IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-00644-WDM-KLM

EDWARD J. KERBER, *et al.*,

Plaintiffs,

vs.

QWEST GROUP LIFE INSURANCE PLAN, *et al.*,

Defendants.

QWEST'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' SECOND CLAIM FOR RELIEF

September 12, 2008

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Defendants Qwest Group Life Insurance Plan (the "Plan" or "Life Plan"), Qwest Employee Benefits Committee ("EBC"), Qwest Plan Design Committee ("PDC"), and Qwest Communications International Inc. (together with its affiliates, "QCII") (jointly, "Qwest") respectfully submit this motion for summary judgment on the Second Claim in plaintiffs' Second Amended Complaint ("Complaint" or "SAC").[1]

I. SUMMARY

Plaintiffs' Second Claim, entitled "Breach of Fiduciary Duty—Material Misrepresentations," alleges that Qwest deceived two of the seven plaintiffs in this case—Edward Kerber ("Kerber") and Nelson Phelps ("Phelps")—by affirmatively misstating that their life insurance coverage "was not subject to amendment, suspension or discontinuance at any time" and by failing to state that Qwest "reserved the right to reduce coverage below the promised minimum levels." (*See* SAC ¶¶ 32-34 & 83-87 & Ex. A-26.) This claim is a repackaging of the estoppel claim alleged in plaintiffs' First Amended Complaint ("Amended Complaint," DN 10), which this Court *dismissed* on the ground, *inter alia*, that plaintiffs had "not identified any 'lies, fraud, or an intent to deceive.'" *See* DN 47 ("Dismissal Order") at 14. Qwest is entitled to summary judgment on plaintiffs' Second Claim because as a matter of law: (1) Qwest made no actionable misrepresentations or omissions; (2) Kerber and Phelps did not reasonably rely on any such misrepresentations or omissions; and (3) Kerber and Phelps are not entitled to the relief sought in their Second Claim.

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[1] The Second Claim is also the subject of Qwest's pending (second) motion to dismiss filed May 16, 2008 (Doc. No. ("DN") 79). Even though the Court has not yet decided that motion to dismiss, Qwest is filing this summary judgment motion to comply with the Court's September 15, 2008 deadline for such motions (*see* DN 77 p. 18).

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Defendant Plan is an ERISA welfare benefit plan that provides a life insurance benefit payable to the estate or beneficiaries of Plan participants who retired from QCII and its predecessor companies, including U S WEST, Inc. ("US West"), after becoming eligible for a service or disability pension. (SAC ¶ 13 and Second Amended Answer ("SAA") ¶ 13; Scheduling Order (DN 77) § 4 ¶ 4.)

2. Defendant QCII is the Plan "sponsor" and (to the extent authority has not been delegated) a Plan "fiduciary," and Defendant EBC is a Plan "fiduciary" and "administrator" within the meaning of ERISA. (SAC ¶¶ 15 & 17 & SAA ¶¶ 15 & 17.)

3. Plaintiff Kerber began his employment with QCII predecessor Pacific Northwest Bell in approximately 1960, and Plaintiff Phelps began his employment with QCII predecessor Mountain Bell in 1966. Kerber and Phelps both retired from US West on February 28, 1990. (SAC ¶¶ 4-5; SAA ¶¶ 4-5; Ex. A-35 p. QL10158.)

4. Throughout Phelps' 24-year tenure at Mountain Bell and US West, and throughout at least the last 13 years of Kerber's tenure at Pacific Northwest Bell, Summary Plan Descriptions ("SPDs") and other Plan documents issued by Mountain Bell, Pacific Northwest Bell, and US West included provisions stating that the Plan sponsor reserved the right to amend or terminate the Plan (the "Reservation of Rights Provisions"). Amended Complaint ¶¶ 41-47 & 51-52; Ex. A-3 p. QL06408; Ex. A-4 p. QL06389; Ex. A-5 p. QL06364; Ex. A-6 p. QL02810; Ex. A-7 p. K00028; Ex. A-8 p. QL03268; Ex. A-9 p. K00100; Ex. A-10 p. K00118; Ex. A-11 p. K00327; Ex. A-12 p. K00414; Ex. A-13 p. QL04562; *see generally* Ex. A-1 ¶¶ 2-14.)

