional form of benefit - , there was a violation of the ROR's restraint and a concurring violation of ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) (duty to act in accordance with plan document terms).

The District Court failed to consider the impact of Plan Amendment 2003-5 on the single sum payment which included the present value of the PDB. The District Court focused attention on determining whether or not the PDB had changed in character from a welfare benefit to a pension benefit. The District Court ruled:

> The plaintiffs do not offer any authority to support their assertion that the Pensioner Death Benefit changes its character upon inclusion in a lump sum pay out of accrued retirement benefits upon early retirement. To the contrary, the Plan states that the lump sum retirement benefit "shall be increased by the DLS Equivalent of the Death Benefit" and "[f]or this purpose only, the DLS Equivalent shall include an assumption that the Participant will be survived by a Beneficiary." Motion, Ex. A-1, Bates 4716, § 7.3(c). Thus, the Pensioner Death Benefit retains its fundamental nature: it remains a benefit that is separate and distinct from the pension benefit, and its DLS Equivalent includes an actuarial assumption that reflects its contingent nature (survival by a qualified beneficiary). Inclusion in the lump sum election does not change it into an accrued pension benefit.

(App. at 1207-1208). The District Court missed the mark. While focusing on whether or not the PDB's character changed from a welfare benefit into a pension

benefit, the District Court lost sight of Appellants' contention that Plan Amendment 2003-5 not only partially eliminated the PDB but completely eliminated the DLS Equivalent of the Death Benefit. That financial construct was impermissibly cut-back from the early retirement benefit. The DLS Equivalent of the Death Benefit is not exactly the same as the PDB. Unlike the PDB, that financial construct does not require, as a precondition for payment, that there be a death with a mandatory surviving beneficiary making a claim for payment. The DLS Equivalent of the Death Benefit is not a welfare benefit.

Since the DLS Equivalent of the Death Benefit is protected by both ERISA Section 204(g), and the restraint in the ROR of the 2001 Plan, Plan Amendment 2003-5 must be stricken and the financial construct restored. In order to restore the DLS Equivalent of the Death Benefit, the PDB must be restored. The PDB must exist in order for the DLS Equivalent of the Death Benefit to exist. (See App. at 841, ". . . it is impossible to restore the DLS Equivalent of a Plan participant's PDB if the Plan's terms state the Plan participant's PDB no longer exists."). Even if the PDB is a welfare benefit, it was inseparably tied to the formula for the protected early retirement benefit.

The case of *Battoni v. IBEW Local Union No. 102 Employee Pension Plan*, 569 F.Supp.2d 480 (D. NJ 2008), is instructive about how a welfare benefit after being made an integral part of an early retirement benefit becomes protected under

ERISA Section 204(g). In *Battoni*, the plaintiffs contested an amendment that cut off certain health care benefits whenever a participant elected to receive the lump sum pension plan benefit. The court, after noting that neither side had cited any cases like the one before him (*Id.* at 492), ruled:

> because the Disputed Amendment to the Welfare Plan is tied to an election in the Pension Plan, it is an indirect amendment to the Pension Plan which has the effect of reducing Plaintiffs' vested accrued right to make a lump sum election in the Pension Plan. This amendment violates the anti-cutback provisions of ERISA, Section 204(g)(1), 29 U.S.C. § 1054(g)(1).

Id. at 496.

Included within Count II is Appellant's contention that due to IRC Section 420 transfers of pension assets to pay retiree health care benefits during 1998-2001, all Plan participants must be fully vested in all accrued pension benefits. Appellees agree that "[o]ne of the conditions that a plan must satisfy to complete a section 420 transfer is that all participants must be fully vested in all accrued pension benefits.' (App. at 192). Appellees also acknowledge that Appellants contend as a matter of law "that the failure to vest benefits at the time of a section 420 transfer somehow constitutes a breach of fiduciary duty under ERISA section 404(a). . ." (App. at 193). "All IRC section 420 requires is that accrued benefits be fully vested; . . " (App. at 193). Therefore, since the single sum benefit with the DLS Equivalent of the Death Benefit is a protected benefit which causes the PDB to be a protected benefit, due to the IRC Section 420 transfers there should be a

declaration identifying Plan participants for whom the benefits are fully vested.

