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

REPLY BRIEF OF PLAINTIFFS – APPELLANTS

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A. Plan Amendment 2003-5 Violates ERISA's Anti-Cutback Rule and the Plan's Then Existing Terms Forbidding Amendments Which Diminish Either an Early Retirement Benefit, Retirement-Type Subsidy or Optional Form of Benefit.

For decades, pension plan provisions specified that the Sickness Death Benefit or Pensioner Death Benefit (hereinafter "PDB") "shall be paid" if a Plan participant died while receiving a service pension and left a surviving 'mandatory' beneficiary. (App. at 821; App. at 621-627). In 1990, Former Plan sponsor U S WEST decided to accelerate the payment of the PDB before death occurred. Appellants contend this action demonstrated the company's intent and viewpoint that the PDB had become vested for service pension eligible Plan participants. In 1990, U S WEST gave thousands of departing employees the choice of either immediately taking the PDB upon ending employment, as part of a lump sum distribution of pension benefits, or deferring the payment of the PDB until after death to surviving "mandatory" beneficiaries, meaning either a spouse, dependent children or dependent parents. That choice was given to Appellants Kerber and Phelps and each decided it would be best for his family to defer payment of the PDB, so as to provide in the future for his spouse.

Effective January 1, 1997, U S WEST changed the pension plan rules so that Management Employees could have a permanent choice of when to receive the

PDB or its equivalent monetary value. U S WEST created an early retirement benefit, a single-sum payment, and the company made this optional payment a permanent feature of the pension plan. From 1997 through part of year 2001, this early retirement lump sum payment was confined to eligible Management Employees. During that period of time, U S WEST explained in its SPD:

> **What payment options are available under the Sickness Death Benefit if I am a Management Employee who is service pension eligible?** If you are a Management Employee with a TOE [Term of Employment] of February 28, 1993 or earlier, meet the Modified Rule of 75, [1] 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.

(emphasis original) (App. at 792).

In July 2000, Qwest became the successor Plan sponsor. Less than a year later, Qwest made the early retirement single sum payment a permanent feature of the pension plan for eligible Occupational Employees. Qwest explained in its

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[1] The "Modified Rule of 75" means a participant has to show one of the following: "(i) attainment of at least age 65 and completion of a ten-year Term of Employment; (ii) attainment of age 60 and completion of a fifteen-year Term of Employment; (iii) attainment of age 55 and completion of a twenty-year Term of Employment; (iv) attainment of age 50 and attainment of a twenty-five year Term of Employment, or (v) completion of a thirty-year Term of Employment." (App. at 219, 5A.1 Service Pension; See also App. at 791, showing a table for the "Modified Rule of 75").

SPD, 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.

(emphasis original) (App. at 786; App. at 855, Section 7.3(c) "Special Rules for Certain Participants Eligible for a Service Pension Who Elect a Lump Sum.") Over the course of seven years (1997-2003), more than ten thousand [2] employees who either met the Modified Rule of 75 or were service pension eligible received the early retirement lump sum optional benefit which single sum payment included the "DLS Equivalent of the PDB."

The DLS Equivalent of the PDB is not the true Pensioner Death Benefit. It is a substitute payment equal to the actuarial present value of the PDB. (App. at 852, Section 1.12B). It does not require as a condition of payment that a Plan

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[2] See App. at 1115, ¶ 25 confirming that since Qwest became Plan sponsor on July 1, 2000 more than 8,200 participants received the early retirement lump sum payment. This figure does not include the thousands of additional persons who received the same early retirement benefit during either 1990 or January 1, 1997 through June 30, 2000 when U S WEST was the Plan sponsor.

participant die or that the deceased have a qualified surviving beneficiary. The DLS Equivalent of the PDB is not classified as a welfare benefit. It is a mere accounting construct that adds significant value to the single sum payment, an early retirement benefit unique to U S WEST employees and retires.[3] While Appellants' Opening Brief focuses on these facts to show a major distinction between the U S WEST/Qwest Pension Plan and the Lucent Pension Plan, in their Answer Brief at p. 19, Appellees curtly comment that the distinction does not withstand scrutiny. Appellees are seriously wrong. The DLS Equivalent of the PDB, a unique feature of the U S WEST/Qwest Pension Plan, weighs heavily in this controversy.

