IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **07-cv-00644-WDM-KLM**

EDWARD J. KERBER,
NELSON B. PHELPS,
JOANNE WEST,
NANCY A. MEISTER,
THOMAS J. INGEMANN, JR.,
MARTHA A. LENSINK,
SAMUEL G. STRIZICH,
Individually, and as Representative of plan participants
and plan beneficiaries of the QWEST GROUP LIFE INSURANCE PLAN,

Plaintiffs,

vs.

QWEST GROUP LIFE INSURANCE PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

MOTION FOR RECONSIDERATION OF MARCH 31, 2009 DECISION (Docket 152)

Plaintiffs, by and through their counsel, respectfully move that this Court reconsider its March 31, 2009 decision (Docket 152) granting summary judgment on Claims III, IV and V. Plaintiffs respectfully wish to point out several significant mistakes that have been made, and they state the grounds for this motion are as follows:

A. The Tenth Circuit Has Made Clear that District Courts Have "General Discretionary Authority to Review and Revise Interlocutory Rulings."

In *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1224 n. 2 (10th Cir. 2008), the Tenth Circuit ruled that a motion to reconsider a ruling short of final judgment is treated as "an interlocutory motion invoking the district court's general discretionary

authority to review and revise interlocutory rulings prior to entry of final judgment." (citing *Wagoner v. Wagoner*, 938 F.2d 1120, 1122 n.1 (10th Cir.1991)). The "stricter standards" of Rule 59(e) and 60(b) only apply to final orders or judgments. *Id.* [1]

Thus, a motion to reconsider can be considered when the order at issue is not a final judgment and the only alternative a party has is an interlocutory appeal or an appeal several years later. *Price v. Philpot*, 420 F.3d 1158, 1167 n.9 (10th Cir. 2005) ("every order short of a final decree is subject to reopening at the discretion of the district judge"). One of the factors the court may consider is judicial economy. "When a lower court is convinced that an interlocutory ruling it has made is substantially erroneous, the only sensible thing to do is to set itself right to avoid subsequent reversal." *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981). Thus, motions to reconsider interlocutory rulings can be granted where the moving party "set[s] forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision" by demonstrating a "manifest error of law or fact" or presenting "newly discovered evidence." *Nat. Business Brokers, Ltd. v. Jim Williamson Productions*, 115 F.Supp. 2d 1250, 1256 (D. Colo. 2000). Accord, *Rasure v. Sitter*, 2007 WL 3046225 *1-2 (D. Colo. 2007) (reversing

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[1] Plaintiffs acknowledge that the Federal Rules of Civil Procedure do not recognize a 'motion to reconsider.' Instead the rules allow a litigant subject to an adverse judgment to file either a motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e) or a motion seeking relief from the judgment pursuant to Fed.R.Civ.P. 60(b)." *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991). Fed.R.Civ.P. 59(e) will govern when the motion for reconsideration is filed within ten days of the judgment and Fed.R.Civ.P. 60(b) will govern all other motions. Since this motion is filed within ten days of the Order dismissing Claims III, IV and V, Plaintiffs request this Court to treat it as a Rule 59(e) motion. A motion to alter or amend a judgment pursuant to Fed.R.Civ.P. 59(e) should be granted to address. . . (3) the need to correct clear error or prevent manifest injustice. *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir.2000).

decision on breach of fiduciary duty after another review of relevant rule and case law).

B. In The March 31, 2009 Decision, This Court Made Erroneous Fact Findings Which, If Not Corrected, Will Lead to Manifest Injustice.

1. In this Court's March 31, 2009 decision (Docket 152), the Court opines that "I am unconvinced that the Group Policy with Prudential is part of the 1998 Documents." (Slip. Op. at p. 16, n. 11). This Court also states, "it appears that the Group Policy between Qwest and Prudential is not incorporated into the Plan such that it would be subject to the plan documents rule." Defendants neither contend those are the facts nor do they make those arguments. This Court's understanding is incorrect and contrary to the parties' mutual understanding of the undisputed material facts.