5. The SPD issued by US West in June 1987, which was in effect when Kerber and Phelps retired from US West in February 1990, stated that the basic life insurance benefit under the Plan equaled approximately the employee's annual salary at the time of retirement, and would be reduced following the retiree's 66th birthday by 10% each year until it reached 50% of the original amount by age 70. The SPD also stated that US West "reserves the right to terminate or amend [the Plan] at any time." (Amended Complaint ¶ 52; Ex. A-13 pp. QL04556-57 & QL04562.)

6. On or about December 15, 1989, US West mailed to the residences of management retirees, including Kerber and Phelps, a letter with enclosures (collectively, the "5+5 Packet") that described a so-called "5+5" early retirement opportunity consisting of enhanced benefits under US West's Pension Plan. The 5+5 Packet included a two-page document, entitled "US West Insurance Plans," that summarized the Life Plan and other insurance plans for which employees were eligible upon retirement (the "Insurance Plan Description"). The following language appears in bold at the beginning of the Insurance Plan Description: **"While the plans listed below are the plans currently provided to eligible employees upon retirement, the Company reserves the right to amend or terminate any or all provisions in the future for any reason."** (Ex. A-29 ¶ 3 & Ex. A-30 p. QL10050 (emphasis in original).)

7. In addition to the Insurance Plan Description, the 5+5 Packet included a form entitled "US West Management Pension Plan Early Retirement Opportunity Response" (the "Response Form"). The first sentence of the Response Form stated: "I have reviewed the materials in the Early Retirement ('5/5') Opportunity Information package sent to me." (Ex. A-29 ¶ 7; Ex. A-30 p. QL10045.) Every employee eligible for 5+5 was required to sign and

return the Response Form by January 31, 1990, and to indicate on that form whether they accepted 5+5 and, if so, whether they elected to receive a lump sum, or instead a monthly, pension check. (Ex. A-29 ¶ 8.)

8. During the month preceding the January 31, 1990 deadline for responding to 5+5, US West made available for viewing by all eligible management employees a video conference designed to answer questions about 5+5 (the "Video Conference"). The Video Conference included the following colloquy:

> **Moderator:** Charlie [Kamen, US West Director of Human Resources], *there is a statement in some of the paperwork that people received in their packets that's raised some questions, and that is the statement that says the company reserves the right to change benefits.* There are some people worried about that. Can you speak to that statement?
>
> **Charlie Kamen:** Sure. That's a typical reservation of rights statement that appears in virtually every employee benefit plan, not just U S West benefit plans, but all companies' benefit plans. It is not intended to be divisive, it is not intended to be a below the board type of thing. What it is intended to do though, is *it's intended to give the company the ability to modify the plans as circumstances and conditions change in the future.*

(Ex. A-29 ¶ 6; Ex. A-33 (emphasis added).)[2]

9. Kerber does not allege that any US West representative made oral misstatements to him regarding the Life Plan. (Ex. A-24 pp. 8-9, Resp. to Interrog. 2.) However, Phelps alleges in an interrogatory answer that in approximately December 1989, US West's Tom Bouchard ("Bouchard") showed him a copy of the cover letter enclosing the 5+5 Packet and told him he would be "entitled to" his existing life insurance benefits if he accepted the 5+5 offer because those benefits would be "guaranteed." (*Id.*) These alleged

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[2] Exhibit A-33 is a DVD that contains both the entire Video Conference and the short excerpt from that conference transcribed above. The excerpt bears the file name "ROR Excerpt from Video."

statements are directly contradicted by the 5+5 Packet's written statement that "the Company reserves the right to amend or terminate any or all provisions in the future for any reason," and by US West's oral statement in the Video Conference that the purpose of this reservation of rights was "to give the company the ability to modify the plans as circumstances and conditions change in the future." (*See* Ex. A-30 p. QL10050 & Ex. A-29 ¶ 6.)

10. In 1996, Phelps signed an affidavit in which he described this same conversation with Bouchard, without making any mention of the Life Plan. (Ex. A-28 ¶¶ 1-2.)

11. Kerber and Phelps signed and returned the Response Form in January 1990. Both accepted 5+5 and elected to receive monthly, rather than lump sum, pension checks. (Exs. A-34 & A-35; SAC ¶¶ 4-5.)