Effective January 1, 2004, Qwest implemented Plan Amendment 2003-5 in order to eliminate the PDB for workers ending employment on or after that date. (App. at 800-802). Plan Amendment 2003-5 also served to cut-back the formula for the early retirement benefit, because the plan amendment removed the DLS Equivalent of the PDB from the formula for calculating the early retirement benefit. (App. at 800 "no lump sum payments shall be made under Section 7.3(c)

[3] U S WEST is the only former Bell System company that offered its employees a choice of either an early retirement lump sum benefit or the traditional monthly annuity. For instance, Lucent and AT&T only provide a traditional monthly annuity pension.

on or after January 1, 2004"). Appellees mock Appellants by rhetorically asking, "If the Pensioner Death Benefit did not fit within the statutory definition of a pension benefit before Qwest's predecessor-in-interest created an optional form of discounted early payout, how did the addition of this new form of payout change its legal nature? (Answer Brief at pp. 21-22). Appellees hope to distract this Court's attention away from the DLS Equivalent of the PDB, just as they tried to do before the District Court.

Appellants' Opening brief thoroughly explains why Plan Amendment 2003-5 violates ERISA's anti cut-back rule and the terms of the Plan, not solely because it partially eliminated the PDB, but also because the plan amendment impermissibly eliminated the DLS Equivalent of the PDB from the early retirement single sum payment. The District Court did not grasp the nature of the two-prong damage caused by Plan Amendment 2003-5. This Court will see otherwise.

1. Plan Amendment 2003-5 Violates ERISA's Anti-Cutback Rule and the Plan's Then Existing Terms Because the Plan Amendment Removed the "DLS Equivalent of the PDB" Component to the Early Retirement Benefit.

In their Answer Brief, Appellees refused to address Appellants' arguments that Plan Amendment 2003-5 impermissibly cut-back an early retirement benefit, and they speciously argue that "[t]he early retirement benefit contention was not

raised below" in the District Court. (Answer Brief at p. 21). To the contrary, the "early retirement contention" was *repeatedly* raised within Appellants' brief opposing summary judgment (App. at pp. 821-843), as shown below:

> The Qwest PDB became a necessary integral for compliance with a formula to calculate an early retirement optional from of benefit – a single sum – paid immediately after employment ended." (emphasis added) (App. at 821).
>
> Effective January 1997, the Plan was amended to permanently give management workers taking early retirement, the option of selecting either a traditional monthly annuity or selecting receipt of a single sum distribution of all earned pension benefits reduced to present value. (emphasis added) (App. at 822).
>
> The monthly equivalent of the PDB and the resulting increased pension benefit, after being actuarially reduced to present value, was provided in the form of an early retirement optional lump-sum benefit. (emphasis added) (App. at 823).
>
> **In 1997, the Plan Sponsor Created a New Early Retirement Optional Form of Benefit Partially Valued By the PDB. Amendment 2003-5 Impermissibly Cuts Back**.
> (emphasis original) (App. at 836).
>
> Effective January 1997, Plan sponsor U S WEST began to permanently allow management Plan participants the ability to receive an early retirement lump-sum distribution payment. . . For every Plan participant selecting the early retirement single-sum optional distribution, payment of the PDB equivalent was not discretionary (emphasis added) (App. at 837).
>
> In any event, the optional early retirement lump sum payment became a protected benefit. (emphasis added) (App. At 838).
>
> Defendants' enforcement of Amendment 2003-5 causes the early

> retirement optional benefit to be reduced. (emphasis added) (App. at 839).
>
> Since the protected early retirement optional form of benefit – a single-sum service pension payment - has been impermissibly diminished, as it no longer includes the DLS Equivalent of the PDB value of the PDB, the full value must be restored. (emphasis added) (App. at 841).
>
> As the analysis in Section IV.A demonstrates, Plaintiffs West and Meister, who received the optional early retirement lump-sum payment, minus the DLS Equivalent of the PDB PDB value, can prove their claim that the harm resulting from Amendment 2003-5 should be undone. (emphasis added) (App. at 843).
>
> This Court has seen the relevant Plan document provisions and, in view of ERISA Section 204(g), can declare, as a matter of law, the value of the PDB became a core element of a protected early retirement optional form of benefit and, thus, rule Amendment 2003-5 which eliminated the PDB and diminished the protected benefit is illegal and should be stricken. (emphasis added) (App. at 846).