This Court should reverse the District Court's summary judgment order in favor of Defendants-Appellees with instructions to go forward with Appellants' claim in Counts II and III that Plan Amendment 2003-5 violates both ERISA's anti-cutback rule and the ROR set forth in the 2001 Plan.

B. The District Court Erroneously Dismissed Appellants Kerber and Phelps As Plaintiffs For Count II.

Within Count II, all Appellants contended that Plan Amendment 2003-5 conflicts with the Plan's prior provisions and commitments and that the plan amendment violates the anti-cutback provisions of ERISA Section 204(g) since accrued benefits have been reduced or eliminated. (App. at 63-64, ¶ 180; App. at 839). Appellants seek an order reforming the Plan, striking Plan Amendment 2003-5 and an order requiring the Appellees to notify and make payment of the correct amount of the PDB, together with interest. (App. at 64, ¶¶ 184-185). The District Court dismissed Appellants Kerber and Phelps from Count II on the basis that "each retired in 1990, and the Complaint does not allege that they have suffered any concrete, particularized, and actual injury from the implementation of Amendment 2003-5." (App. at 396-397).

Article III of the United States Constitution restricts judicial authority to deciding "Cases" and "Controversies." U.S. Const. art. III § 2. The case-or

controversy requirement "is satisfied only where a plaintiff has standing." *Sprint Commc'ns Co. v. APCC Servs., Inc*., ___ U.S. ___, 128 S. Ct. 2531, 2535 (2008). The District Court erred because ERISA grants Appellants standing, as Plan participants, to seek equitable relief . Section 502(a)(3) of ERISA provides a cause of action to any participant or beneficiary:

> (A) to enjoin any act or practice which violates any provision of this title [i.e., 29 U.S.C §§ 1001-1191] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

(bracketed portions added) 29 U.S.C. § 1132(a)(3). "ERISA's legislative history indicates that its standing requirements should be construed broadly to allow employees to enforce their rights." *Graden v. Conexant Sys. Inc*., 496 F.3d 291, 302 (3d Cir.2007) (citing *Leuthner v. Blue Cross and Blue Shield of Ne. Penn*., 454 F.3d 120, 128 (3d Cir.2006) (citing S. Rep. No. 93-127, at 3 (1974), reprinted in 1974 U.S.C.C.A.N. 4639, 4871)). Because Appellants Kerber and Phelps sought injunctive relief to redress violations of the Plan's terms and violations of the statute, they have both Article III constitutional and ERISA Section 502(a)(3) statutory standing to pursue Count II. Appellants need not demonstrate actual harm in order to have standing to seek injunctive relief requiring a defendant to satisfy statutorily-created responsibilities. See *Loren v. Blue Cross & Blue Shield of Mich*., 505 F.3d 598, 609-610 (6th Cir. 2007) (citing *Gillis v. Hoechst Celanese Corp*., 4 F.3d 1137, 1148 (3d Cir.1993) (finding "ERISA does not require that

harm be shown before a plan participant is entitled to an injunction ordering the plan administrator to comply with ERISA's reporting and disclosure requirements").

Accordingly, this Court should reverse that part of the judgment which incorporates the District Court's order dismissing Appellants Kerber and Phelps from pursuing Count II. The case should be remanded allowing Mr. Kerber and Mr. Phelps to go forward with their claims within Count II.

C. When Addressing the Summary Judgment Motion With Respect to Counts I, II and III, the District Court Incorrectly Reasoned That a Welfare Benefit Can Vest *Only* Upon a Showing of Clear and Express Language In Plan Documents. Appellants Sufficiently Demonstrated the Plan Sponsor's Actions Proved Intent to Vest the PDB.

The District Court concluded the PDB was an unvested welfare benefit because there was no clear and express plan language stating otherwise. But, plaintiffs are permitted alternative ways of showing a welfare benefit vests. This Court instructs that plaintiffs meet the burden proving a welfare benefit vests by either "showing an agreement *or* other demonstration of employer intent to have [the benefit in question] vest under the plan." *Chiles*, 95 F.3d at 1511. (emphasis added). The law established in *Chiles* was not correctly applied in this case. After reviewing various Plan documents, the District Court concluded that:

> Examining the plan documents as a whole, a reasonable person in the position of the plan participant would have understood that the

> Pensioner Death Benefit was not contractually vested and could be amended. The plaintiffs have failed to point to any clear and express language that the welfare benefit right was vested and not subject to change.

