IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **05-cv-00478-BNB-PAC**

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,

vs.

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

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO [Docket No. 68]
Qwest Defendants' MOTION FOR SUMMARY JUDGMENT

DATED this 3rd day of October, 2006.

s/ Curtis L. Kennedy
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I. INTRODUCTION.

Named Plaintiffs Edward J. Kerber, Nelson B. Phelps, Joanne West, Nancy A. Meister and Thomas J. Ingemann, Jr., hereby submit their brief in opposition to Defendants' Rule 56 Motion for Summary Judgment (Docket 68). This case is governed by the federal law Employee Retirement Income Security Act (ERISA) Congress created in order "to promote the interests of employees and their beneficiaries in employee benefit plans and to protect contractually defined benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113, 109 S. Ct.948, 956 (1989); see also 29 U.S.C. § 1001 (listing the congressional findings and declaration of policy regarding ERISA).[1]

The primary dispute concerns the "**Pension Death Benefit**" ("PDB"), a fixed lump sum amount paid out of Qwest's defined pension benefit plan, the successor to the pension plan previously sponsored by U S WEST and AT&T. This Court has jurisdiction of the underlying claims for relief based upon the civil enforcement provisions of ERISA, 29 U.S.C. §§ 1132(a)(1), 1132(a)(2), (a)(3), 1132(e)(1), and 1132(f), and upon 28 U.S.C. § 1331. The parties fully disagree whether or not the PDB, by virtue of historic Governing Plan documents, summary plan descriptions, course of dealings since 1980 and Plan fiduciaries' representations, became vested when an employee became service pension eligible.

This case is fact intensive, involving language set forth in numerous pension plan

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[1] "ERISA was enacted for the purpose of assuring employees that they would not be deprived of their reasonably-anticipated pension benefits; an employer was to be prevented from 'pulling the rug out from under' promised benefits upon which his employees had relied during their long years of service." See *Amato v. Western Union Intern. Inc.*, 733 F.2d 1402 , 1409 (2nd Cir. 1985), *cert dismissed*, 474 U.S. 1113, 106 S. Ct. 1167 (1986) .

documents issued by Plan sponsor since at least 1980. Defendants have cherry picked phrases from more recent pension documents – 1998 and later – and defense counsel have even submitted for this Court's consideration a *bogus* pension plan document (See Defts' Ex. F) which only serves to mislead this Court about the historic terms and administration of the pension plan [2] Since, there are numerous disputed material issues of fact and credibility issues, Defendants' motion should be denied.

So as to not repeat everything herein, Plaintiffs incorporate herein all allegations and relief sought in their Second Amended Complaint (Docket 29) and the arguments in their brief (Docket 48) opposing Defendants' Motion to Dismiss. Plaintiffs also incorporate their expert opinion report by Leonard Garofolo, former Regional Director for the Department of Labor's Employee Benefits Security Administration. Among other conclusions, Mr. Garofolo opines the PDB is not a welfare or ancillary benefit but an accrued benefit that became vested. (**Ex. 1**, pp. 40 and 49,Garofolo expert report).

II. STATEMENT OF AGREED UNDISPUTED FACTS The following allegations in the Second Amended Complaint were admitted by Defendants' Answer:

1. (Answer to ¶ 5). Edward J. Kerber was formerly employed as a "District Manager" within U S WEST's Human Resources Department and he retired after 30

[2] As more thoroughly explained in Section VI.A.4,, pp. 16-19 herein, Defendants' Ex. F is a bogus plan document executed on December 29, 1994 which U S WEST purportedly attempted to make retroactive to January 1, 1989 for IRS purposes *only*. A team of defense counsel for U S WEST previously explained to Judge Wiley Daniel in this Court that the same document, Ex. F, was *never* in force, never effective concerning the administration of the Plan. In so doing, the defense attorneys convinced Judge Daniel to disregard the document and, accordingly, he ruled to dismiss all plaintiffs' claims in the *Bronk* case. Now, defense counsel take an opposite approach, asking this Court to give credence and effect to the same bogus document. This manipulation of the facts is most disturbing. In order to effectively rebut Qwest Defendants' contentions, Plaintiffs' counsel searched this Court's archives and obtained a rebuttal witness statement from former U S WEST EBC member David Brenner.

years of service effective February 28, 1990. He receives a Qwest service pension.

2. (Answer to ¶ 7). Nelson B. Phelps was formerly employed as "Executive Director" within U S WEST's Human Resources Department and he retired after 24 years of service effective February 28, 1990. He receives a Qwest service pension.

3. (Answer to ¶ 13). Named Plaintiff Thoms J. Ingemann, Jr., was formerly employed as an "Account Consultant" in the National Accounts Department at QWEST. He retired after almost 40 years service from QWEST effective March 2, 2005. He is a retiree receiving a service pension annuity from the Qwest Pension Plan.

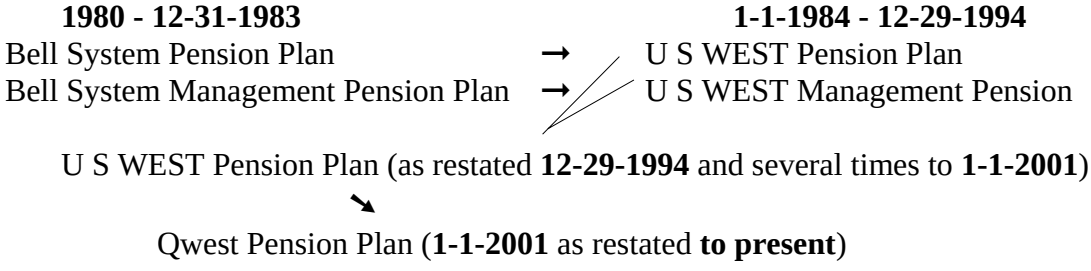
4. (Answer to ¶¶ 6, 8 and 14). Kerber, Phelps and Ingemann are each Plan "participants," as defined by ERISA § 3(7), 29 U.S.C. § 1002(7).

5. (Answer to ¶ 9). Named Plaintiff Joanne West was formerly employed as an "Senior Process Specialist" within Qwest's Wholesale Markets Department. She retired after about 35 years of service effective February 11, 2004 and received a lump sum service pension payment which did not include the value of the PDB she seeks.

6. (Answer to ¶ 11). Named Plaintiff Nancy A. Meister was formerly employed as a Qwest "Lead Project Analyst." She retired after over 25 years of service effective February 11, 2004 and received a lump sum service pension payment which did not include the value of the PDB she seeks.

7. (Answer to ¶¶ 15-17). U S WEST, Inc., was at various times: an "employer" as defined by ERISA § 3(5), 29 U.S.C. § 1002(5); "plan administrator" and "plan sponsor," pursuant to ERISA § 3(16)(A)(i) & (B), 29 U.S.C. § 1002(16)(A)(i) & (B). In July 2000, U S WEST, Inc. merged with Qwest Communications International, Inc., the surviving corporation and the current "plan sponsor" of the Qwest Pension Plan.

8. (Answer to ¶ 18). The Qwest Pension Plan history is summarized in § 1.56 of Defts' Ex. A, the current Governing Plan document executed in December 2002. The following flow chart shows how the original defined benefit pensions plans evolved since 1980 to become the Qwest Pension Plan:



9. (Answer to ¶ 19). The Qwest Pension Plan ("Plan) is an "employee pension benefit plan," pursuant to ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A).

10. (Answer to ¶¶ 26-27). Defendant Qwest Employees' Benefit Committee ("EBC") is, pursuant to ERISA §§ 3(21) and 3(16), 29 U.S.C. §§ 1002(21) and 1002(16), a named "fiduciary" and "administrator" of the Plan. The U S WEST Employees Benefit Committee was the named fiduciary January 1984 through June 2000.

11. (Answer to ¶ 96). The initial Governing Plan documents for the U S WEST pension plans contained the following "Changes in Plan" language:

> "***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**."* (emphasis added).

(See also Defts' Ex. B, Bates 3387; Defts' Ex.C, Bates 3661).

12. (Answer to ¶ 29). Defendant Qwest Pension Plan Design Committee is

the entity to with delegated certain authority to amend the PLAN.

13. (Answer to ¶¶ 177 and 187). In December 2003, Qwest Pension Plan Amendment 2003-5 was adopted and Defts' Ex H is the plan amendment which partially eliminated the PDB. As a result, the Plan does not provide for a PDB payment for persons retiring after January 1, 2004.

14. (Answer to ¶ 42). Plaintiffs Kerber and Phelps individually exhausted their administrative remedies and their demand letters and responses are accurately reproduced in the Second Amended Complaint.

15. (Answer to ¶ 39). The Plan does not provide for an internal administrative claim process to overturn Plan amendments.

III. RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS. Plaintiffs state the following response corresponding to Defendants' listed facts set forth in ¶s 1-15 on pages 6-13 of Defendants' Memorandum Brief (Docket 69), Section II entitled "**Undisputed Material Facts**:"

1-4. Admitted.

5. Plaintiffs dispute. West and Meister are each a "participant," as defined by ERISA § 3(7), 29 U.S.C. § 1002(7), of the Qwest Pension Plan who has not yet received *all* the benefits to which each is entitled. Each has a "mandatory beneficiary" for the PDB payable from the Qwest Pension Plan. (Docket 29, ¶¶ 10 and 12).

6-9. Admitted.

10. Plaintiffs dispute. Defts' Ex. E is not a proper plan amendment and does not comply with ERISA's requirements. As the Supreme Court has ruled, a company is

"bound" to "whatever level of specificity [the] company ultimately chooses in an amendment procedure." *Curtis-Wright v. Schoonejongen*, 514 U.S. 73, 83 (1995). The "Changes in Plan" procedure in effect during January 1, 1984 through December 29, 1994 says the "Committee" makes changes, not the "Company" or the "Board of Directors." Ex. E, is an excerpt of "resolutions" made by the Board of Directors in December 1992, and that document does not comply with the Governing Plan document plan amendment procedure. Besides Ex. E, which does not show action on the part of the Committee, Defendants' have nothing to show where the Committee ever made the pension change to freeze the dollar amount of the PDB, in accordance with the "Changes in Plan" governing language. (**Ex. 2**, O'Herron Depo. Tr. 212:18-215:16). Since there never was a valid amendment executed by the Committee, Plaintiffs contend thousands of putative Class members and their beneficiaries expecting to receive future PDB payments, stand to receive *increased* PDB amounts, upon Plaintiffs' success of their ERISA § 502(a)(1)(B) claim to clarify rights to future payment of benefits.

11. Plaintiffs dispute. Defts' Ex. F is a *bogus* plan document, never in effect. (See the detailed discussion in Section VI.A.4., pp. 16-19 hereinbelow).

12-13. Admitted. However, Plaintiffs dispute the legality and enforceability of Qwest Pension Plan Amendment 2003-5.

14. Plaintiffs dispute. Prior to December 29, 1994, the Plan stated:

> "***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**."* (emphasis added).

(Defts' Ex. B "Changes in Plan," Bates 3387; Defts' Ex. C, Bates 3661). In addition, Plaintiffs dispute Defendants' characterization of Ex. D as a "1993" plan document, as it was not executed until December 29, 199**4** (Ex. D, Bates 4517).

15. Plaintiffs dispute. Defendants have asserted legal argument and do not quote specific language set forth in the SPDs compiled in Defts' Ex. J. Specific material language set forth in the SPDs since 1977 is accurately quoted in Appendix C of **Ex.1**, pp. 62-93. Several SPDs issued during U S WEST's reign reported "U S WEST may, from time to time, make changes in the Plan or terminate the Plan. **Future changes** or termination **will not affect** the rights of any individual to **any benefit** or pension **that they may have previously been entitled to receive**." (**Ex. 3**, 1984-1989 SPD, p. 2, Bates 5666). "Benefit" included the PDB. (**Ex. 4**, Jill Sanford, Qwest EBC member, Depo. Tr. 60:19-61:4; (**Ex. 25**, David Brenner, U S WEST EBC member, Affd, ¶ 6).

IV. STATEMENT OF ADDITIONAL *UNDISPUTED* MATERIAL FACTS.

The following additional undisputed material facts sorely undercut Defendants' position.

1. The original Governing Plan documents for the U S WEST pension plans effective during January 1, 1984 through December 31, 1994 did ***not*** expressly give either the named fiduciary - the EBC - or any other person or entity the power to make interpretative decisions about plan terms. (See, e.g., Defendants' Ex. B Section 3 "Administration," Bates 3240-3248; and Defendants' Ex. C, Bates 3559-3569).

2. Judge Edward Nottingham of this District Court previously interpreted the U S WEST Pension Plan term "accrued benefit" as having the same meaning "as a benefit to which a participant has previously become entitled," which terminology was

used in the original Governing Plan documents during January 1, 1984 through December 29, 1994. Furthermore, Judge Nottingham issued a ruling stating that as long as a U S WEST Pension Plan "amendment does not implicate vested benefits, it is well within the defendant's authority." (See discussion hereinbelow in Section VI.B.3,.

3. After Judge Nottingham's decision in the *Jarvis v. U S West Pension Plan* case, the plan sponsor made several more IRS Section 420 transfers of pension monies to pay retiree health care expenses, and the company sent out disclosures reporting that all accrued benefits that had been earned were then fully vested. (**Ex. 5**, Disclosures about IRS Section 420 transfers made in 1999, 2000 and 2001).

4. At least since 1984, all Governing Plan documents have given the PDB a *higher* payment priority over payment of several classes of accrued deferred vested benefits in the event of either Plan termination or partial Plan termination.

5. When Kerber and Phelps retired from U S WEST and made their respective retirement elections and had to choose the structure of benefits to be received for themselves and their spouses, they specifically and detrimentally relied upon representations and assurances classifying the PDB to be protected, not a "take away" benefit. The PDB was a *huge* financial component of Kerber's and Phelps' respective financial and estate planning. For Kerber and Phelps and most similarly situated retirees, the PDB is the equivalent of the retiree's last annual salary at U S WEST. (**Ex. 6**, Affidavit of Nelson Phelps ¶ 9; **Ex. 7**, Affidavit of Edward Kerber ¶ 7).

6. On September 2, 2003, Qwest officials, including Executive Vice President Barry Allen, announced to Kerber, Phelps and other retirees that Qwest had decided to eliminate the PDB for all retirees. Qwest had 40,000 copies of a signed letter

ready to mail to retirees. Due to Plaintiffs' and numerous retirees' protestations, the decision to go forward has been delayed, although CEO Richard Notebaert has stated the decision is final. (**Ex. 8**, Barry Allen Depo. Tr. 42:21-42:7, 46:19-50:14, 52:4-20, 58:6-13, 59-61:1; **Ex. 9**, Sept, 2, 2003 letter).

7. Defendants refuse to incorporate in the Governing Plan document and SPD either an acknowledgment that the PDB is vested or incorporate a commitment to provide PDBs to service pension eligible retirees. (**Ex. 2**, O'Herron Depo. Tr. 258:6-20).

V. PLAINTIFF'S STATEMENT OF STANDARD OF REVIEW.

Plaintiffs agree that Defendants have correctly stated in their brief (Docket 69) at page 13 the Court's standard of review for ruling on their pending Rule 56 motion for summary judgment. However, Plaintiffs contend that even if all the material facts are undisputed, "summary judgment may not be granted. . . if there is a disagreement over what inferences can be reasonably drawn from the facts." *See, e.g., Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 744 (3d Cir. 1996).

The Court's present task is to determine whether genuine issues of material fact exist and whether Defendants are entitled to judgment as a matter of law. However, this case is not appropriate for summary judgment. Credibility determinations at the summary judgment stage are impermissible. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51, 120 S. Ct. 2097, 2110 (2000).

Additional Legal Standard. *Section 102 of ERISA*

ERISA has "an elaborate scheme in place for enabling participants and beneficiaries to learn their rights and obligations at any time, a scheme that is built

around reliance on the face of written plan documents." *Curtiss-Wright Corp.*, 514 U.S. 73, 83 (1995). Section 102 of ERISA requires plan administrators to furnish a summary plan description (SPD) of any employee benefit plan to participants and beneficiaries. 29 U.S.C. § 1022(a). A plan administrator must furnish a SPD "written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1024(b)(1)(B). The applicable labor regulations stipulate that the format of the SPD "must not have the effect to [sic] misleading, misinforming or failing to inform participants and beneficiaries." 29 C.F.R. § 2520.102-2(b). An SPD must not minimize or obscure any description of an exception, limitation, reduction, and any other restrictions of plan benefits. *Id*.

Section 102(b) of ERISA sets forth specific requirements regarding the content of every conforming SPD, 29 U.S.C. § 1022(b). In relevant part, the statute requires every SPD to contain 12 categories of information, including:

> [t]he name and type of administration of the plan. . . the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; the circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided. . .

29 U.S.C. § 1022(b). See also DOL Regulations, 29 C.F.R. § 2520.102-3. "ERISA contemplates that the SPD is an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." *Mario v. P & C Foods Mkts., Inc.*, 238 F.3d 758, 764 (2nd Cir. 2002).

VI. ARGUMENT.

A. Defendants Seek to Recast the PDB By Ignoring Founding Pension Plan Documents and SPDs Which Govern Plaintiffs' Rights; Defendants Submitted a *Bogus* Pension Plan Document For this Court's Consideration.

1. The SPD in Effect When Both Plaintiffs Kerber and Phelps Retired is Controlling of Their Rights, Not Later Issued SPDs.