In addition to beating that dead horse within their brief opposing summary judgment, Appellants continued to raise that contention on two more occasions in their filings concerning supplemental case law authority. (See App. at 1146-1147 and 1155).

Moreover, in the District Court and on this appeal, Appellants contend Plan Amendment 2003-5 violates Plan terms prohibiting any plan amendment that serves to "diminish" an early retirement benefit. (See App. at 833, 839, 841and 846; Appellants' Opening Brief at pp. 18 and 34-36) (quoting 2001 Plan document

- App. at at 607, § 11.4 - which states: "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). This private anti-amendment restraint can only be read to mean the Plan sponsor may not diminish any of the forms of accrued benefits listed within IRC Section 411(d)(6) and its exact counterpart, ERISA Section 204(g)(2). An early retirement benefit, such as the optional single sum payment made available to thousands of persons under age 65 who had sufficient years of employment service, is an accrued benefit under IRC Section 411(d)(6) and ERISA Section 204(g)(2). By cutting out the DLS Equivalent of the PDB from the formula for the single sum payment, Qwest impermissibly diminished the early retirement benefit. Also, there can be no doubt that Qwest, via implementation of Plan Amendment 2003-5, impermissibly diminished the optional form of single sum benefit payment that existed for seven full years (1997-2003).

No where in their Answer Brief do Appellees dispute the fact that the single sum payment is indeed an "early retirement benefit," and they cannot because it was made available to employees under age 65 with enough employment service to meet the Plan's "Modified Rule of 75". The single sum payment squarely meets the Treasury Department's definition of "an early retirement benefit." Treas. Reg.

§ 1.441(d)-3(g)(6)(i), 26 C.F.R. § 1.441(d)-3(g)(6)(i). In their Answer Brief, Appellees neither address nor attack Appellants' claim and argument that Plan Amendment 2003-5 violated Section 11.4 of the 2001 Plan Document that was in effect when the challenged plan amendment was implemented. [4]

2. Plan Amendment 2003-5 Violates ERISA's Anti- Cutback Provision Because it Removed the "DLS Equivalent of the PDB", a Retirement-Type Subsidy to the Early Retirement Single Sum Payment.

The District Court stated in the Summary Judgment Order:

> Finally, the plaintiffs argue that the Pension Death Benefit is a 'retirement-type subsidy' under the anti-cutback provision of ERISA Section 204(g)(2)(A), 29 U.S.C Section 1054(g)(2)(A).

(emphasis added) (App. at 1208). That is *not* Plaintiffs-Appellants' argument. To be clear, Appellants' contention is that the DLS Equivalent of the PDB is a 'retirement-type subsidy.' Appellants argued in their brief opposing summary judgment, as follows:

> Since the DLS Equivalent adds significant value above the accrued pension benefit, reduced to present value for immediate optional

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[4] Appellees recognize and state that "Appellants claim challenges the legality of Amendment 2003-5. . . Appellants must prove that the 2003 amendment violated a provision of subchapter 1 of ERISA (29 U.S.C. § 1005-1053) or the terms of the Plan." (Answer Brief, p. 41, n. 26). Appellants met that burden. Appellants have amply proven their claim that Amendment 2003-5 violated the Plan's strict prohibition set forth in Section 11.4 of the 2001 Plan Document which provision states that no plan amendment may "diminish" any form of accrued benefit defined within IRC Section 411(d)(6).

> lump-sum payment, the DLS Equivalent is deemed to be a 'retirement-type subsidy, also protected by ERISA § 204(g)(2)(A)'s anti-cutback prohibition.