12. On or about March 26, 1990—*i.e.*, two months after Kerber and Phelps accepted 5+5—US West sent a letter to all 5+5 Retirees, including Kerber and Phelps, who elected to receive a monthly pension check (the "March 1990 Letter"). The March 1990 Letter described how and when the retirees would receive their pension checks, and included a single reference to the Life Plan. After describing a so-called "death benefit" for which retirees were then eligible, the letter noted that "[t]he death benefit is paid in addition to benefits paid under the Group Life Insurance Program." (Ex. A-2 ¶ 13, Ex. A-29 ¶ 9 & Ex. A-37.)

13. US West sent a slightly different letter to 5+5 Retirees who, unlike Kerber and Phelps, elected to receive lump sum pension checks. This letter described how and when the retirees would receive lump sum pension checks, and included but one

reference to the Life Plan. It stated that "[y]ou are entitled to the benefits paid under the Group Life Insurance Program." (Ex. A-29 ¶ 9 & Ex. A-38.)

14. During the 18 years between Kerber's and Phelps' February 1990 retirement and the present, US West and QCII have issued a series of SPDs to retirees concerning the Life Plan, all of which have included Reservation of Rights Provisions. (Amended Complaint ¶¶ 53-55; Ex. A-14 pp. QL01797, QL01954 & QL02118; Ex. A-15 pp. QL03273, QL03743 & QL03875; Ex. A-16 p. QL00114; Ex. A-18 pp. QL01784 & QL01790; *see generally* Ex. A-2 ¶¶ 15-19.) For example, US West's 1996 SPD stated that the Company "reserves the right to terminate or amend [the Plan] at any time with respect to any or all classes of current or future participants (including retired employees)," and further stated that if the Plan is amended or terminated "you will not be vested in any plan benefits." (Ex. A-16 p. QL00114.)

15. In 2000, 2001, 2002 and 2003, Kerber and Phelps received annual Confirmation Statements that summarized their benefit elections under the Life Plan and a health care plan. These Statements included the following language:

> This Statement contains only a general description of Company-sponsored benefit plans. The exact details of these plans are included in the legal plan documents that govern them. *If there's a discrepancy between this worksheet and the plan documents, the plan documents will govern.*
>
> The Company . . . reserves the right to amend, suspend, or discontinue [the plans] at any time, except for those who retired before 1991 and where prohibited by collective bargaining agreements.[3]

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[3] In 1996, Qwest agreed to memorialize its commitment to guaranteed coverage under the Qwest Health Care Plan (as distinguished from the Life Plan) for benefits for pre-1991 retirees. (*See* Ex. A-41, p. QL10192.) The Confirmation Statements' exception for "those who retired before 1991" applies to the Health Care Plan, but not the Life Plan.

(Ex. A-19 p. K00369; Ex. A-20 p. K00422; Ex. A-21 p. K00371; Ex. A-22 p. K00374 (emphasis added).) The "plan documents" to which the Statements referred unambiguously reserved Qwest's right to amend or terminate the Life Plan as to *all* retirees. (*See, e.g.*, Ex. A-16 p. QL00114.)

16. Effective January 1, 2007, Qwest reduced the life insurance benefit for Kerber, Phelps, and certain other retirees under the Plan to $10,000. (SAC ¶ 71.)

17. Plaintiffs' Second Claim is based on the same alleged misrepresentations and omissions as the Amended Complaint's estoppel claim, including the language in the March 26, 1990 letter and Confirmation Statements quoted above. (*Cf.* Amended Complaint ¶¶ 69 & 76 *with* SAC ¶¶ 32 & 34 & 84-86; DN 17 at pp. 17 & 19-21.) Thus, plaintiffs' counsel has acknowledged that plaintiffs' estoppel claim (like their breach of fiduciary duty claim) was based on plaintiffs' contention that they "made retirement decisions (e.g., whether to choose a spousal survival annuity) and decisions about obtaining additional life insurance out on the open market based upon what they were told was their package of retirement benefits which included the promised basic life insurance benefits." (Ex. A-25.)

18. This Court dismissed plaintiffs' estoppel claim on the grounds that "the terms of the Plan are unambiguous as a matter of law," that "[p]laintiffs have not identified any 'lies, fraud, or an intent to deceive," and that "the inclusion of an express statement that the Plan documents control over the confirmation statement, appearing directly above the pre-1991 retiree limitation negates any claim of Qwest's intent to deceive." (Dismissal Order at 14-15.)