Which SPD should control when the SPD has been significantly changed several times after retirement, or after the plan participant becomes service pension eligible? Plaintiffs contend that the SPD in effect upon their becoming service pension eligible should be enforceable, not later revisions. Accordingly, the SPD issued in July 1989 with an effective date of January 1, 1989 is the SPD that governs the rights of Plaintiffs Kerber and Phelps who retired in February 1990. (**Ex. 10**). Indeed, the plan sponsor has continuously taken the stance that the SPD in effect when a person retires is the governing SPD, not later editions. (*See e.g.*, **Ex.11**, p 2, Bates 5453, 2003 SPD "If you terminated employment before January 1, 2001, *the rules of the Plan in effect at the time your employment ended govern your pension benefits.*"; **Ex. 12**, p. 1, Bates 0009, 1999 SPD, "If you terminated employment before then [i.e., before January 1, 1999] the rules of the plan in effect at the time your employment ended govern your pension benefits. *Your benefits are described in the SPD in effect at the time you terminated; thus, many of the rules in this SPD do not apply to you.*" Defendants' Rule 30(b)(6) witness testified that "the SPD in effect at the time a person retires summarizes the rules that apply to that person when they retire," and those rules govern his or her pension benefits. (**Ex. 2**, O'Herron Depo. Tr. 179:9-181:10).

Operating under the premise that the plan participant's right to disability benefits

became vested when he became disabled, the Second Circuit Court of Appeals has ruled that the SPD in effect when the individual became disabled was the one for the trial court to follow, not the later SPD edition which included different terms and different language about plan administration. *Gibbs v. CIGNA Corp*, 440 F.3d 571, 576 (2d Cir.2006). See also *Delvin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 84 (2nd Cir. 2001) where the appellate court concluded that the relevant plan provisions were only those contained in the earlier SPD, and that the reservation of rights clause contained in the later issued SPD was ineffective as to those earlier retirees.

2. The SPD in Effect When Kerber and Phelps Retired Controls, Not the Undisclosed Text of a Governing Plan Document.

Defendants argue that this Court should pay no attention to the terms of the SPD in effect and given to Kerber and Phelps when they retired. Defendants argue that the controlling Governing Plan document controls, because the SPD told the reader that "THIS SUMMARY PLAN DESCRIPTION DOES NOT DESCRIBE ALL THE DETAILS OF THE PLAN. THE OFFICIAL PLAN TEXT GOVERNS IN ALL CASES." (**Ex. 10**, p. 1, Bates 1147). In accordance with several appellate court holdings, this Court should make a finding that such a disclaimer is not enforceable by the employer. *See Pierce v. Security Trust Life Ins. Co.*, 979 F.2d 23, 26-7 (4th Cir. 1992) (explaining case law from various circuits holding that SPD governs when it conflicts with the Plan); *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566 (11th Cir. 1985); *see also Springs Valley Bank & Trust Co. v. Carpenter*, 885 F. Supp. 1131, 1142 (S.D. Ind. 1993). To find otherwise would be inequitable. In general, a claimant sees the SPD, not the Governing Plan document and he or she makes decisions based on the terms as they are set forth in

the SPD. "Because the SPD best reflects the expectations of the parties to the plan, the terms of the SPD control the terms of the plan itself." *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir.1996) (citing *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir. 1991)). It is unreasonable to allow plan sponsors to place promises such as "benefits will be paid" or "you will always remain eligible for benefits" in the SPD and official plan bulletins and then to allow plan sponsors to rely on a disclaimer in an undisclosed Governing document and, thereby, to renege on false promises. Enforcement of a disclaimer in the SPD saying the terms of the governing document control would defeat the ERISA's intended protections and would render 29 U.S.C. § 1022 a virtual nullity. *See Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 788 (7th Cir. 1996).

The Tenth Circuit, in the case of *Semtner v. Group Health Serv. of Oklahoma, Inc.*, 129 F.3d 1390, 1393 (10th Cir. 1997), ruled:

> "[w]hen the summary plan description and the plan language differ, then summary plan description is binding." S*ee Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir.1996). "A summary must be 'written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." *Williams v. Midwest Operating Eng'rs Welfare Fund,* 125 F.3d 1138, 1140 (7th Cir.1997) (quoting 29 U.S.C. § 1022(a)(1))."

Here, it is undisputed that both Kerber and Phelps relied to their detriment upon the representations set forth in the 1989 SPD issued to them, as they made their retirement choices and estate planning decisions.[3] Within the Tenth Circuit, a plan participant may secure relief under ERISA § 502(a)(3) based on representations in a SPD

[3] For instance, the 1989 SPD states unequivocally, "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). (**Ex. 10**, p. 9, Bates 1155) (emphasis added).

even if inconsistent with provisions of the other official plan documents. *Chiles* 95 F.3d at 1518-19 (10th Cir. 1996) (holding relief is appropriate where employees rely on an ambiguous or faulty SPD, or otherwise show prejudice from the inconsistency between the SPD and the master plan document).

3. <u>The SPD in Effect When Kerber and Phelps Retired Does Not Contain a Clear, Conspicuous 'Reservation of Rights' Clause.</u>

Certainly, the SPD issued to Kerber and Phelps gave insufficient notice of any right of the Plan sponsor to either reduce or takeaway the PDBs they had earned. What Defendants' argue today to be a "'reservation of rights" is not only ambiguous, but clearly inconspicuous, buried on page 12 within a section entitled "Plan Termination" and states:

> "The current provisions of the Plan states that if there are any remaining assets. . . . **It should be noted that, as with other Plan provisions, U S WEST reserves the right to amend this provision relating to any remaining assets *in the event* of Plan termination**. ." (emphasis added).

One must look meticulously within the SPD in order to stumble onto that sentence. Certainly, it is not prominent. Moreover, it doesn't constitute an explicit reservation of rights to affect negative changes. It only speaks about changes conditioned upon the occurrence of a specific *event*, i.e., plan termination. Indeed, the SPD's alleged "reservation of rights language" doesn't come anywhere near the language found in SPDs at issue in other cases where the courts ruled the SPDs more clearly established the employer/plan sponsor's right to amend or terminate. See, e.g., *Sprague v. General Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998) (en banc) (stating SPD specifically provided that General Motors "reserve[d] the right to amend, change or terminate the Plans and Programs described in this booklet"), *cert. denied*, 524 U.S. 923,

118 S.Ct. 2312, (1998). For example, in *Balestracci v. NSTAR Electric and Gas Corp.*, 449 F.3d 224 (1st Cir. 2006), the appellate court noted an *explicit* "reservation of rights" clause stating, "[T]he company reserves the right, subject to the provisions of any collective bargaining agreement, to amend, modify or terminate the [dental benefits] Plan at any time." *Id.* at 232.

None of the SPDs issued by either AT&T or U S WEST to Kerber and Phelps come anywhere near the specificity found in those cases or other cases cited by Defendants in their memorandum brief. The SPDs controlling Kerber's and Phelps's rights have no language that can be construed as granting the plan sponsor *unlimited* discretion to change the pension plan *at any time*, for *any* reason. It is Plaintiffs' contention that "in light of all the surrounding facts and circumstances, a reasonable employee [making a retirement decision] would [have] perceive[d] an ongoing commitment by the employer to provide employee benefits [the PDB]." *Belanger v. Wyman-Gordon Co.*, 71 F.3d 451, 455 (1st Cir. 1995) (quoted with approval by the Tenth Circuit in the case of *Deboard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1239 (10th Cir. 2000)). The lack of a sufficiently straightforward "reservation of rights" in either the SPDs or any information brochures generally distributed to Kerber and Phelps proves most significant, heavily weighing against Defendants' present position.

The Court should look at that SPD provisions from the viewpoint of the objectively reasonable employee.[4] See *McGee v. Equicor-Equitable HCA Corp.*, 953

[4] As note in Plaintiffs' Statement of Additional Undisputed Material Facts, the Governing Plan document during January 1, 1984 through December 31, 2004 did not give the named fiduciary - the EBC - plan interpretative authority. (See Section IV ¶ 1, at p. 7 herein above).

F.2d 1192, 1202 (10th Cir. 1992) (court gives words their common and ordinary meaning, as a reasonable person in the position of the plan participant would have understood them); *Keszenheimer v. Reliance Life Ins. Co.*, 402 F.3d 504, 506 (5th Cir. 2005) (the pertinent language is read "in the ordinary and popular sense as would a person of ordinary intelligence and experience, such that the language is given its generally accepted meaning"); *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982, 985 (9th Cir. 1997) ("terms in an ERISA plan should be interpreted in an ordinary and popular sense as would a [person] of average intelligence and experience"); *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1135 (1st Cir. 1995) (conducting ERISA analysis from "the viewpoint of an objectively reasonable employee"). Applying this analysis, the Court must conclude the SPDs given to Kerber and Phelps contain no reservation of rights to reduce or eliminate PDBs after a person earns a service pension.