(emphasis added) (App. at 839-840). There is a huge difference between the DLS Equivalent of the PDB and the actual PDB. The DLS Equivalent of the PDB is a lump sum *substitute* for the death benefit. The DLS Equivalent of the PDB is not a welfare benefit and it does not require, as a condition subsequent for payment, that there be a death or that the recipient either be married with the potential for having a surviving spouse or any other mandatory beneficiary, such as dependent children or dependent parents. The District Court missed the mark. In their Answer Brief filed in this Court, Appellees run with and expand upon the District Court's key error.

Yet, when Appellees were before the District Court, they fully recognized the true nature of the DLS Equivalent of the PDB. In their brief submitted to the District Court, Appellees called the DLS Equivalent of the PDB "the lump sum death benefit substitute payment." (emphasis added) (App. At 1127). Indeed, all parties agree that the DLS Equivalent of the PDB is not a true death benefit; it is a substitute payment and it is not a welfare benefit.

In their Answer Brief submitted to this Court, Appellees rely upon irrelevant and inapposite case law and other legal authority for their argument that a death

benefit should not be treated as a "retirement-type subsidy." Appellees totally miss the point. Again, the DLS Equivalent of the PDB is a "substitute", not the real McCoy. There is no legal authority for any contention that the DLS Equivalent of the PDB, as included in the early retirement benefit, cannot be deemed to be a bona fide retirement-type subsidy. That's the reason Appellees avoid using the term "DLS Equivalent" anywhere in their Answer Brief.

In their Answer Brief, Appellees contend Appellants' argument that Plan Amendment 2003-5 impermissibly cut-back an early retirement benefit and impermissibly cut-back a retirement-type subsidy was a mere "fleeting contention." (Answer Brief at p. 23). To the contrary, Appellants' argument was neither perfunctory, a fleeting contention, or limited to "a single, poorly worded statement." *Tele-Communications, Inc. v. C.I.R.*, 104 F.3d 1229, 1233 (10th Cir. 1007), citing *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir.1985) (holding that appellate courts should not permit "fleeting references to preserve questions on appeal"), *cert. denied*, 475 U.S. 1088, 106 S.Ct. 1475, (1986). This case is a far cry from the cases cited within Appellees' Answer Brief in which cases the appellants argued issues on appeal that had merely been raised by implication in a trial court proceeding.

Here, the issue thoroughly raised by Appellants was that Plan Amendment

2003-5 wrongfully removed or cut-back the DLS Equivalent of the PDB from the early retirement single sum benefit. The legal issue was properly preserved for this appeal, since Appellants-Plaintiffs alerted the District Court to the issues about ERISA's anti cut-back rule and sought a ruling. See, e.g., *Century 21 Real Estate Corp. v. Meraj Int'l Inv. Corp*., 315 F.3d 1271, 1278 (10th Cir. 2003). . An issue raised on appeal must be one that was " 'presented to, considered [and] decided by the trial court,' " *Cavic v. Pioneer Astro Indus*., 825 F.2d 1421, 1425 (10th Cir.1987) (quoting *Eureka-Carlisle Co. v. Rottman,* 398 F.2d 1015, 1019 (10th Cir.1968)). The rule may be relaxed when the issue is one of law and the proper resolution is beyond doubt or where injustice might otherwise result. *Singleton v. Wulff,* 428 U.S. 106, 121, 96 S.Ct. 2868, 2877 (1976). Further, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Id*.

The District Court, while fully quoting Appellants' contention that the DLS Equivalent of the PDB is a retirement-type subsidy, nevertheless proceeded to focus on the PDB, the actual death benefit, and then made the wrong ruling. The District Court ruled the actual death benefit - the PDB - was not a retirement-type subsidy, but an unprotected welfare benefit. (App. at 1215). The District Court

did not address Appellants' contention that Plan Amendment 2003-5 impermissibly cut-back the DLS Equivalent of the PDB. That error should be addressed and corrected by this Court. [5]

In a recent clarifying regulation, 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. . . .

Treas. Reg. § 1.441(d)-3(g)(6)(iv), 26 C.F.R. § 1.441(d)-3(g)(6)(iv). This regulation proves that, since the DLS Equivalent of the PDB is an excess amount over the actuarial present value of the accrued benefit, it is indeed a retirement-type subsidy. Appellees speciously argue that Appellants are changing course, and they contend Appellants took the position in the District Court that the clarifying regulation was not applicable to this controversy. Appellants did no such thing.