19. The alleged misrepresentations and omissions on which the Second Claim is based were not made intentionally. Plaintiffs' counsel has acknowledged that plaintiffs don't allege any "intent to lie when U S WEST made the assurances [in 1989-90] and when Qwest sent the confirming notices [in 2000-2003] telling Pre-1991 Retirees that no changes could be made to their life insurance coverage." (Ex. A-27 p. 1.) Plaintiffs' counsel further acknowledged: "Unfortunately, we don't have evidence of a deliberate intent to deceive the retirees and we can't honestly claim there was a deliberate intent to act fraudulently." (*Id.*)

20. In response to an interrogatory asking how they "detrimentally relied" on the alleged misrepresentations referred to in their Second Claim, Kerber and Phelps identify but one form of detrimental reliance: They assert that because of those misrepresentations, "they saw no need to investigate whether to obtain alternative life insurance coverage to replace the promised U S WEST life insurance and, to their detriment, they took no such action." (Ex. A-23, p. 18, Resp. to Interrog. 16.)

III. ARGUMENT

"To allege and prove a breach of fiduciary duty for misrepresentations, a plaintiff must establish each of the following elements: (1) the defendant's status as an ERISA fiduciary acting as a fiduciary;[4] (2) a misrepresentation on the part of the defendant; (3) the materiality of that misrepresentation; and (4) detrimental reliance by the plaintiff on the misrepresentation." *Burstein v. Retirement Acct. Plan*, 334 F.3d 365, 387 (3rd Cir. 2003)

[4] Although the Complaint does not specify the defendants against whom the Second Claim is asserted, it does not allege, nor could it, that the Plan and PDC are Plan fiduciaries. To the extent the Second Claim is asserted against the Plan and PDC, those defendants seek summary judgment in their favor on the ground that as a matter of law they are not Plan fiduciaries, and hence owed plaintiffs no fiduciary duties.

(citation omitted); *accord Owen v. Regence BlueCross BlueShield of Utah*, 388 F. Supp. 2d 1335, 1338 (D. Utah 2005). Qwest is entitled to summary judgment on plaintiffs' breach of fiduciary duty claim for the three independent reasons set forth below.[5]

A. Qwest Made No Actionable Misrepresentations or Omissions.

The gravamen of the Second Claim is that the 5+5 Packet Kerber and Phelps received in December 1989, a letter they received in March 1990, annual Confirmation Notices they received in 2000-2003, and oral representations Phelps allegedly received in December 1989 either affirmatively misstated that their life insurance coverage "was not subject to amendment, suspension or discontinuance at any time" or failed to state that US West and Qwest "reserved the right to reduce coverage below the promised minimum levels." (*See* SAC ¶¶ 32-34 & 83-87.)

It is undisputed, because this Court has so found and/or because plaintiffs' counsel has admitted, that the alleged misstatements and omissions on which the Second Claim is based were not intentional. (*See* UF ¶¶ 18-19.) It is also undisputed that Qwest and its predecessors issued multiple SPDs to employees and retirees, including Kerber and Phelps, over a period spanning more than three decades expressly stating that the Life Plan could be amended or terminated at any time. (*See* UF 4 & 14.) Finally, US West informed Kerber and Phelps of the following regarding amendment and termination of the Life Plan at the time they retired:

- The 5+5 Packet sent to Kerber and Phelps in December 1989 included a two-page document entitled "US West Insurance Plans" that opened with the following bolded language: **"While the plans listed below are the plans**

[5] The law governing summary judgment motions is summarized in Qwest's Motion for Summary Judgment on Plaintiffs' First, Third, Fourth and Fifth Claims for Relief (DN 90), pp. 1-2.

currently provided to eligible employees upon retirement, the Company reserves the right to amend or terminate any or all provisions in the future for any reason." (UF ¶ 6.)

- The Video Conference available for viewing in January 1990 included a colloquy in which US West's Director of Human Resources stated, in response to a question about the reservation of rights provision quoted above, that the provision was "intended to give the company the ability to modify the plans as circumstances and conditions change in the future." (UF ¶ 8.)