2. Indeed, the parties *agree* that the Group Policy Contract between Qwest and Prudential *is* incorporated into the Plan, as shown below:

> **a.** The 1998 Master Plan Document states "Plan means U S WEST Group Life Insurance Plan set forth herein, *together with the Contracts*, if any, and the Appendices attached hereto, *as amended from time to time*." (DN 99-5, at p. 6, QL0008) (emphasis added);
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> **b.** The 1998 Master Plan Document requires that "The payment of Benefits under the Plan shall be in accordance with the Plan *and* the applicable Contracts. (DN 99-5, at p. 19, § 5.2, QL00021) (emphasis added);
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> **c.** "Effective January 1, 2001, The Prudential Insurance Company of America ("Prudential") and Qwest entered into a Group Insurance Contract (the "Group Contract") pursuant to which Qwest purchases group life insurance covering certain Qwest retirees." (DN 122-2, Erik P. Ammidown Declaration, at p. 2 of 5, ¶ 3 - referring to Exhibit A-10 to Qwest's motion which document is Group Contract G-93634);
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> **d.** Defendants ***admit*** that "the 1998 Plan Document incorporates the *Group Policy Contract* [between Qwest and Prudential] as part of the 'Plan'." (DN 122 at p. 2 of 16, ¶ 26 - admitting Plaintiffs' "Additional Undisputed Facts" set forth on DN 113, at p. 7 of 26, ¶ 26). Defendants

further admit that "no amendment to the *Group Policy Contract* was executed by both parties [Qwest and Prudential]" *Id.* (emphasis added);

e. When making the admissions concerning the "*Group Policy Contract* ", Defendants were specifically referring to Contract No. G-93634 between Qwest and Prudential (See DN 122 at p. 2 of 16, ¶ 26 responding to Plaintiffs statements referring to the same document on DN 113, at p. 7 of 26, ¶ 26);

f. The Group Contract between Qwest and Prudential expressly requires any amendment to reduce benefits be executed by both Qwest and Prudential before it can be applied to a beneficiary's claim. (DN 113-6 at QL08262 "an amendment will not affect a claim incurred before the date of change."); and

g. There was no properly executed amendment to reduce benefits to $10,000 under the Group Contact between Qwest and Prudential until January 21, 2009, the date Erik Ammidown executed the amendment on behalf of Qwest. (DN 135-3, at p. 4 of 6, QL10223).

3. Therefore, in view of the undisputed material facts establishing that the 1998 Master Plan Document incorporated the Group Contract between Qwest and Prudential and that there was no valid amendment to the Group Contract until at least January 21, 2009, this Court should reconsider its March 31, 2009 decision which is based upon a clearly erroneous assumption and misunderstanding of the undisputed material facts.

C. In The March 31, 2009 Decision, This Court Made An Erroneous Determination that Plaintiffs Had Not Alleged There Had Been a Violation of the Requirement to Act in Conformity With Terms of Plan Documents.

4. In the March 31, 2009 decision, this Court noted that "failure to abide by the terms of the insurance contract with Prudential may be a violate (sic) of the plan documents rule." (DN 152, at p. 16). Then, this Court stated "if Plaintiffs are alleging a violation of ERISA for failure to abide by the plan documents rule, such a violation was

not alleged in the Second Amended Complaint and, therefore, is inappropriately argued, now." (*Id.*). This is in error. Moreover, Defendants do not make that argument. [2]

5. Within the Second Amended Complaint (DN 69), Plaintiffs alleged that: Plan administrators should have "carried out the more favorable terms of the Governing PLAN Document when making benefit payments to beneficiaries of deceased Eligible Retirees;" " PLAN fiduciaries and administrators breached fiduciary duties under ERISA Section 1104(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D);" and Plaintiffs alleged this Court should declare " the more favorable terms of the unamended Governing PLAN Document continued to govern the benefit rights of Eligible Retirees and their beneficiaries." (See DN 69 at ¶¶ 66, 68, 72 and 93). Specifically, Plaintiffs asked in the Prayer for Relief for this Court to "declare that PLAN fiduciaries and administrators failed to discharge duties to act in accordance with PLAN documents, as required by ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). (DN 69 at Prayer ¶ E). In so doing, Plaintiffs invoked the "plan documents rule," which is ERISA Section 404(a)(1)(D).