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[5] The District Court steered way off course after making the fundamental error that Plaintiffs' argument was that the Pension Death Benefit was transformed into "an optional form of benefit protected by the anti-cutback provision." (App. at 1206). Plaintiffs never made that contention. Plaintiffs concisely explained and contended that the DLS Equivalent of the PDB was made part of the early retirement single sum payment. Plaintiffs explained that the resulting lump sum payment is an optional form of benefit. (See App. at 822-823, ¶ 6).

Appellants pointed out in their brief opposing summary judgment that the regulation counsels against applying the rules when testing whether or not a plan amendment adopted before August 2005 serves to disqualify a pension plan under I.R.C. Section 411(a), 26 U.S.C. Section 411(a) from receiving favorable tax treatment. (See App. at 838, n. 11; Treas. Reg. § 1.441(d)-3(j)(i), 26 C.F.R. § 1.441(d)-3(j)(i), stating "[e]xcept as otherwise provided in this paragraph (j) the rules of this section apply to amendments adopted on or after August 12, 2005").

Plaintiffs-Appellants neither claim nor seek a declaration that Plan Amendment 2003-5 operates to disqualify the Qwest Pension Plan from receiving favorable Internal Revenue Code qualification, i.e., deferral of income tax on the value of pension contributions. There is no impediment to applying the clarifying regulation's definitions to the present controversy concerning the correct characterization of the DLS Equivalent of the PDB, a significant monetary component of the early retirement benefit.

Indeed, since the Treasury Department's regulation is directly on point and defines "retirement-type subsidy" it is the best legal source of authority for this Court to apply to the present controversy. *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); *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.").

Since the DLS Equivalent of the PDB is protected by ERISA Section 204(g)(2) and I.R.C. Section 411(d)(6) and the restraint included in the 2001 Plan Document's reservation of rights clause ("ROR"), Plan Amendment 2003-5 must be stricken and the DLS Equivalent of the PDB restored to the early retirement benefit. In order to restore the DLS Equivalent of the PDB, the actual PDB must also be restored. You cannot have one without the other. (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.").

B. The Plan Sponsors Consistently Demonstrated Intent to Treat the PDB as a Vested or Protected Benefit.

Appellees agree with Appellants' contention that 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 v. Ceridian Corp.,* 95 F.3d 1505, 1511 (10th Cir.1996) (emphasis added) (Answer Brief, p. 30, n. 19). However, Appellees contend that any "demonstration of employer intent" to have [the benefit in

question] vest under the plan "must be incorporated into the formal written plan." (*Id*.). That is not the holding of *Chiles* which case has not been overturned by any subsequent ruling by this Court.

Chiles does not require that every "demonstration of employer intent" be in written language appearing within pension plan documents. But, even if that were a correct interpretation of *Chiles* and its guidance, Appellants have amply shown that former Plan sponsor U S WEST demonstrated the company's intent that the PDB be deemed to be vested since U S WEST added new provisions to pension plan documents. The most significant evidence demonstrating U S WEST's intent is that the company made the PDB an integral part of calculating the early retirement single sum payment. The formula U S WEST chose for calculating the total amount of the single sum payment, which formula is set forth in the governing pension plan document, proves U S WEST considered the PDB to be vested and an essential element of the service pension benefit. Why else would the actuarial equivalent value of the PDB be included in the lump sum distribution with the express understanding that the recipient could not receive the death benefit in the future? 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 also served as Chairpersons of the named fiduciary for the pension plans. (See Appellants' Opening Brief, pp. 8-9, 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 to receive his pension in the form of a one-time lump sum payment. Plan participants, like Appellants Kerber and Phelps, who had the choice of immediately receiving the value of the PDB or deferring payment of the PDB until after death, should not at any time be cheated out of their election for a deferral payment of the PDB.