- The letter sent to Kerber and Phelps in March 1990 contains but one, utterly innocuous reference to the Life Plan, a statement that "[t]he death benefit is paid in addition to benefits paid under the Group Life Insurance Program." (UF ¶ 12.)[6]

Kerber and Phelps also base their Second Claim on a sentence in Confirmation Statements they received in 2000-2003 that allegedly suggests Qwest did not reserve the right to amend the Life Plan as to pre-1991 retirees. But as this Court noted in its Dismissal Order, the paragraph immediately preceding the sentence specifies that the Confirmation Statement "contains only a general description of Company-sponsored benefit plans," that the "details of these plans are included in the legal plan documents that govern them," and that "[i]f there's a discrepancy between this worksheet and the plan documents, the plan documents will govern." (UF ¶ 15.) The Plan documents to which this language refers reserved Qwest's right to amend or terminate the Plan as to *all* retirees. (*Id.*)

Phelps, but not Kerber, also bases his Second Claim on an alleged December 1989 statement by US West's Bouchard that Phelps would be "entitled to" his existing life

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[6] Kerber and Phelps have stipulated that this is the letter that was sent to them. (*See* Ex. A-2 ¶ 13 & Ex. A-37.) They may try to repudiate this stipulation, and instead claim that they received a slightly different letter sent to 5+5 Retirees who (unlike them) elected to receive a lump sum pension check. Even if Kerber and Phelps could permissibly repudiate a fact to which they have stipulated, the language in this second letter does not even remotely contain a misstatement or omission: It merely states that "[y]ou are entitled to the benefits paid under the Group Life Insurance Program." (Ex. A-38.)

insurance benefits if he accepted 5+5 because those benefits would be "guaranteed." This alleged 19-year-old oral statement is directly contradicted by contemporaneous, and indisputable, written and oral statements made by US West in connection with the very 5+5 offer Bouchard was allegedly discussing. (*See* UF ¶¶ 6 & 8.) Indeed, documents enclosed with Bouchard's 5+5 cover letter flatly contradict the statements Phelps now seeks to attribute to Bouchard. (*See id.* ¶ 6.)

Few plaintiffs have had the temerity to claim Plan fiduciaries have violated their fiduciary duties by virtue of alleged misstatements and omissions of the sort alleged by plaintiffs here. When such claims have been asserted, courts have uniformly rejected them as a matter of law. For example:

- In *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998), General Motors retirees alleged that GM breached its fiduciary duties under ERISA by its oral and written representations to retirees regarding an early retirement program. *Id.* at 393-94. GM had provided health insurance benefits to retirees for more than two decades pursuant to plan documents that stated retirees would receive such benefits at GM's expense "for your lifetime," but that reserved GM's right to amend or terminate the plan at any time. *Id.* When the retirees sued GM after it reduced their health plan benefits for, *inter alia*, breach of fiduciary duty, the Sixth Circuit noted that GM hadn't told the early retirees that their benefits "vested" upon retirement, but instead told them something "undeniably true under the terms of GM's then-existing plan," namely, that "their coverage was to be paid by GM for their lifetimes." *Id.* The court then stated:

> Explanations of benefits tend to sound promissory by their very nature. While these explanations may state a company's current intentions with respect to the plan, they

> cannot be expected to foreclose the possibility that changing financial conditions will require a company to modify welfare benefit plan provisions at some point in the future.
>
> GM's failure, if it may properly be called such, amounted to this: the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change.

Id. (quotation marks and citation omitted). The court concluded that GM had not breached its fiduciary duties as a matter of law. *Id.* at 405.

- In *Vallone v. CNA Financial Corp.* 375 F.3d 623 (7th Cir. 2004), CNA employees were offered an early retirement package that included a monthly health care allowance described as a "lifetime benefit." *Id.* at 626. Plaintiffs alleged that CNA failed to explain when it made its early retirement offer that these "lifetime benefits" could be altered or terminated. *Id.* at 641. The Seventh Circuit held that "the lack of a specific warning that welfare benefits are terminable would not alone create a breach of fiduciary duty." *Id.* at 642. After noting that the plan documents included reservation of rights provisions stating that CNA could change or eliminate plan benefits (*id.*), the court stated:

> [I]f accurate written information is provided, as it was here, then the plaintiffs are unfortunately out of luck. In law, the inclusion of reservation of rights clauses in an agreement accurately conveys that benefits may be altered or terminated. Thus, the plaintiffs' fiduciary duty claim fails.