4. Apparently, Aware the 1989 SPD In Effect When Both Kerber and Phelps Retired Does Not Contain a Clear or Conspicuous 'Reservation of Rights' Clause, Qwest Defendants Refer This Court to a *Bogus* Governing Pension Plan Document.

Apparently, after realizing how deficient the alleged "reservation of rights" sentence is within the 1989 SPD issued to Kerber and Phelps, Defendants have flipped their arguments to a position contrary to what they previously stated on record in a prior case in this Court. In their memorandum brief, they represent their Ex. F is a Governing Plan document effective as of January 1, 1989, and they request this Court take special note that the document contains "*definitions of 'accrued benefit' that state explicitly that the death benefit is not an accrued benefit. Exhibit F: Bates Stamp 4318-4378 at 4322, 4360-61 (defining 'accrued benefit' as 'the benefit to which a Participant is entitled*

under the Plan, as computed in accordance with Article V as of the applicable date of calculation' and including the death benefit as part of Article VII, not V)." (See Docket 69, Defts Brf, p. 9 at ¶ 11) . The undersigned counsel fairly warned defense counsel not to use that document - Ex. F - in this case during the August 18, 2006 deposition questioning by defense counsel Beth Kiovsky of Plaintiff's expert, Leonard Garofolo, former Regional Director of the DOL. (See **Ex. 13**, Garofolo Depo. Tr. 163:2-164:13). Despite that warning, defense counsel unfairly proceeded to use Ex. F.

In rebuttal to Defts' Ex. F**,** Plaintiffs obtained an Affidavit by David Brenner, U S WEST EBC member from 1986 to 1993 (See **Ex. 25,** ¶ 13). Mr. Brenner confirms Ex. F did not control plan administration when he served on the EBC. Also, Plaintiffs' counsel searched this Court's archives for other cases involving U S WEST Pension Plan issues and the same document - Ex. F. Ironically, that document had paramount importance in the case of *Bronk v. Mountain States Telephone & Telegraph, Inc.*, Civil Action No. 93-D-1961 (D. Colo.). In *Bronk*, defense counsel [5] argued before Judge Wiley Daniel:

Judge Daniel:	I'm trying to understand this. **The plans were dated in 1989, but they didn't take effect until 1994; is that what you're saying?**
Mr. Kallstrom:	I'm saying that these - - that the two separate plans - - plan restatements, the one for the craft plan, which is the one at issue anyway, and the one for the management plan, were adopted as of 1-1-89, but **they never had any operative effect**. They were formal documents to reflect that - - to reassure the IRS that the plan had complied with the tax reform rules as implemented in the 1993 regulations.
Judge Daniel:	Let me ask it a different way. The employees in question in this case are in the 1990, 1991 time frame, is that correct?

[5] Qwest Defendants' counsel Elizabeth I. Kiovsky was part of the team of U S WEST's defense counsel who appeared in the *Bronk* case, including the hearing conducted by Judge Wiley Daniel.

Mr. Kallstrom: That's correct.

Judge Daniel: Was this plan, which is attached as Exhibit A to - - can't tell if its to Mary Davis's affidavit, or if it's to the defendants' opposition; but in any event, it's a U S WEST pension plan amended and restated effective 1-1-89. **Was this plan actually in effect prior to 1994?**

Mr. Kallstrom: **No, Your Honor**.

* * *

Judge Daniel: (Reading from affidavit by Mary Davis, U S WEST Pension Plan Administrator submitted by Defendants): Now, in paragraph 7 of her affidavit, she explains, I think in the clearest words that I have heard so far, what this 1994 restatement was. . . **the 1994 restatement was prepared solely for tax purposes** to reflect the pension plan's qualified status between 1988 and 1993 so that an IRS determination letter could be obtained. **It was never contemplated that the provisions of the 1994 restatement, other than those required by the tax law changes, would be effective in 1989, or that the 1994 restatement would be used for purposes of administering the pension plan** other than as required by the Code. In fact, **the 1994 restatement was never used for plan administration purposes and was not effective in 1989 for any purpose** other than those required by recent tax legislation and the implementing regulations. And then, she says this same is true of the restatement of the management plan effective January 1, 1989, which was also adopted December 29, 1994. . . .So in light of what this affidavit says, the Court believes it's got to accept this as a true statement of the facts. . ."

(**Ex. 14**, certified transcript of proceedings in the *Bronk* case on March 25, 1999, Tr: 13:10-14:4; and 35:5- 36:17; See also Mary Davis Affidavit, ¶ 7 and Ex. A attached thereto – same as Defts' Ex. F submitted in this case). Since the document was not in existence and had ***no*** effect prior to December 29, 1994, Judge Daniel ruled for the defendants and entered summary judgment against the plaintiffs in the *Bronk* case.

Since it was argued in the *Bronk* case that the same document had ***no*** force or effect on plan administration prior to December 29, 1994, Defendants should be

judicially estopped to take an inconsistent position in this case and, thereby, argue Ex. F was operational and controlled plan administration when Kerber and Phelps retired during February 1990. Defendants' submission of Ex. F for this Court's consideration so as to defeat Named Plaintiffs' claims runs afoul of the requirement to make a reasonable inquiry under the circumstances. See Fed.R.Civ.Proc., Rule 11(b)(3).

B. Historic SPDs, Governing Plan Documents and the Plan Sponsor's Course of Dealings Treated the PDB to Be Vested Once a Plan Participant Became Service Pension Eligible.

1. All SPDs Existing Prior to and When Plaintiffs Kerber and Phelps Retired Confirmed the PDB Was A Defined Benefit Plan Entitlement, Not a Welfare Benefit.

Defendants cannot dispute the fact that all SPDs issued during the course of Kerber's and Phelps' U S WEST employment and when they retired confirmed the PDB was not a welfare benefit. The plan sponsor deliberately chose to classify the PDB as a defined benefit plan. Included within **Ex. 1,** the expert opinion report, is Appendix C, a summary of excerpts from the SPDs issued. Every SPD issued during 1980 through at least 1999 made the following representation:

> "**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**. The Plan is a "welfare plan" for purposes of providing disability pensions and other death benefit payments.

The plan sponsor has always been sophisticated enough to know exactly how to classify employee benefits. In the SPDs, the PDB for retirees was *never* reported to be a welfare benefit. (**Ex. 2**, O'Herron Depo. Tr. 231:11-232:3).

To comply with ERISA's reporting requirements, U S WEST sent Annual

Reports on Form 5500 to the U.S. Department of Labor and the Internal Revenue Service. In these Annual Form 5500 reports, the plan administrator, under penalty of perjury, consistently submitted schedules confirming the PDB liability was included in the *vested benefits* accounting column.[6] Defendants' interrogatory responses and their Rule 30(b)(6) witness confirmed that the Form 5500s included as part of the total "present value of **vested** benefits" the dollar amount of PDB obligations for retirees. (**Ex. 16**, Defts' Resps. Interrogs. 9 and 10; **Ex. 2**, O'Herron Depo. Tr. 196:4-197:19).

2. Past Members of the U S WEST Employee Benefits Committee Confirm the PDB Was Always Treated As a Vested Benefit, Not a Mere Ancillary or Welfare Benefit.

In opposition to Defendants' summary judgment motion, Plaintiffs tender herewith Affidavits by past members of the U S WEST Employee Benefits Committee, the named fiduciary for the qualified defined pension benefit plans when U S WEST sponsored the plan. The affidavits set forth "course of dealing" evidence confirming the PDB was never considered to be a mere ancillary or welfare benefit. (**Ex. 17**, Barbara Doherty Affd, ¶¶ 5-8; **Ex. 18**, Richard Remington Affd ¶¶ 5-10. This evidence sorely undermines Defendants' position.

The Tenth Circuit teaches that an ERISA plan is to be interpreted like any other contract. *Capitol Cities / ABC, Inc. v. Ratcliff*, 141 F.3d 1405, 1411 (10th Cir. 1998)

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[6] 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 ten 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**." (See **Ex. 15**, year 1993 and 2003 Instructions). For as far back as Form 5500 records could be found, Defendants concede the PDB was, indeed, *included* in that disclosure column which tallied up "vested" benefits.

saying "[t]he Supreme Court has directed us to interpret an ERISA plan like any contract." *See also Matthews v. Sears Pension Plan*, 144 F.3d 461, 465 (7th Cir. 1998) ("ordinary principles of contract interpretation govern the interpretation of pension plans covered by ERISA"). Under ordinary principles of contract interpretation, "a course of dealing between the parties gives meaning to or supplements or qualifies their agreement." *Restatement (Second) of Contracts* § 223(2). "A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions or other conduct." *Id*. § 223(1).