Appellees seek refuge in the ROR set forth in the original 1984 master pension plan documents, which ROR had a single restraint. Appellees correctly note the ROR mandates that "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". (emphasis added) (Answer Brief, p. 34 - referring to the 1984 Plan Document; See the full text of the ROR in App. at 824). While the parties disagree about what this ambiguous private anti-amendment provision means and the scope of "benefits" protected by the restraint, the parties agree this ROR existed from January 1, 1984 until changed when U S WEST

executed a restated master pension plan document on December 29, 1994. (App. at 46, ¶ 105; App. at 93, ¶ 105). This ROR was in effect when Appellants Kerber and Phelps retired in 1990 and they made their respective choice of either immediately receiving a lump sum pension payment, including the value of the PDB, or receiving a monthly annuity and deferring the PDB payment for the benefit of their respective surviving spouse.

The evidence shows that with this ROR in the background, Plan sponsor U S WEST told Plan participants, including Mr. Kerber and Mr. Phelps, that they were entitled to the PDB. (Appellants' Opening Brief, pp. 11-13, Fact Nos. 10-13). In their Answer Brief, Appellees don't dispute those facts. Appellees also admit that while the ROR specifically prohibiting changes to "entitled" benefits was in effect, a "U S WEST Retirement Plans Bulletin" was issued in July 1993 which plan document states:

> Employees hired on or after March 1, 1993 are not entitled to the lump sum death benefit. If your Term of Employment [TOE] [6] date is February 28, 1993 or earlier, at the time of your death, your eligible beneficiaries are **entitled** to this benefit.

(emphasis added) (App. at 92, ¶ 88 admitting App. at 44, ¶ 88). U S WEST issued a follow-up January 1994 dated SPD stating:

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

> . . . 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, ¶ 89; App. at 92, ¶ 89).

Moreover, the restated master pension plan document executed on December 29, 1994, states emphatically:

> 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).

Appellants contend that since Plan participants, like Mr. Kerber and Mr. Phelps, were being told they and their eligible beneficiaries were "entitled to this benefit", meaning the PDB, and the long standing ROR pledged that the company could not reduce or eliminate any benefits and pensions to which they had become entitled, their logical conclusion was that U S WEST intended to vest the PDB and it was treated as a protected benefit. That U S WEST chose to tell Plan participants they were entitled to the PDB comports with the same conclusion reached by the court in *United Foods, Inc. v. Western Conf. of Teamster Pension Trust Fund*, 816 F. Supp. 602, 608-609 (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. . .[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."), *aff'd*, 41 F.3d 1338 (9th Cir. 1994). [7]

Both before the District Court and throughout their Opening Brief in this Court, Appellants presented and discussed the evidence that supports 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 representations and *action* by former Plan sponsor U S WEST reflecting an intent to vest the PDB. Much of the evidence is documented not only in pension plan documents but also in associated annual reports required to be filed with federal agencies. In response to that overwhelming evidence, Appellees sarcastically argue that "Appellants include a hodge-podge of sources

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[7] The Third Circuit came to a different conclusion with respect to Lucent Technologies' Pensioner Death Benefit. In the case of *In re Lucent Death Benefits ERISA Litigation*, 541 F.3d 250 (3d Cir. 2008), the appellate court ruled that a Lucent retiree must first die before becoming entitled to the death benefit. However, that case was not decided under Fed.R.Civ.P. Rule 56 with an analysis of all the developed facts. Instead, the case was decided on the allegations of the complaint and the trial court's Fed.R.Civ.P. Rule 12(b)(6) order of dismissal for failure to state a claim was upheld by the appellate court.

that are outside of the Plan documents to bolster their case that [U S WEST's] 'conduct' demonstrates that the Pension Death Benefit is vested." (Answer Brief, p. 37). That alleged "hodge-podge" includes annual filings sent to the IRS and the Department of Labor , which filings were sworn to for accuracy by the Plan administrators, as well as a succession of SPDs confirming that U S WEST considered the PDB for retirees to be a defined pension benefit, not a welfare benefit.

And, Appellants' evidence includes a plethora of periodic official written communications from Plan administrators assuring Plan participants that they were "entitled" to the PDB and that the PDB "will be paid." Those communications served as interpretations about what was meant by the ROR's prohibition of plan amendments that changed "entitled" benefits. The communications were not made with the intention that they be ignored or dismissed by employees planning their retirement portfolio.

