**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.

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# QWEST'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' FIRST, THIRD, FOURTH AND FIFTH CLAIMS

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Defendants (collectively, "Qwest") respectfully submit this reply brief in support of their motion ("Motion") for summary judgment on the First, Third, Fourth, and Fifth Claims in plaintiffs' Second Amended Complaint.

## I. PRELIMINARY STATEMENT

Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment ("Response" or "Res.," Doc. No. ("DN") 99) accuses Qwest of violating this Court's Pre-Trial Procedure Rules—an accusation that is baseless for reasons Qwest has previously explained. (*See* DN 94.) Ironically, immediately after leveling this charge, plaintiffs themselves violate every requirement set forth in the following Section 6.4 of those Rules:

> The brief in opposition [to a motion for summary judgment] shall include a section entitled "Response to Statement of Undisputed Material Facts" in which the movant's asserted undisputed material facts shall be admitted or denied in the same numbered paragraphs used by movant. Any denial shall include a brief factual explanation of the reasons with specific reference to material in the record supporting the denial.

Plaintiffs' failure to deny the undisputed material facts ("UF") set forth in Paragraphs 13-45 of Qwest's Statement of Undisputed Material Facts (*see* DN 91) was not inadvertent. Plaintiffs' Reply Brief in support of their Amended Motion for Summary Judgment on these same claims ("Reply Br.," DN 98) likewise fails to deny Qwest's Undisputed Facts 13-45, even though Section 6.5 of this Court's Rules states that "[a] reply brief shall include . . . [a section] in which the movant shall admit or deny each such fact and support any denial in the same fashion as provided above." Moreover, plaintiffs admit, both in that brief and in their Response, that none of the facts identified by Qwest are disputed. *See* Reply Br. at 1 ("The Material Facts are Undisputed") & 2 ("With one exception [relating

to a fact alleged by plaintiffs and disputed by Qwest], the material facts are not disputed"); Res. at 20 (the "relevant material facts are not disputed").

Even without plaintiffs' express admission that the facts presented by Qwest are undisputed, those facts should be deemed admitted due to plaintiffs' failure to deny them in conformance with this Court's Rules. *See, e.g., Alvariza v. Home Depot*, 506 F. Supp. 2d 451, 455 n. 2 (D. Colo. 2007) (when plaintiff's response to defendant's summary judgment motion violated courtroom rules because it denied fact statements without attaching supporting fact material, court deemed denials ineffective and accepted facts as stated by defendant); *Wollan v. U.S. Dept. of Interior*, 997 F. Supp. 1397, 1401 & n. 5 (D. Colo. 1998) (when plaintiff's response to defendants' motion for summary judgment violated courtroom rules in numerous ways, court adopted "in its entirety" the statement of facts set forth in motion). The Tenth Circuit has consistently upheld district courts' enforcement of local and courtroom rules regarding summary judgment motions. *See, e.g., Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106, 1108 n. 1 (10th Cir. 1999) (district court properly granted defendants' motion for summary judgment based in part on plaintiffs' failure to comply with local rule regarding the format for presentation of responsive fact material); *Amro v. The Boeing Co.*, No. 97-3049, 1998 WL 380510 * 1, n. 1 (10th Cir. July 8, 1998) (unpublished; Ex. A hereto) (same).

In summary, with the minor exceptions discussed below, plaintiffs and Qwest agree that the facts material to Qwest's Motion are undisputed. As discussed below, plaintiffs also largely concede that the law applicable to Qwest's Motion is undisputed. Because plaintiffs' First, Third, Fourth and Fifth Claims are without merit in light of that law, Qwest is entitled to summary judgment on those claims.

## II. REPLY CONCERNING ADDITIONAL ALLEGED UNDISPUTED FACTS

1. Deny. Plaintiffs' belated attempt to inject "Appendix 8" into this case is unfathomable. In June 2007, plaintiffs signed a Stipulation Regarding Authenticity and Admissibility of Certain Documents in which they stipulated that the 1998 Plan Document, including the version of that document on which their claims are based, consists of the Plan Document itself plus Appendices 1-7 thereto, *without* Appendix 8. (*See* DN 17-2 ¶ 19 & DN 95 Ex. 4.) This alleged fact is also immaterial because Appendix 8 is a redundant and largely-identical version of Appendix 7 that was mistakenly attached to the 1998 Plan Document. (*See* DN 100 pp. 3-9; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (a fact is material only if it might affect the outcome of the case under governing law).