(App. at 1215, p 28). By adopting the notion that welfare benefits can only vest by virtue of clear and express language, and looking only for a written agreement within numerous Plan documents, the District Court erred. The District Court gave no weight to Appellants' evidence showing former Plan sponsor U S WEST's conduct and treatment of the PDB reflecting an intent to vest the PDB.

In support of Count III's ERISA Section 502(a)(1)(B) claim for a declaration that the PDB became vested or protected by ERISA, Appellants met their burden by presenting cumulative sufficient evidence of *action* by former Plan sponsor U S WEST reflecting an intent to vest the PDB.

As previously discussed, the most significant evidence presented by Appellants is that former Plan sponsor U S WEST made the PDB an integral part of the early retirement singe sum payment. The formula U S WEST chose for calculating the total amount of the single sum payment proves U S WEST considered the PDB to be vested and an essential element of the normal retirement benefit. Why else would the actuarial equivalent value of the PDB be included in the lump sum distribution? The strong inference in favor of Appellants is that U S WEST must have considered and intended for the PDB to be an entitlement, a vested benefit. Indeed, that was U S WEST's official position, as confirmed by

unopposed sworn testimony given by two former U S WEST Chief Human Resources Officers who served as Chairpersons of the named fiduciary for the pension plans. (See Fact No. 6). The evidence strongly suggests that Plan sponsor U S WEST's position was that if an annuitant was entitled to the PDB, the PDB's actuarial equivalent must also be provided to a Plan participant who chose instead to receive his pension in the form of a one-time lump sum distribution.

Next, U S WEST repeatedly told service pension eligible Plan participants in reassuring communications that they were "entitled" to the PDB. (See Fact No. 10, former Chairperson of the EBC, the named fiduciary, testifying, "The July 1989 SPD gave reassurances that the Pension Death Benefit was an entitlement for someone who was survived by a spouse, dependent children or dependent parents under certain circumstances"; see, e.g., Fact Nos. 17-18, "If your TOE date is February 28, 1993 or earlier, your eligible beneficiaries are entitled to this benefit"). To say someone is "entitled" to benefits is to say the company has conferred unalterable and irrevocable benefits on the person. The commonly understood definition of "entitle" is "to furnish with proper grounds for seeking or claiming something." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 387 (10th ed. 1998); see also BLACK'S LAW DICTIONARY 573 (8th ed. 2004) ("entitle" means "to qualify for"). When former Plan sponsor U S WEST told Appellants Kerber and Phelps that they were entitled to the PDB, the company did

not use durational language. U S WEST used unequivocal language. There was no mention that the entitlement was subject to change at the employer's will. The July 1989 version SPD given to Appellants Kerber and Phelps upon retirement contained a ROR but it is limited to the right to terminate the pension plan. The SPDs' ROR says nothing about any right to cut-back benefits after retirement. The evidence supports Appellants' contention that they became entitled to the PDB upon becoming service pension eligible.

As noted in *United Foods, Inc. v. Western Conf. of Teamster Pension Trust Fund*, 816 F. Supp. 602, 609 (N.D. Cal. 1993), "when death benefits are related to normal pension benefits, the survivor's entitlement to the benefit is derived from the participant's satisfaction of the conditions for entitlement to her pension." (citation omitted). Judge Patel opined in *United Foods*, that "[a] plan participant doesn't have to die to be entitled to the type of death benefits at issue in this case. Rather, death is simply the time at which vested benefits are paid out to the beneficiaries of plan participants." *Id*. at 608, *aff'd*, 41 F.3d 1338 (9th Cir. 1994).