Id. at 642 (citations omitted).

- In *Frahm v. Equitable Life Assur. Soc. of U.S.*, 137 F.3d 955 (7th Cir. 1998), plaintiffs alleged that oral and written statements made to them regarding their

retirement benefits violated their employer's fiduciary duties. *Id.* at 957 & 959. In rejecting this claim, the court stated:

> Statements of the kind to which plaintiffs point—that retirees should expect to receive the health benefits in force at the date of their retirement . . . were, when made, not false statements of fact. They were not false, because they accurately informed the agents about the operation of the plans the [company] then had in force; and to the extent they were forward-looking, it was not clearly erroneous for the district court to conclude that they were statements not of "fact" but of present intention.

- In *Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224 (1st Cir. 2006), plaintiffs alleged that their employer breached its fiduciary duties by failing to state during meetings prior to their participation in early retirement programs that their dental benefits could be amended or terminated. *Id.* at 233. The First Circuit affirmed entry of summary judgment for employers on this claim because "plaintiffs were put on notice of the company's right to modify, amend, and terminate the plan by the individualized benefits summaries and program brochures, which pointed to the underlying plan documents that contained the reservation of rights." *Id.* at 233-34.

- In *Robinson v. Sheet Metal Workers' Nat. Pension Fund, Plan A*, 441 F. Supp. 2d 405 (D. Conn. 2006), *aff'd in part, appeal dismissed in part,* 515 F.3d 93 (2d Cir. 2008), plaintiffs alleged that defendants breached their fiduciary duties by giving them documents containing "lifetime" language that failed to mention any right to amend plan benefits. *Id.* at 433. In granting summary judgment for defendants, the court held that plaintiffs failed to establish a material misrepresentation as a matter of law:

> First . . . the "lifetime" language those documents use was a factually correct statement of the benefits then existing under the Plan . . . . Second, these non-plan documents were relatively

> cursory in nature . . . and did not purport to set out the full terms of the Plan. The Court does not believe that any reasonable beneficiary would have looked at these forms and assumed that they spelled out the full terms and conditions of the IRD benefit. Third, beneficiaries were repeatedly informed, through successive versions of the Plan and SPDs, that IRD benefits might be amended.

Id. at 434. *See also Jenson v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994) ("the failure to disclose that a welfare plan's benefits are not vested is neither a material misrepresentation nor a breach of the plan administrator's fiduciary duties"); *Leuthner v. Blue Cross and Blue Shield of Northeastern Pennsylvania*, 454 F.3d 120, 129 (3d Cir. 2006) ("A representation is not a misrepresentation if it is an accurate reflection of the plan administrator's intent when the statement was made.").

Indeed, "[i]f the mere restatement of the benefits currently in effect could be construed as an enforceable guarantee of those benefits into perpetuity, then any free-standing memorandum or informational brochure stating the current status of available benefits would, if not inclusive of a disclaimer, give rise to" irrevocable ERISA benefits—a result that is aptly characterized as "absurd." *Richmond v. NCR Corp.*, 227 F. Supp. 2d 802, 815 (S.D. Ohio 2002). *See also id.* at 817 ("the mere restatement of current health care coverages is not, in this Court's opinion, even *reasonably* susceptible to interpretation as a promise") (emphasis in original).

Here as in *Sprague,* the worst that can be said is that Qwest "did not tell the . . . retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." And here as in *Sprague*—and in the many other cases cited above—the allegations plaintiffs have marshaled to support their fiduciary breach claim are insufficient as a matter of law.

Although Phelps tries to avoid this outcome by citing an alleged conversation from 19 years ago, his effort is unavailing. As the Tenth Circuit stated in *Averhart v. US West Mgmt. Pension Plan*, 46 F.3d 1480 (10th Cir. 1994): "Where the written language of the plan is clear, as here, any representation that is contrary to the written language of an ERISA plan can be viewed only as a purported modification of the plan and, hence, preempted by ERISA." *Id.* at 1485 (citation and brackets omitted). *Accord Straub v. Western Union Telegraph*, 851 F.2d 1262 (10th Cir. 1988) ("no liability exists under ERISA for purported oral modifications of the terms of an employee benefit plan"); *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992) (same).