Any reasonable person, after reading the original ROR which protected entitlements to benefits and governed the rights of thousands of Plan participants, including Mr. Kerber and Mr. Phelps, and keeping up with SPDs and official communications confirming he or she was "entitled" to the PDB and that the benefit "will be paid", would come to the simple and reasonable conclusion that his

or right to the PDB was protected. The District Court erred by applying the viewpoint of a thoroughly ERISA schooled lawyer and concluding 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." (App. at 1215). The District Court's conclusion is both unsupported by the evidence in the record and exactly contrary to all of the unopposed testimony in the record presented by Plaintiffs-Appellants' witnesses. Certainly, Appellees presented no witness testimony that any reasonable person, after being told by U S WEST that they were "entitled" to the PDB, came to the conclusion that he or she really wasn't entitled to the benefit. That's simply because no such witness can be found.

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

In their Opening Brief at pp. 39-41, Appellants explained why the District Court erred when dismissing Appellants Kerber and Phelps as Plaintiffs for Count II. Appellees respond by stating in a footnote within their Answer Brief that Mr. Kerber and Mr. Phelps "suffer no injury in fact from the 2003 amendment [i.e., Plan Amendment 2003-5] and therefore lack an essential element of standing." (Answer Brief, p. 27, n. 18]. Both the District Court and Appellees are wrong.

Appellants need not demonstrate actual personal harm in order to have standing to seek injunctive relief requiring a defendant to satisfy statutorily-created responsibilities. The key case relied upon by Appellees actually supports Appellants' contention that both Mr. Kerber and Mr. Phelps have standing to address Qwest Defendants' breaches of ERISA fiduciary duties. *Hovarth v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 456 (3rd Cir. 2003) (citing to *Financial Institutions Retirement Fund v. Office of Thrift Supervision*, 964 F.2d 142, 149 (2nd Cir. 1992) (noting that "ERISA's goal of deterring fiduciary misdeeds" supports a "broad view of participant standing under ERISA," and holding that a violation of § 404 satisfies the injury requirement of Article III)).

ERISA Section 502(a)(3), plainly states that any plan participant and any plan fiduciary has the right to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). There are no reported cases where the courts have required a plaintiff plan fiduciary to either allege or show that he or she has suffered personal harm before going forward under ERISA Section 502(a)(3). This same standard should apply to both plan fiduciaries and plan participants, especially since ERISA

contemplates that plan participants will act as "private attorney generals." The District Court erred when concluding that Appellants Kerber and Phelps could not proceed with Count II.

D. Plaintiffs-Appellants Have Raised and Established a Cognizable Claim for Breach of Fiduciary Duty.

Count I is a hybrid breach of fiduciary duty and ERISA equitable estoppel claim. In so far as the breach of fiduciary duty component of Count I, Plaintiffs-Appellants Kerber and Phelps contended they were misinformed due to the inadequate 1989 SPD given to them when they made their retirement choices in 1990. Appellees contend that Appellants raise no cognizable claim of breach of fiduciary because federal courts have ruled SPDs need not specifically address the possibly that benefits might later be changed. (Answer Brief, pp. 42-43). But, what Appellees fail to recognize is that all four of the appellate cases cited by Appellees - *Wise, Jenson, Gable* and *Sprague* [8] - were solely concerned with a welfare benefit plan, not a defined pension plan, as we have in this case. The four appellate cases cited by Appellees gave no consideration for the regulations governing a defined pension benefit plan. The Department of Labor ("DOL"),

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[8] *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993); *Gable v. Sweetheart Cup Co., Inc*., 35 F.3d 851 (4th Cir. 1994); *Jenson v. SIPCO, Inc*., 38 F.3d 945 (8th Cir. 1994); *Sprague v. General Motors Corp*., 133 F.3d 388 (6th Cir. 1998).

which is responsible for interpreting and enforcing ERISA, has promulgated detailed regulations specifying higher disclosure requirements for a pension plan. The regulations specifically require a pension plan's SPD to have:

> . . . In addition to other required information, plans **must include a summary of** any plan provisions governing **the authority of the plan sponsor** 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**; . . .