The Management Plan, the master plan document effective when Appellants Kerber and Phelps retired, contained an ROR giving the Plan sponsor the right to make changes and to terminate the plan. But, the ROR had a specific restraint, to-wit: "such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously

become entitled hereunder." (Fact No. 4). The Management Plan's ROR is a private anti-plan amendment provision, for the reasons argued above in Section A.3. with respect to the ROR in the 2001 Plan. The ROR language in the Management Plan does not simply mimic or track the anti-cutback language set forth in ERISA Section 204(g). It goes much further. The District Court erred by not accepting Appellants' argument that the Management Plan's ROR constituted a private anti-cutback provision designed to protect benefits the Plan sponsor declared plan participants entitled to receive.

The Management Plan's ROR is ambiguous and subject to differing interpretations. After reading the ROR, any reasonable Management Plan participant would ask, exactly what benefits, besides pensions, are intended to be protected by the ROR's restraint? No reasonable person would come to the District Court's conclusion and understand the ROR words to mean that the PDB could be cut-back or eliminated.[10] When one looks at the ROR's restraint and considers U S WEST's contemporaneous representations to retired plan participants that they are "entitled" to the PDB, a most reasonable inference is the Plan sponsor must have intended the PDB to be protected by the ROR's restraint.

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[10] This Court instructs lower courts to give plan 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." *See, e.g., Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004).

Indeed, that inference is directly supported by the testimony of former U S WEST Chief Human Resources Officers and EBC Chairpersons Doherty and Remington. (See Fact Nos. 6 and 10). The former fiduciaries testified that U S WEST considered the PDB vested when the employee became service pension eligible and "HR management personnel routinely advised persons who were making retirement decisions that they would always be entitled to the Pension Death Benefit." (See Fact No. 6).

Since the Management Plan did not give the Plan Administrator discretionary interpretive authority, the District Court should not have adopted Qwest's belated point of view, but should have looked at the ROR provision and applied principles of *contra proferentem*, construing the ambiguous language against the drafter. *Miller v. Monumental Life Insurance Company*, 502 F.3d 1245 (10th Cir. 2007) concerned a dispute over plan language with respect to a welfare benefit - insurance. This Court concluded that "[f]ailure to employ *contra proferentem* would "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted, a result that would be at odds with the congressional purposes of promoting the interests of employees and beneficiaries and protecting contractually defined benefits. . . ." *Id.* at 1253.

In addition to former Plan sponsor's representations that a retiree was entitled to the PDB, which representative served to interpret the relationship

between the PDB and the ROR, Appellants presented a plethora of other evidence that U S WEST intended the PDB to be a vested benefit. For instance, both U S WEST and Qwest have always reported on Form 5500s, submitted under penalty of perjury, that liabilities for the PDB were vested benefits and fully funded. In that respect the PDBs for all service pension retirees were akin to paid in full whole life insurance policies.

In the trial court, Appellants argued the PDB was deemed to be a vested benefit because of the priority given to payment of PDBs by the Plan's rules applicable upon termination of the Plan (App. at 835-836). The Plan goes far beyond the "insurance" scheme or six-tier allocation scheme set forth in ERISA Section 4044(a), 29 U.S.C. § 1344(a). ERISA Section 4044(a)'s scheme "does not create additional benefit entitlements. It merely provides for the orderly distribution of benefits already earned under the terms of a defined benefit plan or otherwise required at termination by other provisions of ERISA." *Mead Corp. v. Tilley*, 490 U.S. 714, 722, 109 S.Ct. 2156, 2161 (1989) (referring to PBGC's position brief). The District Court summarily dismissed Appellants' argument that the Plan's elaborate termination priority scheme was evidence of the Plan sponsor's intent to vest the PDB. The District Court concluded:

> The [Plan's] termination clause prioritizes the payout for benefits as required by ERISA Section 4044, 29 U.S.C. § 1344(a). Such prioritization of benefits pursuant to Section 4044 does not create vesting rights; but rather 'insurance' upon termination of a plan.

(citing *Foss*).

(App. at 1212).

However, Appellants argued the Plan has always gone much further than the insurance scheme set forth in ERISA Section 4044(a). The Plan specifies that PDB payments are to receive priority over payment of certain deferred vested pensions. The Plan's termination priority rules provide for payment of PDB benefits without regard to whether participants have surviving beneficiaries. Thus, the Plan's rules essentially create new rights for retired participants which is strong evidence of intent to vest the PDB.