Certainly, in view of the ambiguous "Changes in Plan" language set forth in the Governing Plan documents during January 1984 through December 1994, this Court should consider the intent of the Plan's sponsor, the reasonable understanding of the Plan participants, and *past practice*, among other things. *Taylor v. Continental Grp*, 933 F.2d 1227, 1232-33 (3d Cir.1991); *Allen v. Adage, Inc*., 967 F.2d 695, 702 (1st Cir. 1992).

3. <u>The Doctrine of Reasonable Expectations Should Be Applied; Denver Federal Judge Nottingham Interpreted "Accrued Benefit" With Respect to the U S WEST Pension Plan To Mean the Same as "Vested Benefits," or the Same as a "Benefit to Which A Participant Has Previously Become Entitled</u>."

In a restatement Governing Plan document executed on December 29, 1994, the plan sponsor revised the "Changes in Plan" language that had existed from January 1, 1984 through December 29, 1994. In this District before Judge Edward Nottingham, there was some prior litigation involving that change and other related issues. In the case of *Jarvis v. U S WEST Pension Plan*, Case No. 97-N-2189 (D. Colo.), Mr. Jarvis challenged U S WEST's implementation of a pension increase he perceived to be

discriminatory. Instead of providing the same percentage *ad hoc* increase to all retirees' service pensions as was past practice, U S WEST implemented a 0-12% graduated increase that was dependent upon the year the person retired. Also, Mr. Jarvis contended the December 29, 1994 plan amendment terms should be reformed because he thought they were less protective of Plan participants' rights than the "Changes in Plan" wording.

When explaining U S WEST's position on the restated plan's new amendment language, defense counsel argued that "'*Accrued' benefit means no more, and no less, than a benefit to which someone 'ha[s] previously become entitled*'" and that *"neither Mr. Jarvis's nor any other participant's life insurance or death benefits have been reduced or diminished, nor does U S WEST claim the right to diminish those benefits after they have become 'accrued.'"* (**Ex. 19**, certified copy of defense counsel's reply brief, ¶¶ III. 6 and III. 8, pp. 9-10).[7] Thus, Judge Nottingham opined that he did not think the December 29, 1994 language made retroactive to January 1993 provided retirees less protection. At the end of the August 5, 1999 hearing, he issued a ruling addressing the amendment language in the restated Governing Plan document:

> "The amendment language of the 1993 plan [i.e., restated document executed on December 29, 1994 said to be retroactive to January 1993] provides that the amendment may not diminish the accrued benefit of any participant as of the effective date of such amendment. . . . **Thus, so long**

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[7] These representations to Judge Nottingham underscore that, notwithstanding Qwest's *new* found position, U S WEST and its cadre of legal counsel clearly understood the PDB could become "accrued" even though the benefit never takes the form of an annual benefit, etc. U S WEST's argument in *Jarvis* runs counter to the central argument found in (Docket 69) Defendants' Memorandum Brief at p. 16.

Even, within the restated Plan document the plan sponsor acknowledged that certain post-retirement benefits other than pensions expressed in the form of an annual payment could be "accrued." See Defts' Ex. D, § 11.5(b), Bates 4508-09, stating that "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 to the extent such use is otherwise permitted by law." (emphasis added).

> **as an amendment does not implicate vested benefits, it is well within the defendant's authority**." (emphasis added).

(**Ex. 20**, certified transcript of August 5, 1999 proceedings, Tr. 18:2-8). And, as pointed out by Defendants, Judge Nottingham elaborated on the subject matter in his prior March 30, 1999 Order also entered in the *Jarvis* case (See Defts' Brf at 22, n. 9):

> ". . . Section 11.4 of the [December 29, 1994 restated] Plan does not diminish the rights of Plan participants. This language merely restates the former language which provided that future amendments to the Plan can not reduce or eliminate a benefit to which the participant has already become entitled. While the language is somewhat different, the meaning is the same: **an "accrued benefit" is the same thing as a benefit to which a participant has previously become entitled**. . . Further, because there is no allegation that any participant's life insurance or death benefits have been in any way impacted the significance of plaintiff's argument on this point eludes me. Therefore, I find that the language of section 11.4 is not less protective of Plan participant's rights than was the language in the superseded [January 1984 to December 1994] plan.". . . Even if the December 29, 1994, amendment is invalid for some reason, I conclude that the graduated *ad hoc* pension increases do not run afoul of the allegedly more restrictive language of the superseded. plan. . . ".

(See Defts' Ex. L, Order at p. 12-13 (emphasis added)). Clearly, Judge Nottingham's rulings and interpretations made in the *Jarvis* case serve to undermine Defendants' new found position repeatedly proclaimed in their memorandum brief that a Plan benefit cannot be deemed to be an "accrued benefit" unless it has two characteristics: 1) be in the form of an annual benefit; and 2) commences at a normal retirement age. Obviously, that's not how either U S WEST or Judge Nottingham interpreted the Plan in 1999; they didn't give "accrued benefit" with respect to the U S WEST Pension Plan such a hyper-technical restrictive meaning; and he saw no need for U S WEST retirees to have any concerns about the December 1994 plan amendment language replacing the "Changes in Plan" provision that existed from January 1, 1984 until December 29, 1994.

A month after Judge Nottingham's interpretative ruling in the *Jarvis* case, U S WEST mailed a letter to every retiree and employee stating: "**Neither** U S WEST, nor Qwest **can** -- or have any intention -- to modify the U S WEST Pension Plan to **reduce or eliminate the pension benefits you have earned**." (**Ex. 21**) (emphasis added).[8] At the end of year 1999, after a IRS Section 420 transfer was made, U S WEST sent a disclosure letter to Plan participants, stating: "[a]ll Pension Plan participants as of November 1999 will be fully vested in any pension benefit they earn." (**Ex. 22**, p. 15, ¶ 28.) Qwest later explained to retirees and plan participants that "Vested means you have the right to receive the benefit you have earned." (*Id*., p. 16 ¶ 30). It was widely understood that a person *earned* the PDB upon becoming service pension eligible. (**Ex. 6**, Affidavit of Nelson Phelps, ¶ 5).

Nevertheless, even after the December 1994 changes to Governing Plan documents, Plaintiffs received *only* the SPDs, not the Governing Plan documents that have been restated several times. The SPDs informed Plaintiffs' reasonable expectations for entitlement and vesting of PDB coverage. *See Salterelli v. Bob Baker Group Med. Trust*, 35 F.3d 382, 386-87 (9th Cir.1994) (adopting doctrine of reasonable expectations as part of federal common law governing ERISA cases). After the December 29, 1994 restated Plan document came into existence, the SPD's that were distributed contained language that could reasonably create different expectations than the revised language inserted into that Governing Plan document. In such cases, the more favorable language in the SPD must control: "Any burden of uncertainty created by careless or inaccurate

[8] This letter was sent out to all retirees "to try to alleviate some of the concerns that retirees had regarding their benefits. So to try to reassure them." (**Ex.2**, O'Herron Depo. Tr. 248:22-24).

drafting of the summary must be placed on those who do the drafting, and who are most able to bear that burden, and not on the individual employee, who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document. Accuracy is not a lot to ask." *Bergt v. Ret. Plan for Pilots Employed by Markair, Inc.*, 293 F .3d 1139, 1145 (9th Cir.2002). (citing *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir.1991)).

The December 29, 1994 restated Governing Plan document stated unequivocally:

> "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."

(Defts' Ex. D, § 7.11, Bates 4502) (emphasis added). The plan sponsor continued to promote the notion that service pension eligible persons were ***entitled*** to the PDB. Pension Application forms reassured the applicant that the PDB **will** be paid, language consistent with vesting. *In re New Valley Corp.*, 89 F.3d 143, 151-52 (3rd Cir. 1996) (language that a benefit "will be paid" was consistent with vesting). In the 1989-1996 Plan brochures, the plan sponsor stated either/or the following:

> *"A benefit equal to one year's pay immediately prior to your retirement **will be paid** under the U S WEST 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*".
>
> * * *
>
> "*If you are a participant of the U S WEST Pension Plan as of 2/28/93, **you will always remain eligible** to a death benefit to the extent an eligible beneficiary under the plan is living."*

(See ¶ G of each document in **Ex. 23**). The next SPDs issued in 1996 stated clearly:

> *"As a retiree with a TOE* [meaning term of employment] *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.*"

(Ans. ¶ 90 of Second Amd. Complt). Plan Administrator Margie Dobis testified:

Q: So, if a retiree asked you in 2002, after you had become plan administrator, "How do I become entitled to the pension death benefit," what would you say?

A: Well, I would say that they would have to have a term [term of employment date] prior to 1/1/1993, they would have to be service pension eligible, and they would have to have a qualified beneficiary."