(emphasis added). 29 C.F.R. § 2520-102-3(*l*). Appellees do not dispute the fact that the 1989 SPD given to Appellants Kerber and Phelps, so as to guide them in their retirement decisions, failed to comply with DOL regulations, since the 1989 SPD said nothing about any retained right by U S WEST to amend or eliminate benefits. This breach of fiduciary duty, due to non-compliance, should be factored-in with respect to Plaintiffs-Appellants' ERISA equitable estoppel claim.

E. Plaintiffs-Appellants Have Established a Clear Basis For This Court to Innovate and Utilize Equitable Estoppel in This ERISA Case - Count I.

In their Answer Brief, Appellees acknowledge that this Court has reserved ruling on adopting equitable estoppel for ERISA cases. (Answer Brief, p. 43). But, they would agree that equitable estoppel should be applied where plan terms are ambiguous and the employer's communications constituted an interpretation of that ambiguity. (*Id.*). As previously explained herein, the ROR in the 1984-1994 master pension plan document is subject to differing points of view about the restraint with respect to "entitled" benefits. When this Court considers that fact, plus the fact that U S WEST's failed to provide thousands of Plan participants, including Appellants Kerber and Phelps, with a SPD making the required disclosures, plus the fact that U S WEST told those persons when they were making retirement choices to rely upon the fact that they were "entitled" to the PDB, it is only appropriate to embrace equitable estoppel. Equitable estoppel is especially appropriate where a former plan sponsor expects plan participants to rely upon the plan sponsor's assurances that the plan participants are entitled to a benefit and those persons then make irrevocable retirement decisions based upon those assurances. Appellees lament that "a person cannot rely on an oral statement when he has in hand written materials disclosing the truth." (Answer Brief, p. 45).

Appellees falsely state in their Answer Brief that "Appellants had in hand – figuratively if not literally – Plan documents disclosing Qwest's right to make changes." (*Id.)*. The undisputed facts show otherwise.

In 1990, when Appellants Kerber and Phelps had to make a choice whether or not to take a lump sum payment or a monthly annuity with the PDB payment deferred, they were given an incomplete 1989 SPD that did not meet the DOL's strict disclosure standards. It is undisputed that Appellants Kerber and Phelps did not have in hand Plan documents disclosing U S WEST's right to make changes. When making their retirement decision and planning what was financially best for their spouses, they were being told that they were "entitled" to the PDB. At that time, they were particularly vulnerable. The retirement decisions Mr. Kerber and Mr. Phelps made are irrevocable. Furthermore, U S WEST followed-up by sending Mr. Kerber and Mr. Phelps written statements confirming the PDB "will be paid" and that they and their surviving beneficiaries were "entitled" to the PDB.

Accordingly, for the reasons stated herein and in Appellants" Opening Brief at pp. 53-54, Appellants urge this Court to adopt and craft an ERISA equitable estoppel claim based upon the appellate panel's reasoning in *Pell v. E.I. DuPont de Nemours & Co. Inc.*, 539 F.3d 292, (3rd Cir. 2008). This Court should reverse the District Court's order granting summary judgment dismissal of the ERISA

equitable estoppel claim within Count I.

F. 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. Appellants Renew Their Request for Attorney's Fees.

As previously explained in Appellants' Opening Brief, 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 Four 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).

In their Answer Brief, Appellees chose not to argue and oppose Appellants' arguments about Count IV. Also, Appellees chose not to argue and oppose Appellants' argument that the District Court abused discretion by denying Appellants' unopposed filing setting forth their position statement regarding the major distinction between this case and the Third Circuit's decision in the *Lucent*

litigation. Apparently, Appellees concede that Appellants are correct on those two matters. 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 in the Opening Brief and 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.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This reply brief complies with the type-volume limitation of FED. R. APP. AT P. 32(a)(7)(B) because the brief contains **6,986** 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 reply 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 reply 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: February 13, 2009

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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' Reply 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 Reply 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 02/13/2009) 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 13th day of February 2009, a true and correct copy of the above and foregoing **REPLY BRIEF OF PLAINTIFFS -APPELLANTS** was emailed to all Attorneys for Defendants-Appellants and a copy was sent by first class mail, postage prepaid to the offices of:

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