Appellants submitted further evidence of actions that indicate the Plan sponsor considered the PDB to be a vested benefit, inseparably tied to the service pension benefit. When Qwest spun-off Qwest Dex, $25 million of the pension assets transferred were for payment of PDBs for service pension eligible employees who were transferred. (See Fact No. 26). A reasonable inference is that Qwest transferred the monies because the PDBs were deemed vested for those transferred employees who were service pension eligible.

Finally, when opposing the motion for summary judgment on Count III's claim for declaration of benefit rights under ERISA Section 502(a)(1)(B), Appellants argued the trial court's "declaration should include a ruling that the PDB must be calculated based upon the Plan participant's annual rate of wages as

of the date of the Plan participant's respective retirement date, not the March 1, 1993 date being used by Defendants, as the Plan was not properly amended to use March 1, 1993 as the determinative date." (App. at 826 and 840). The District Court would not consider the argument, instead, considering it to be a claim not asserted within the SAC. (App. at 1216, n. 9). That ruling was error. Appellants asserted a proper claim for a declaration of their rights to benefits under ERISA Section 502(a)(1)(B), which is all that is required. Appellants' need not assert a redundant ERISA Section 502(a)(1)(B) claim.

Accordingly, the summary judgment order concluding the PDB never became vested should be reversed.

D. The District Court Erred When Granting Summary Judgment Dismissal of the Breach of Fiduciary Duty Claim and the Equitable Estoppel Claim Within Count I.

Appellants Kerber and Phelps contend in Count I that the District Court should grant relief on the basis of ERISA equitable estoppel. The District Court erroneously denied that claim as a matter of law.

When both Appellants retired and chose the structure of benefits to be received for themselves and their spouses, they specifically and detrimentally relied upon representations and assurances about the PDB. (See Fact Nos. 11 and 12). As explained by former U S WEST Chief Human Resources Officers who served as named fiduciaries of the pension plans, the representations made to

retirees served as U S WEST's oral interpretations about what benefits were protected by the Management Plan's ROR. (See Fact Nos. 6 and 10). The promised PDB was a huge financial component of the retirement package as it represented a payment equivalent to each Appellant's last annual salary at U S WEST. (App. at 923, ¶ 7; App. at 927 ¶ 9). There was no notice given to Appellants Kerber and Phelps that any benefits, including the PDB, could be reduced or eliminated.

It is undisputed that the July 1989 version SPD issued to Appellants Kerber and Phelps when they retired did not disclose any reserved right to change, reduce or eliminate any benefits, including the PDB. The District Court opined that the SPD's lack of disclosure was irrelevant because the Management Plan contained an ROR. (App. at 1214-1215). The District Court concluded that the SPD's silence did not conflict with the master plan document. However, for purposes of the equitable estoppel claim, the District Court failed to factor the SPD's role in influencing the retirement decisions made by Appellants Kerber and Phelps. The SPD was faulty. In accordance with ERISA Section 102(b), the SPD given to Appellants had to explain the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," 29 U.S.C. § 1022(b). Under the applicable regulation clarifying the statutory provision, the SPD had to contain:

> . . . a summary of any plan provisions governing the authority of the plan sponsors or others to terminate the plan or amend or eliminate

> benefits under the plan and the circumstances, if any, under which the plan may be terminated or benefits may be amended or eliminated; . .

29 C.F.R. § 2520-102-3(*l*). The July 1989 version SPD issued to Appellants Kerber and Phelps violated both ERISA and the regulation and it was reasonable for them to rely upon the terms of the SPD.

All of the cumulative evidence discussed in Section C above shows U S WEST's intent to vest Appellants Kerber and Phelps with the PDB. It is unreasonable to allow Plan sponsor Qwest to rely on an obscure incomprehensible disclaimer in the Management Plan and, thereby, to renege on U S WEST's prior promises. Any reasonable person in the shoes of Appellants Kerber and Phelps would have understood that once U S WEST said he or she was entitled to a benefit that meant it could not be taken away without his or her consent. Here, the facts cry out for application of the principles of equitable estoppel, compelling a judicial determination that Plan sponsor Qwest should be estopped from reducing or eliminating the PDB promised to Appellants.