6. In addition, Plaintiffs invoked the "plan documents rule" within the Final Pretrial Order which as of March 17, 2009 controls the subsequent course of this action. (DN 149, ¶ 12 "EFFECT OF FINAL PRETRIAL ORDER"). In the Final Pretrial Order which was in effect before this Court's March 31, 2009 decision, Plaintiffs asserted the following contentions and arguments in the section entitled "Plaintiffs' Statement of

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[2] While a District Court may be expected to raise *sua sponte* fact issues and arguments with respect to its subject matter jurisdiction, it is unusual for a District Court when considering a defendant's motion for summary judgment to raise fact issues not disputed by the defendant and arguments not raised by the defendant.

Their Claims":

> The group life insurance plan is controlled by a June 12, 1998 Plan document, together with appendices created by former Plan sponsor U S WEST. (hereinafter called "1998 Master Plan Document."). The 1998 Master Plan Document expressly incorporates the terms of the Company's group insurance contract, thereby requiring the Plan sponsor to comply with the terms of the Group Contract between Qwest and Prudential Insurance Company. (DN 149, p. 3)
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> * * *
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> Indeed, the express terms of the Plan must be enforced, no matter whom those terms benefit. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002) ("we have been most reluctant to enforce deviations from plan language (whether considered plan amendments, modifications or deviations) on estoppel theories")).
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> When making the limited $10,000 payment to well over a thousand beneficiaries, Defendants acted contrary to the express terms of the Group Contract and contrary to favorable terms existing in the 1998 Master Plan Document. The ERISA statute requires plan fiduciaries to act solely "in accordance with the *documents and instruments* governing the plan ...." 29 U.S.C. § 1104(a)(1)(D) (emphasis added). (DN 149, p. 11).
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> * * *
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> Plaintiffs invoke the teachings and pronouncements by the United States Supreme Court in the case of *Kennedy v. Plan Administrator for DuPont Savings and Investment*, --- S.Ct. ----, 2009 WL 160440, Case No. 07-636 (January 26, 2009), where the Court confirmed that ERISA provides no exception to the plan administrator's duty to act in accordance with plan documents:
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> > The plan administrator is obliged to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA]," § 1104(a)(1)(D), and the Act provides no exemption from this duty when it comes time to pay benefits.
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> (*Id.*, Slip Op. at p. 11). In *Kennedy*, the Court also confirmed that ". . . ERISA forecloses any justification for enquiries into nice expressions of intent. ." (*Id.*). Due to ERISA preemption, and the Supreme Court's

> recent ruling in *Kennedy*, Defendants cannot rely upon their argument state case law support their proposition that, notwithstanding express governing terms of the Group Contract requiring amendments be signed by both Qwest and Prudential and the express terms of the Prior Loss Proviso in the 1998 Master Plan Document requiring any amendment to reduce benefits be "adopted", there is some circumstantial evidence that proves Prudential and Qwest had an informal understanding that retiree benefits were reduced. *Kennedy* mandates that Plan benefits should have been paid out in exact compliance with Plan terms existing when Eligible Retirees died. Plaintiffs also invoke *Phillips v. Teamster Local 639*, 79 F.Supp.2d 847, 852-53 (N.D. Ohio 2000), where the court declined to enforce an amended pension policy provision because the administrator had failed to follow the required procedures for amending the plan. (DN 149, pp. 12-13).