(**Ex. 24**, Margie Dobis Depo. Tr. 36:20-37:1). And, the whole reason for implementing Qwest Pension Plan 2003-5 and partially eliminating the PDB was "to reduce the *accrued* liability under the pension fund." (**Ex. 4**, Jill Sanford Depo. Tr. 82:10-25).

C. Defendants' *Post Hoc* Rationalization That the PDB is an Ancillary Benefit Finds No Support in Fact, Relevant Authority and the Course of Dealings Evidence; The PDB is *Not* an Ancillary Benefit.

Defendants' memorandum brief reveals a *post hoc* rationalization that the PDB can only be deemed to be a mere "ancillary benefit." In so far as Plaintiffs can follow it, this is what Defendants' position boils down to: If the original Plan documents did not specifically state the PDB was an "accrued benefit" and because, more than a dozen years later, restated Plan documents characterize the PDB as excluded from being considered an accrued benefit within the meaning of certain Treasury Department Regulations, and Qwest Defendants choose to call it an "ancillary" benefit, then the PDB could never have been considered either a vested benefit or an accrued benefit.

With due respect, this is counter-factual sophistry simply to avoid the application of past conduct, past representations and past characterization of the PDB. The PDB provided for the deferral of income – a benefit payment equal to the plan participant's annual compensation that was pre-funded on an actuarial basis by U S WEST and paid to

the qualified surviving survivors, usually the spouse of the retiree. The PDB was squarely tied to the retiree's eligibility for a service pension and years of service, making it a retirement benefit. 26 C.F.R. § 1.401-1(b)(1)(i) (". . . Retirement benefits generally are measured by, and based on, such factors as years of service and compensation received by the employees"). The tax treatment of PDBs is also consistent with their status as a pension benefit. PDBs are payable from an exempt pension trust, eligible for a lump sum distribution and potentially eligible for a rollover to an IRA.

1. None of the SPDs Classified PDBs as Welfare or Ancillary.

It is undisputed that the PDB was never characterized in an SPD as either a welfare or ancillary benefit. In the latest SPD distributed in April 2003, Qwest explains that the *only* welfare benefits in the Qwest Pension Plan are those benefits that are paid from insurance policies out of operating revenues. The SPD states:

> "**What type of plan is the Plan?** In general, it is a pension plan, specifically a "defined benefit plan." A "defined benefit plan" is a retirement plan that provides an explicit benefit determined by a formula based on factors such as compensation, age and/or service. The DLS formula is a pension equity formula and the Account Balance formula is a cash balance formula. The Plan document also contains a **"welfare plan" to the extent certain death benefit payments [are made] from insurance policies**. The Plan document also contains an "excess plan" to the extent it provides certain benefits in excess of certain IRS limits directly out of operating expenses of the Participating Companies."

(**Ex. 11**, 2003 SPD, p. 69, Bates 5520) (emphasis added). Thus, even the latest SPD does not report the PDB, which is payable from a funded trust, to be a welfare or ancillary benefit. Defendants' Rule 30(b)(6) witness testified that nowhere in any of the prior SPDs could she find either "ancillary benefit" or "incidental benefit" to describe the PDB. (**Ex. 2**, O'Herron Depo. Tr. 174:12-179:8, 182:6-183:21 and 203:12-204:9).

2. In the Event of Plan Termination, the Governing Plan Documents Have *Always* Given the PDB a Higher Payment Priority Than Many Categories of Deferred Vested Pensions.

Since U S WEST was established in 1984, all Governing Plan documents have stated that upon plan termination or partial plan termination, Plan assets are to be applied, after making the payments required by ERISA § 4044, 29 U.S.C. § 1344, and payments required for service pensioners and deferred vested pensioners on the pension payroll:

> "to making provisions for the payment of deaths attributable to deaths occurring prior to the date of termination which would have been payable from the [Plan] and for the payment, upon the deaths of retired employees who are on the pension roll as of the date of termination and of employees eligible as of that date for retirement, of death benefits which would have been payable from the [Plan] had the Plan not been so terminated."

(See, e.g., Defts' Ex. C 1984 Governing Plan, Bates 3620; Defts' Ex. A 2002 Governing Plan, Bates 4727, Section 11.2(b)(ii)). The Governing Plan documents *next* required that plan assets be applied for the payment of several categories of *deferred* vested pensions starting at age sixty-five. (*Id*., Defts' Ex. C, Bates 3621-25and Defts' Ex. A Bates 4727-28, Sections 11.2(b)(iii), (iv), (v) and (vi)). In short, in the event of a plan termination, payment of PDBs has always held a ***higher*** payment priority status than many deferred vested pension benefits which indisputably are accrued benefits. This proves unequivocally the Plan sponsor harbored and expressed an intent to treat the PDB as a vested nonforfeitable benefit when a participant retired or became service pension eligible, a treatment that would not be appropriate for a welfare or mere ancillary forfeitable benefit.[9]

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[9] Defendants' Rule 30(b)(6) representative witness testified: Q: "Well, why did the company have that priority for a termination of the plan? Why did the death benefit have a higher priority than payment of deferred vested pensions? A: I don't know." (**Ex. 2**, O'Herron Depo. Tr. 254:7-11)

Indeed, the original framers of the Governing Plan documents stressed the importance of the PDB as a permanent and fixed part of an employee's entire compensation package. From January 1984 until December 29, 1994, the Governing Plan documents contained an identically worded Section 4.8 stating the pension funds:

> "***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 or any other Participating Company, as applicable, from time to time. The Company undertakes to preserve the integrity of the U S WEST Pension Plan 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*."

(Defts' Ex. B Section 4.8, Bates 3315-3316; and Ex. C, Bates 3613).

3. Pursuant to Treasury Department Regulations, Since the PDB is a Post-Retirement Benefit, it is Not an Ancillary Benefit.

Defendants' new found contention that PDBs are "ancillary" benefits is unavailing, because the Treasury Department has defined ancillary benefits as follows:

> "(2) Ancillary benefit. The term ancillary benefit means social security supplements (other than QSUPPs), disability benefits not in excess of a qualified disability benefit described in section 411(a)(9), ancillary life insurance and health insurance benefits, death benefits under a defined contribution plan, **preretirement death benefits under a defined benefit plan**, shut-down benefits not protected under section 411(d)(6), and other similar benefits." (emphasis supplied).

26 C.F.R. § 1.401(a)(4)-4(e)(2); *see also* 26 C.F.R. § 1.412(c)(3)-1(f)(2) ("an ancillary benefit is a benefit that is paid as a result of a specified event which--(i) Occurs not later than a participant's separation from service, and (ii) Was detrimental to the participant's health."). Since the PDB is a **post-retirement death benefit paid under a defined benefit plan**, upon an event *after* separation from service, it is *not* an "ancillary benefit."

D. Qwest Defendants' Contention that the PDB is Not an 'Accrued Benefit', But Rather a Mere Ancillary Benefit Does Not Find Support in Fact, Relevant Authority and the Course of Dealings Evidence.

Defendants' contention that an "accrued benefit" can only be limited to an "annual benefit" that "commencing at normal retirement age" is inconsistent with ERISA, its legislative history and the case law interpreting it. Under Defendants' analysis, the pension benefits provided in the cash balance portion of the Qwest Pension Plan wold not be protected accrued benefits, since those benefits are expressed in the form of a lump sum, not an annuity. See *Esden v. Bank of Boston*, 229 F.3d 154, 158 (2nd Cir. 2000) (holding that "notwithstanding that cash balance plans are designed to imitate some features of defined contribution plans, they are nonetheless defined benefit plans").

The historic objective of the AT&T pension plans, the U S WEST pension plans and, now, Qwest Pension Plan has been to treat the PDB as a vested or accrued pension benefit when a Plan participant became service pension eligible. That was the course of dealings, despite obscure Treasury Department regulations that plan sponsors AT&T and U S WEST never considered. ERISA's definition of "accrued benefit" only states that the benefit be "expressed" in the form of an annual benefit commencing at normal retirement date, 29 U.S.C. § 1002(23)(A), and qualifies that requirement by stating it is subject to ERISA Section 204(c)(3), 29 U.S.C. § 1054(c)(3).[10] The fact that some pension benefits may be paid in a form different than in the form of an annual benefit

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[10] When Defendants' lawyers quote the statute (Defts' Brf. at p. 16), they deliberately left out an important part of the text. ERISA Section 3(23)(A) provides, "The term 'accrued benefit' means - (A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, **except as provided in section 1054(c)(3) of this title [§ 204(c)(3) of ERISA]**, expressed in the form of an annual benefit commencing at normal retirement age, . . ." 29 U.S.C. § 1002(23)(A) (emphasis added). Thus, the definition of "accrued benefit" under ERISA is qualified by reference to the actuarial equivalence provision of Section 204(c)(3).

commencing at normal retirement age does not mean those benefits are not "accrued benefits." For instance, an actuarially equivalent present lump sum benefit can be an accrued benefit.