Although this Court has neither adopted nor rejected an equitable estoppel rule in the ERISA context, this Court has outlined a framework of rules and elements to be followed when analyzing an equitable estoppel claim. *Cannon v. Group Health Service of Okla.*, 77 F.3d 1270 (10th Cir. 1996), *cert. denied*, 519 U.S. 816, 117 S.Ct. 66 (1996). In *Cannon*, this Court considered whether the plaintiff had stated an equitable estoppel claim applying the five elements of

equitable estoppel which the Eleventh Circuit has identified: (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted upon or had reason to believe that the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation. *Id.* at 1276-77 (citing *National Companies Health Benefit Plan v. St. Joseph's Hosp. of Atlanta*, 929 F.2d 1558, 1572 (11th Cir.1991).

The vast majority of appellate courts recognize equitable estoppel as a viable claim in an ERISA context. See *Sprague, et al. v. General Motors Corp.*, 133 F.3d 388, 403 (6th Cir. 1998) (en banc), *cert. denied*, 524 U.S. 923, 118 S. Ct. 2312 (1998); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 458 n.12 (11th Cir. 1996), *cert. denied*, 519 U.S. 1149, 117 S.Ct. 1082 (1997); *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 542 (7th Cir. 1996); *Fink v. Union Central Life Ins. Co.*, 94F.3d 489, 492 (8th Cir. 1996); *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72, 78 (2nd Cir. 1996); *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 58 F.3d 896, 907 (3rd Cir. 1995); *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812,821-22 (9th Cir. 1992); *Cleary v. Graphic Communications International Union Supplemental Retirement and Disability Fund*, 841 F.2d 444, 447 (1st Cir. 1988).

The same appellate judges who decided *Lucent* addressed an ERISA equitable estoppel claim several weeks before they penned the *Lucent* ruling. In *Pell v. E.I. DuPont de Nemours & Co. Inc.*, 539 F.3d 292, (3rd Cir. 2008) the appellate court stated:

> A beneficiary may "obtain ... appropriate equitable relief ... to redress [ERISA] violations or ... to enforce any provisions of [ERISA]." 29 U.S.C. § 1132(a)(3). A beneficiary can make out a claim for "appropriate equitable relief," *id*., based on a theory of equitable estoppel. *Curcio v. John Hancock Mut. Life Ins. Co*., 33 F.3d 226, 235 (3d Cir.1994). "To succeed under this theory of relief, an ERISA plaintiff must establish (1) a material representation, (2) reasonable and detrimental reliance upon the representation, and (3) extraordinary circumstances." *Id*.

Id. at 300. The appellate panel reiterated that, "[e]xtraordinary circumstances can arise where there are 'affirmative acts of fraud,' where there is a 'network of misrepresentations...over an extended course of dealing,' or where particular plaintiffs are especially vulnerable.'" *Id*. at 303-304. In the final analysis, the appellate court concluded that DuPont's representations to Pell about his pension benefit calculation date misled Pell as he attempted to make an adequately informed decision about his benefits. The Third Circuit affirmed the lower courts' ruling in favor of Pell on the basis of equitable estoppel under ERISA.

Similarly, in this case, Appellants Kerber and Phelps contend that U S WEST's representations about the PDB misled them into making an inadequately informed decision about providing sufficient survivor's benefits for their spouses.

Appellants Kerber and Phelps were especially vulnerable as they had to decide whether or not to accept the 5+5 early retirement offer and how best to provide survivor's benefits for their spouses. Each was led to believe the PDB had become an entitlement benefit they could count on for their spouses. Former U S WEST senior leadership and named fiduciaries of the pension plan have confirmed the company intended for the retirees to perceive the PDB as a protected benefit. It is too late for Appellants Kerber and Phelps to undo their retirement decisions and their choices about survivor's benefits.

This case gives this Court an opportunity to expand upon *Cannon* and, now, firmly adopt ERISA equitable estoppel as a viable claim. Appellants urge this Court to adopt the appellate panel's reasoning in *Pell* and, accordingly, reverse the District Court's order granting summary judgment dismissal of the ERISA equitable estoppel claim within Count I.