7. The foregoing discussion by Plaintiffs in the Final Pretrial Order sufficiently explains Plaintiffs' contentions raised within the Second Amended Complaint that there has been a violation of ERISA Section 404(a)(1)(D), the "plan documents rule." Plaintiffs allegations and contentions with respect to the "plan documents rule" does not come as a surprise to Defendants, as the parties pursued this issue during formal discovery. The parties' respective counsel spent a great deal of time working on the jointly proposed Final Pretrial Order. When the parties settled on and submitted the proposed Final Pretrial Order there were no objections, no claims of prejudice, no claims of surprise, and no claims of fair notice raised by any party as to the proposed Final Pretrial Order. Defendants consented to the Court's adoption of the parties' proposed Final Pretrial Order. The explanation of a claim or inclusion of a claim in the pretrial order is deemed to amend any previous pleadings which did not include that claim. *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir.2002); *McKenzie v. Benton*, 388 F.3d 1342, 1349 n.2 (10th Cir. 2004).

8. In conclusion, in the March 31, 2009 decision, this Court raised incorrect

fact issues and an incorrect argument, none of which matters were remotely raised by Defendants. Plaintiffs have identified the correct undisputed material evidence most relevant and appropriate to the Court's analysis and decision dated March 31, 2009. In that decision, the Court's misunderstanding of undisputed material facts led to clear error. In addition, the Court's failure to acknowledge Plaintiffs' ERISA Section 404(a)(1)(D) contentions and arguments invoking the plan documents rule as presented in both the Second Amended Complaint and Final Pretrial Order warrants reconsideration of the March 31, 2009 decision. Therefore, the Court should correct those errors and reconsider the March 31, 2009 decision in order to prevent manifest injustice. [3] With this corrections, this Court should apply the Supreme Court's ruling with respect to strict application of ERISA Section 404(a)(1)(D), the "plan documents rule." *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, __ U.S.__, 129 S.Ct. 865 (2009).

9. In *Kennedy*, the Supreme Court made it very clear that with respect to ERISA plan benefits the focus is not on a party's "intent" to do something. The focus is on whether there has been compliance with the specific terms of the plan documents. Here, despite the requirement, there was a failure by both Qwest and Prudential to have a jointly executed amendment to the Group Contract in place until at least January 21, 2009. Therefore, this Court must reconsider its position that "[n]one of Plaintiffs' arguments, however, negate that Defendants' actions manifested its intent to amend the

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[3] This Court should also correct the March 31, 2009 decision to the extent it purports to be a ruling concerning Claim VI (see DN 152 at p. 16 - incorrectly referring to "Claim 6"), because the discussion does not involve Claim VI. The discussion is about Claim V.

Plan." (DN 152 at p. 12). *Kennedy* teaches very directly that ERISA provides no exception to the plan administrator's duty to act in accordance with the terms of plan documents:

> The plan administrator is obliged to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA]," § 1104(a)(1)(D), and the Act provides no exemption from this duty when it comes time to pay benefits.

Id., 129 S.Ct. at 875. (emphasis added). In *Kennedy*, the Court also confirmed that ". . . ERISA forecloses any justification for enquiries into nice expressions of intent. ." *Id.*. The fact that Defendants had not amended both the 1998 Master Plan Document *and* the Group Contract, as they were required to do so, before paying Plan beneficiaries reduced benefits is not disputed. There was a clear violation of ERISA Section 404(a)(1)(D), the "plan documents rule." In view of this violation, numerous beneficiaries should receive the original promised amount of Plan benefits. It is cardinal rule that express terms of the Plan documents must be enforced, no matter whom those terms benefit. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002).

WHEREFORE, Plaintiffs respectfully move that this Court grant Plaintiffs' motion to reconsider its March 31, 2009 decision (Docket 152).

Dated: April 3, 2009

s/ Curtis L. Kennedy
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

Prior to filing this motion, the undersigned asked counsel for Qwest Defendants whether or not there would be any objection to Plaintiffs' filing a motion for consideration. In a telephone conversation on April 2, 2009, defense counsel Chris Koenigs confirmed that Qwest Defendants object to any changes being made to this Court's March 31, 2009 decision.

Dated: April 3, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of April, 2009, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and a courtesy copy was emailed to Defendants' counsel as follows:

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