> "What these provisions mean in less technical language is that: (1) the accrued benefit under a defined benefit plan must be valued in terms of the annuity that it will yield at normal retirement age; and (2) if the benefit is paid at any other time (e.g., on termination rather than retirement) or in any other form (e.g., lump sum distribution, instead of annuity) it must be worth at least as much as that annuity."

Esden, 229 F.3d at 163.

It is undisputed that, prior to Qwest Pension Plan Amendment 2003-5, Plan administrators paid actuarially determined present value lump sum PDBs to thousands of Plan participants. (**Ex. 22**, p. 14, ¶ 25.) In so doing, Defendants recognized the PDB should be treated as an "accrued benefit." For convenience, Qwest Defendants, now, apply a warped analysis of what can constitute an "accrued benefit" under modern day Treasury Department regulations. Applying that same analysis further would recast joint and survivor pension benefits as not "accrued benefits," since those are not expressed as a single life annuity.

Defendants' lawyers mischaracterize the ruling in *American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986, 990 (10th Cir. 1991). Defendants argue the Tenth Circuit holding was "that an accrued benefit can only be based on two characteristics – it must be in the form of (1) an annual benefit that (2) commences at normal retirement age." (Defts' Brf at p. 18). *American Stores* dealt with a challenge to a plan amendment made effective close in time to passage of the "Retirement Equity Act of 1984," (REA) Pub.L 98-397, § 301(a)(2), 98 Stat. 1426, 1451 (codified in ERISA

Section 204(g)(2), 29 U.S.C. § 1054(g)(2)). The panel of judges ruled the amendment ending an early retirement benefit could be lawful, if it was effective before the REA which governed plan amendments made after July 30, 1984. Since the amendment's effective date was unclear, the case was remanded. *Id.* at 988, n.5. More importantly, the appellate court noted the early retirement benefit amended out of the plan was not actuarially reduced in accordance with ERISA Section 204(c)(3), 29 U.S.C. § 1054(c)(3):

> "This section enables one to calculate an employee's accrued benefit in those cases where the benefits either are not annual or are not commenced at a normal retirement age [i.e., age 65] by calculating the "actuarial equivalent of such benefit····" *Id.* Under § 1054(c)(3) a non-normal retirement age benefit that is actuarially reduced to reflect its payment prior to normal retirement age may be a benefit "expressed in the form of an annual benefit commencing at normal retirement age." However, a failure actuarially to reduce an early retirement benefit to reflect its earlier payment has the effect of increasing its value so that it no longer reflects the retirement benefit calculated as of the normal retirement age. Thus, our analysis of the relevant ERISA provisions leads us to conclude that **to the extent the early retirement benefits actuarially exceed the normal retirement benefits, the excess is not an accrued benefit** and may, therefore, be reduced by the plan sponsor without violating ERISA."

Id. at 990. Therefore, the appellate court explained its holding to mean that "to the extent that early retirement benefits actuarially exceed the normal retirement age benefits, **the non-actuarially reduced excess is not an accrued benefit**." *Id.* at 991. Thus, even ignoring Plaintiffs' other arguments and evidence proving the PDBs to be vested, under the Tenth Circuit's holding in *American Stores*, only the non-actuarially reduced excess dollar amount of the PDB can be treated as not an "accrued benefit." [11]

Treasury Regulation § 1.411(a)-7(a)(1)(ii) provides, in relevant part:

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[11] Even applying that result, Defendants run afoul of the law, because they don't recognize the accrued benefit status of the PDB, to the extent it can be actuarially reduced. Moreover, Plaintiffs Kerber, Phelps and countless tens of thousand of putative class members are already *over* age 65, meaning all of their expected PDBs would be deemed an accrued benefit, as there is nothing to actuarially reduce.

In general, the term "accrued benefits" refers only to pension or retirement benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits. 26 C.F.R. § 1.411(a)-7(a)(1)(ii) (1984). Since the PDB is *directly* related to - *inextricably intertwined with* - retirement benefits earned by an employee who becomes service pension eligible, it is an "accrued benefit." In *United Foods, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 816 F.Supp. 602, 609-10 (N.D. Cal. 1993), the trial court declared the fixed lump sum PDB to be directly related to service pension benefits and, hence, part of the employer's liability for withdrawal from the pension plan. The trial judge court poignantly stated:

> "Employers do not give benefits to their employees gratuitously. Rather, death benefits, like the other benefits at issue in this case, are the product of collective bargaining and represent both a promise by the employer to fund vested benefits in return for labor, and savings which workers have earned in the form of deferred compensation for their work. This was not lost on the Congress which enacted ERISA: "losses of pension rights are inequitable, since the pension contributions previously made on behalf of the employee may have been made in lieu of additional compensation or some other benefits which he would have received." S.Rep. No. 383, 93d Cong., 2d Sess. 45, *reprinted in* 1974 U.S.C.C.A.N. 4890, 4930. . . .
>
> For all these reasons, the court finds that the death benefits at issue in this case are nonforfeitable under [29 U.S.C. § 1301(a)(8)]. Although death has not occurred and therefore the liability is not currently payable, these benefits will in fact be paid, thereby affecting the fiscal soundness of the plan. Accordingly, the actuarially determined value of the plan's death benefits for vested participants was properly included in the Fund's withdrawal liability calculation." *Id*. at 611.

Finally, *Rombach v. Nestle USA, Inc.*, 211 F. 3d 190 (2nd Cir. 2001) does not support Defendants' position. (See Deft's Brf at 20). The *Rombach* court addressed disability benefits provided in the employer's pension plan. Such benefits were correctly found to constitute a "welfare plan" and not a pension plan protected by section

204(g). *Id*. at 192-194. The case is distinguishable for a number of reasons: 1) disability benefits are always *temporal*, as payments can cease as soon as the plan participant recovers from the disability condition, unlike death where there is no known ability to recover; and 2) there was no dispute that the plan contained a clear and conspicuous "reservation of rights" clause in the SPD sent to the plaintiff, unlike in this case where the historic SPDs do not have either explicit or conspicuous reservation of rights clauses.

E. The Historic SPDs, Governing Plan Documents and Plan Sponsor's Course of Dealings Caused the PDB to Be *Contractually Vested* Once a Plan Participant Became Service Pension Eligible.

Even, if Defendants correctly argue that PDBs are not accrued benefits but mere ancillary benefits (which argument is seriously wrong), Plaintiffs contend those benefits are still protected from reduction or elimination due to contractual vesting. Thus, this Court is called upon to determine whether there exists language in a Plan document indicating that benefits have become vested. Plaintiffs have amply established the SPDs and Governing Plan documents throughout 1980 to 1997 contained language ordinarily understood to mean service pension eligible retirees became **entitled** to PDBs.

In the case of *Abbruscato v. Empire Blue Cross and Blue Shield*, 274 F.3d 90 (2nd Cir. 2001), the plan document stated the employer "reserves the right to amend and/or terminate the VSO Program at any time for any purpose." *Id.* at 97. The Second Circuit held that "[w]e do not believe that this statement *unambiguously* reserves [the employer's] right to reduce the life insurance benefits provided by the VSOP. Instead, this provision is capable of being interpreted to mean that [the employer] merely reserved the right to change the *program* for those individuals who have not already retired under

the terms described, not the right to alter the described benefits for those individuals who had retired under those terms." *Id.* at 98. Therefore, the appellate court remanded the case instructing the trial court to allow the parties to present extrinsic evidence concerning the meaning of those terms. *Id.* Under ordinary rules of ERISA plan interpretation, if a party demonstrates ambiguity in a plan on a particular question, reference may be made to extrinsic evidence to determine the parties' intended meaning. *See Smart v. Gillette Co. Long-Term Disability Plan,* 70 F.3d 173, 178 (1st Cir.1995).

F. This Case Presents an Extraordinary Situation For the Court's Application of the Doctrine of Equitable Estoppel Under ERISA.

Defendants also move for summary judgment on Plaintiffs' federal common law claim of equitable estoppel. Plaintiffs claim that they relied to their detriment on the SPD statement and other official bulletins reporting that the PDBs *will be* paid. Plaintiffs made their retirement choices and estate planning decisions reasonably relying upon the written representations. Plaintiffs argue, therefore, that Defendants should be equitably estopped from either reducing or eliminating the PDBs.

Neither the Tenth Circuit nor the Supreme Court has determined whether federal common law equitable estoppel is a viable claim in the ERISA context. Yet, the majority of Circuit Courts recognize equitable estoppel as a viable claim in an ERISA context.[12]

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[12] See *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 Inss. 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).