In *Frahm*, the Seventh Circuit noted that the ERISA provision imposing fiduciary duties (Section 404(a)) does not allow plaintiffs to use alleged oral statements about the terms of ERISA plans to evade ERISA's requirement that such plans be in writing:

> Treating [ERISA Section 404(a)] as establishing a duty to give plan participants whatever benefits someone on the staff led them to believe were available would undermine an essential principle established by ERISA: there are no oral variances from written plans. * * * Havoc would ensue if plans meant different things for different participants, depending on what someone said to them years earlier. Memory is weak compared to the written word, and there is a substantial risk that participants will not correctly recall what was said, will exaggerate (in their favor) what they heard, or will simply prevaricate in order to improve their position. * * * We do not think that [Section 404(a)] takes back with the left hand the primacy of the written word that ERISA establishes with the right hand.

Conceivably, a court might allow a fiduciary breach claim to be based on *intentional* misrepresentations that constitute interpretations of *ambiguous* plan provisions. But where, as here, alleged *unintentional* misrepresentations contradict *unambiguous* plan

provisions giving the plan sponsor the right to amend or terminate the plan, the resulting breach of fiduciary duty claim fails as a matter of law.

B. Kerber and Phelps Did Not Reasonably Rely on the Alleged Misrepresentations and Omissions.

Reliance is a second insurmountable hurdle for the fiduciary breach claim alleged by Kerber and Phelps. As numerous courts have held, a plaintiff's reliance on alleged representations that plan benefits cannot be amended is inherently unreasonable where, as here, plaintiffs have been issued plan documents that unambiguously reserve the right to amend or terminate the benefits in question. *See, e.g. Frahm*, 137 F.3d at 961 ("In federal law, a person cannot rely on an oral statement, when he has in hand written materials disclosing the truth."); *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 588 (7th Cir. 2000) ("the oral representations of an ERISA plan may not be relied upon by a plan participant when the representation is contrary to the written terms of the plan and those terms are set forth clearly") (citations omitted); *Crosby v. Rohm & Haas Co.*, 480 F.3d 423, 431 (6th Cir. 2007) (affirming summary judgment for employer where "[t]he terms of this plan . . . were exceedingly clear, making [plaintiff's] alleged reliance on contrary informal communications from the company unreasonable as a matter of law"); *Mello v. Sara Lee Corp.*, 431 F.3d 440, 447-48 (5th Cir. 2005) (reversing summary judgment for employee on the ground that his "reliance on the informal benefit statements and oral representations was unreasonable" as a matter of law in light of "the clear and consistent case law forbidding recognizing reasonable reliance on informal documents in the face of unambiguous Plan terms"); *In re Unisys Corp. Retiree Med. Benefit ERISA Lit.*, 58 F.3d 896, 907 (3d Cir. 1995) ("Due to the unambiguous reservation of rights clauses in the summary plan descriptions by which Unisys could

terminate its retiree medical benefit plans, the regular retirees cannot establish 'reasonable' detrimental reliance based on an interpretation that the SPDs promised vested benefits").

In *Livick v. The Gillette Co.*, 524 F.3d 24 (1st Cir. 2008), the First Circuit declared:

> [A] plan beneficiary might reasonably rely on an informal statement interpreting an *ambiguous* plan provision; if the provision is clear, however, an informal statement in conflict with it is in effect purporting to *modify* the plan term, rendering any reliance on it inherently unreasonable.

Id. at 31 (emphasis in original). For *decades*, Qwest and its predecessors issued SPDs to employees and retirees, including Kerber and Phelps, that unambiguously reserved the right to amend or terminate the Life Plan. Under these circumstances, Kerber and Phelps are barred as a matter of law from claiming that they reasonably relied on alleged informal contrary misstatements or omissions.

C. Kerber and Phelps Are Not Entitled to the Relief Sought in the Second Claim.

Kerber and Phelps seek two remedies for Qwest's alleged breach of fiduciary duty: (1) "removal of the Plan fiduciaries/administrators [and] appointment of an independent fiduciary"; and (2) "an order to make beneficiaries whole with payment of full life insurance benefits," *i.e.*, benefits at "the levels in place before Qwest decided to reduce them." (Ex. A-23 p. 20, Resp. to Interrog. 20.) As a matter of law, Kerber and Phelps are not entitled to either of these remedies.