E. Reversal of the Order to Dismiss and/or Reversal of the Order for Summary Judgment Should Require the District Court to Reexamine Count IV and the Motion for Class Certification.

As briefly previously explained above, Count IV is a claim that the current Plan documents discussing the PDB and official notifications describing the PDB are inaccurate and must be corrected. The District Court concluded "Claim One is redundant of Claims One and Two." (App. at 1219). Should Appellants prevail with either of their claims within Counts I-III that the PDB became vested or a

protected benefit or that Plan Amendment 2003-5 illegally either cutback a retirement-type subsidy or an early retirement benefit, then the Plan sponsor must correct the plan documents. Count IV goes further and seeks an order requiring corrected documents be sent to all Plan participants and known beneficiaries. (App. at 43-44, ¶¶ 193-198). Therefore, Appellants contend that, upon reversal of the summary judgment order dismissing either Count I, II, or III, the summary judgment order also dismissing Count IV should be reversed. In addition, Appellants' motion for class certification which was dismissed as moot will need to be revisited. Therefore, that part of the District Court's separate order (See App. at 1186) should be reversed.

CONCLUSION

The District Court incorrectly examined the facts and arguments and incorrectly reached the conclusion to dismiss Plaintiffs-Appellants Kerber and Phelps from Count II. The District Court incorrectly granted summary judgment to Defendants-Appellees on all claims. For the reasons stated herein, this Court should vacate the judgment and award of costs, reverse both the order to dismiss and the order for summary judgment, and remand with instructions to proceed with Plaintiffs-Appellants' claims. Since the summary judgment ruling is to be reversed, the District Court should be instructed to consider the motion for class certification which motion the District Court ruled to be moot.

REQUEST FOR APPEAL RELATED FEES

Pursuant to ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1), Appellants seek an award of reasonable attorney's fees for successfully appealing the District Court's orders and the final judgment. See *Crumpacker v. Kansas, Dept. of Human Resources*, 474 F.3d 747, 756 (10th Cir. 2007) (holding appeal-related fees must generally be awarded by this Court). Appellants request this Court to remand with instructions to award fees (including fees for this appeal) and costs on appeal taxable in the District Court upon establishment that Defendants-Appellees violated ERISA. See *Hoyt v. Robson Companies, Inc.*, 11 F.3d 983, 985 (10th Cir.1993) ("Should we decide that it is appropriate to award such fees, we may then remand to the district court to determine an award of reasonable fees.").

STATEMENT CONCERNING ORAL ARGUMENT

Due to the factual complexity of the case and the unique legal arguments posed by the parties concerning ERISA, a complicated federal statute, oral argument may prove useful to the Court and, therefore, Plaintiffs-Appellants request oral argument.

Respectfully submitted this 19th day of December, 2008.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. AT P. 32(a)(7)(B) because the brief contains **13,977** words in text and footnotes, excluding (table of contents, table of citations, and certificates of counsel) the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. AT P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Times New Roman 14-point font and word counted in WordPerfect 12, the word processing software system used to prepare this brief.

Dated: December 19, 2008

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CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Pursuant to the Federal Rules of Appellate Procedure and the Local Rules of the United States Court of Appeals for the Tenth Circuit, I hereby certify:

1. The text of the electronic PDF version of the foregoing Plaintiffs-Appellants Opening Brief that was electronically filed with the Court is identical to the text of the hard copies of the brief that were filed with the Court and served on Counsel;

2. Plaintiffs-Appellants Opening Brief complies with the privacy policy of the Judicial Conference of the United States; and

3. A virus check was performed on the electronic brief using Symantec/Norton Internet Security and Anti-Virus software (v.16.1.0.33, current as of 12-18-08) and, according to the software application, the PDF file was found to be virus free.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19TH day of December 2008, a true and correct copy of the above and foregoing **OPENING BRIEF OF PLAINTIFFS -- APPELLANTS** was emailed to all Attorneys for Defendants-Appellants and a copy was hand delivered to the offices of:

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