Though the Tenth Circuit has neither adopted nor rejected an equitable estoppel rule in the ERISA context, the Tenth Circuit has discussed the claim. See, e.g., *Cannon v. Group Health Serv.* 77 F.3d 1270, 1275-77 (10th Cir. 1996), *cert. denied,* 519 U.S. 816, 117 S.Ct. 66 (1996); *Averhart v. U S WEST Management Pension Plan,* 46 F.3d 1480, 1486 (10th Cir. 1994). In *Averhart,* the Tenth Circuit avoided a decision of the viability of such claim by concluding the plaintiffs failed to state a claim:

> "We hold that, in any even, the plaintiffs have not shown any viable basis for the estoppel theory they advance – that there were representations made interpreting ambiguous Plan terms. Courts that have recognized estoppel claims in these circumstances have done so only where "the terms of the plan are ambiguous" and "the employer['s] communications constituted an interpretation of that ambiguity."

Averhart at 1486 (citations omitted) (excerpt cited in *Cannon* at 1275-77). The Tenth Circuit has outlined a framework of rules and elements to be followed when analyzing an equitable estoppel claim. *Cannon,* 77 F.3d at 1276-77; [13] *Kaus v. Standard Life Ins.* Co., 176 F.Supp. 2d 1193, 1198 (D. Kan. 2001).

Assuming the Tenth Circuit, like numerous other appellate courts, will recognize Plaintiffs' ERISA equitable estoppel claim, it is quite obvious the original Governing Plan documents with the "Changes in Plan" language is ambiguous - reasonable people differ as to its meaning. U S WEST's legal position advocated during the 1998-1999

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[13] In *Cannon*, the Tenth Circuit considered whether plaintiff has stated an equitable estoppel claim applying the Eleventh Circuit's test for equitable estoppel in ERISA cases. The five elements of equitable estoppel which the Eleventh Circuit has identified are: (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. *Cannon*, 77 F.3d at 1276-77 (citing *National Cos. Heath Benefit Plan*, 929 F.2d at 1572).

Jarvis case and Judge Nottingham's interpretative rulings, which rulings Plaintiffs contend should have *res judicata* effect, is quite different from Defendants' position. In addition, written statements in the SPDs, the official Plan bulletins sent to Plan participants and the prior Plan sponsor's course of dealings all gave meaning to that original "Changes in Plan" language, and it was most reasonable for Plaintiffs and Plan participants to rely upon the same. If all along the PDBs were unprotected mere "ancillary' benefits" - as Defendants now choose to re-classify the benefits - then, there was a plethora of misrepresentations and official Plan announcements which said otherwise, especially during U S WEST's reign. Thus, Defendants should not be granted a summary judgment on Plaintiffs' First Claim for Relief, the federal common law equitable estoppel claim in the ERISA context.

G. Once This Court Determines the PDB to Be Either Vested or An Accrued Benefit, Qwest Pension Plan Amendment 2003-5 Violates ERISA Section 204(g); The Plan Was Not Properly Amended.

For all the foregoing reasons, this Court should declare the PDB was a vested benefit or accrued benefit for service pension eligible employees and retirees. Defendants concede that if the PDB was accrued, Defendants would be "barred from eliminating it." (See Defts' Brf at 22). *Pratt v. Petroleum Prod. Management Employee Sav. Plan*, 920 F.2d 651, 661 (10th Cir. 1990) ("subsequent unilateral adoption of an amendment which is used to defeat or diminish the employee's fully vested rights under the governing plan document is not only ineffective, but also arbitrary and capricious"). Hence, Defendants' implementation of Qwest Pension Plan Amendment 2003-5 runs afoul of ERISA Section 204(g), as pled in (Docket 29) the Second Amended Complaint

at ¶¶ 180, 202 and Relief ¶ C. ERISA Section 204(g), 29 U.S.C. § 1054(g), prohibits a plan sponsor from either reducing or eliminating an accrued benefit except by process including the Secretary of Treasury after notice to plan participants and the Secretary's determination that the plan amendment is "necessary because of a substantial business hardship." ERISA Section 302(c)(8), 29 U.S.C. § 1082(c)(8). In this instance, that process was not carried out and the Secretary of Treasury made no determination of substantial business hardship.

H. This Court May Enter Partial Summary Judgment For Plaintiffs.

While Defendants assert that the PDB is a welfare benefit terminable at will, the relevant Plan documents show that the PDB is a protected pension benefit. Defendants' summary judgment argument is dependent upon an obscure Treasury Regulation that does not have retroactive affect. (See Defts' Brf. at p. 17, citing Treasury Regulation 1.411(d)-3(g)(2)(v)). Defendants' lawyers fail to tell this Court that the regulation they cite applies to plan amendments made *after* August 12, 200**5**. *See* page 26 of http://www.irs.gov/pub/irs-regs/td_9219.pdf stating "Plan Amendments adopted before August 12, 2005 are to be evaluated in light of the applicable authorities without regard to these regulations." In this case, the challenged plan amendment, Qwest Pension Plan 2003-5 used to defeat Plaintiffs West's Meister's and Ingemann's rights to vested PDBs, was adopted in early December 2003 more than a year and half *before* the new Treasury Regulations became effective.[14]

[14] Ironically, the new Treasury Regulation which Defendants rely upon says "a plan may not be amended to recharacterize a retirement-type benefit as an ancillary benefit." Treasury Regulation 1.411(d)-3(g)(3)(i). *See* page 33 at http://www.irs.gov/pub/irs-regs/td_9219.pdf .

This Court has seen sufficient evidence, including Judge Nottingham's analysis in the *Jarvis* case, to declare the PDB is a vested or an accrued benefit. Hence, this Court may enter partial summary judgment in favor of Plaintiffs and the class of service pension eligible employees and retirees. District Courts are empowered to enter summary judgment *sua sponte* under limited conditions, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2554 (1986). The entry of a partial summary judgment *sua sponte* is warranted when the following conditions are met: (1) there is no dispute of material fact with respect to the partial summary judgment; (2) the losing party has had an adequate opportunity to address the issues involved, including an adequate time to develop any facts necessary to oppose a partial summary judgment. *David v. City and County of Denver*, 101 F.3d 1344, 1358-1359 (10th Cir. 1996) (citing *Celotex* and *Fuller v. City of Oakland*, 47 F.3d 1522, 1533 (9th Cir. 1995).

VII. CONCLUSION and REQUEST FOR ORAL ARGUMENT

For all the foregoing reasons, and because material factual and credibility issues remain in this case, the Court should deny Defendants' motion for summary judgment in its entirety. Due to significant factual and legal issues presented in this phase of the case and the critical importance of the PDB for tens of thousands of U S WEST/Qwest retirees, an oral argument hearing may materially aid the Court.

DATED this 3rd day of October, 2006.

s/ Curtis L. Kennedy
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Index of Exhibits Filed Herewith

Exhibit 1	Expert Opinion Report by Leonard Garofolo, ERISA Consulting Group
Exhibit 2	Deposition Transcript - Felicity O'Herron, EBC member and Rule 30(b)(6) witness
Exhibit 3	1984-1989 SPD
Exhibit 4	Deposition Transcript - Jill Sanford, Qwest Chief Human Resources Officer, EBC member
Exhibit 5	Disclosures about IRS Section 420 transfers made in 1999, 2000 and 2001)
Exhibit 6	Affidavit of Named Plaintiff Nelson B. Phelps
Exhibit 7	Affidavit of Named Plaintiff Edward J. Kerber
Exhibit 8	Deposition Transcript - Barry Allen, Qwest Executive Vice President
Exhibit 9	September 2, 2003 letter from Jill Sanford to Retirees
Exhibit 10	1989 SPD
Exhibit 11	2003 SPD
Exhibit 12	1999 SPD
Exhibit 13	Deposition Transcript - Leonard Garofolo, Plaintiffs' Expert Witness
Exhibit 14	Certified copy of transcript, affidavit and Exhibit in *Bronk v. Mountain Bell, U S WEST al*
Exhibit 15	Instructions for Schedule B to Form 5500 for years 1993 and 2003
Exhibit 16	Defendants' Amended Response to Interrogatories Nos. 9 and 10
Exhibit 17	Affidavit of Barbara Doherty, U S WEST EBC member
Exhibit 18	Affidavit of Richard Remington, U S WEST EBC member
Exhibit 19	Certified copy of defense counsel's reply brief filed in *Jarvis v. U S WEST*
Exhibit 20	Certified copy of transcript of court proceedings in *Jarvis v. U S WEST*
Exhibit 21	September 22, 1999 letter from U S WEST CEO Sol Trujillo to Retirees and Employees
Exhibit 22	Defendants' Responses to Request for Admissions Nos. 23-30
Exhibit 23	1989-1996 Plan document brochures
Exhibit 24	Deposition Transcript - Margie Dobis, Qwest Pension Plan Administrator
Exhibit 25	Affidavit of Dave Brenner, U S WEST EBC member

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2006, 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 of record as follows:

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