1. Removal of Plan Fiduciaries Is Not an Appropriate Remedy.

ERISA Section 409(a) provides in pertinent part that a fiduciary who breaches his fiduciary obligations under ERISA shall be subject to such "equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." 29 U.S.C. §

1109(a). However, courts have repeatedly held that removal of fiduciaries under Section 409(a) is warranted only if the fiduciaries have engaged in *repeated* or *substantial* violations of their fiduciary duties. *See, e.g., Chao v. Malkani*, 452 F.3d 290, 294 (4th Cir. 2006); *Birdsell v. United Parcel Service of America, Inc.*, 94 F.3d 1130, 1134 (8th Cir. 1996); *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir. 1984); *see also* S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad.News 4890, 4989 (stating that "[i]t is expected that a fiduciary . . . may be removed for *repeated or substantial violations* of his responsibilities") (emphasis added).

The Fourth Circuit in *Chao* explained the policy behind this rule as follows:

> [R]emoval can be detrimental for plan participants and employers alike. It imposes significant costs on plans, which must undergo an inevitable period of transition as a new fiduciary familiarizes itself with the plan's provisions. Constant turnover can also disrupt plan administration, and might cause delay in participants receiving vital benefits. Courts should thus not dislodge fiduciaries for committing minor errors in their attempt to manage the plan and comply with a complicated statutory scheme. Rather, *removal is only appropriate where fiduciaries "have engaged in repeated or substantial violations of their fiduciary duties."*

452 F.3d at 294 (emphasis added).

Plaintiffs' suggestion that the Life Plan fiduciaries should be removed on account of the fiduciary breaches alleged in their Second Claim is absurd. Even assuming *arguendo* the existence of the fiduciary breaches alleged by plaintiffs, those breaches were indisputably *unintentional* and mostly occurred *nearly two decades ago*, when the Plan sponsor was a no-longer-extant company, US West. Where, as here, Plan fiduciaries did not engage in repeated or substantial (or indeed any) violations of their fiduciary responsibilities, their removal is inappropriate as a matter of law.

2. An Order Requiring Qwest To Pay Life Insurance Benefits to Kerber's and Phelps' Beneficiaries at Pre-Reduction Levels Is Not an Appropriate Remedy.

The second remedy Kerber and Phelps seek for the fiduciary breaches alleged in their Second Claim is an order requiring Qwest to pay its beneficiaries life insurance benefits at pre-reduction levels. Plaintiffs allege that this remedy constitutes "other appropriate equitable relief" under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). *See* SAC ¶ 88 & Prayer for Relief ¶ K.

In *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), the Supreme Court noted that "the term 'equitable relief' in [Section 1132(a)(3)] must refer to 'those categories of relief that were *typically* available in equity." *Id.* at 210 (emphasis in original). The court then stated that "[a]lmost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,'" and that "[m]oney damages are, of course, the classic form of legal relief." *Id.* (internal citations and quotations omitted).

In *Callery v. U.S. Life Ins. Co. in City of New York*, 392 F.3d 401, 405 (10th Cir 2004), the Tenth Circuit rejected plaintiff's contention that "appropriate equitable relief" under Section 502(a)(3) included payment of the face value of the policy insuring the life of her deceased husband. *See also Amschwand v. Spherion Corp.*, 505 F.3d 392, 348 (5th Cir. 2007) (holding that under Section 502(a)(3) "other appropriate equitable relief" does not include "make-whole" damages in the form of payment of life insurance benefits that would have accrued to a plan beneficiary but for a plan fiduciary's breach of fiduciary duty *cert. denied,* 128 S. Ct. 2995 (2008)); *Todisco v. Verizon Communications, Inc.*, 497 F.3d 95, 99-100 (1st Cir. 2007) (same). Thus, as a matter of law Kerber and Phelps are not entitled to an

order requiring Qwest to pay life insurance benefits to their beneficiaries at pre-reduction levels.

IV. CONCLUSION

For the reasons set forth above, Qwest respectfully requests that this Court enter summary judgment in its favor on plaintiffs' Second Claim.

DATED: September 12, 2008.

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2008, I electronically filed the foregoing **Qwest's Motion for Summary Judgment on Plaintiffs' Second Claim for Relief** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Curtis L. Kennedy, Esq. at CurtisLKennedy@aol.com

s/Patricia Eckman
Patricia Eckman