2. Deny. This alleged "fact" is actually a legal argument—namely, that even where (as here) the Plan sponsor approves a Plan amendment reducing a life insurance benefit to $10,000, a pre-existing, inconsistent Plan provision providing for a life insurance benefit in an amount greater than $10,000 remains part of the Plan document because the amendment did not expressly delete the inconsistent provision. This legal argument is without merit for the reasons set forth below.

## III. ARGUMENT

### A. Qwest Is Entitled To Summary Judgment on Plaintiffs' First Claim.

Plaintiffs' Response repeats, often *verbatim*, arguments regarding the First Claim set forth in their Response in Opposition to Qwest Defendants' Second Motion To Dismiss (DN 80). For example, plaintiffs accuse Qwest in both briefs of "grossly mischaracteriz[ing]" their First Claim, and of failing to acknowledge that plaintiffs' First Claim incorporates all other claims in the Complaint. (*Cf. id.* pp. 4-10 *with* Res. pp. 3-9.)

Rather than force this Court to read twice, not merely plaintiffs' arguments, but Qwest's response to those arguments, Qwest respectfully refers the Court to pages 2-5 of its Reply Brief in Support of Its Second Motion To Dismiss (DN 81).

1. **The Plan's Amendment Procedure Fully Complies with the Requirements of Section 402(b)(3) as Interpreted by the Supreme Court.**

Plaintiffs do not dispute that the Supreme Court held in *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 75 (1995), that an ERISA plan document containing language identical in all material respects to the amendment language in the 1998 Plan Document specifies a procedure for amending an ERISA plan that complies with Section 402(b)(3). Qwest is therefore entitled to judgment on plaintiffs' First Claim as a matter of law.

2. **Even If the Plan's Amendment Procedure Were Inadequate, Plaintiffs Would Not Be Entitled to the Relief They Seek.**

Plaintiffs likewise do not dispute that a plan amendment may be invalidated due to a plan's inadequate amendment procedure only if plaintiffs prove detrimental reliance by plaintiffs or bad faith or active concealment by the plan sponsor. Plaintiffs concede that they did not detrimentally rely on the Plan's allegedly inadequate amendment procedure. And although plaintiffs allege concealment and bad faith by Qwest, they present no evidence of concealment or bad faith relating to the subject of their First Claim, *i.e.*, the Plan's allegedly defective amendment procedure. To the contrary, plaintiffs admit that the Plan document, including its allegedly defective amendment provision, has been available for inspection and copying at all times since it was created a decade ago. (UF ¶¶ 35-36.) Any claim that Qwest acted in bad faith when it reduced life insurance benefits pursuant to the Plan's amendment procedure is also baseless in light of this Court's finding that "the Plan unambiguously reserve[d] Qwest's right to amend the Plan including reducing the amount of

life insurance benefits for retired employees." (Dismissal Order at 12.) In summary, plaintiffs have failed to create a triable issue of fact regarding whether Qwest engaged in concealment or bad faith with respect to the Plan document's allegedly defective amendment procedure.

**B. Qwest Is Entitled To Summary Judgment on Plaintiffs' Third, Fourth and Fifth Claims.**

Plaintiffs dispute neither the facts material to, nor the law applicable to, their Third, Fourth, and Fifth Claims. Those facts and law demonstrate Qwest's entitlement to summary judgment on those claims for three independent reasons.

**1. Qwest Approved the 2005 Amendment By Means of the Oct. 2005 Resolutions.**

Plaintiffs do not dispute that a plan sponsor (1) effectuates a plan amendment if it "actually approves" the amendment, and (2) "actually approves" the amendment if it "sufficiently manifest[s] its intention" to amend the plan. *Curtiss-Wright*, 514 U.S. at 80 & 85. Thus, to avoid summary judgment, plaintiffs must present sufficient evidence to support a finding that Qwest did not "sufficiently manifest its intention" to amend the Plan in October 2005.

Plaintiffs have not done so. Plaintiffs concede, not only that Qwest *intended* to so amend the Plan in October 2005, but that it *manifested this intention* in multiple ways, including by (1) approving resolutions stating that the Plan "be and hereby is amended" to reduce the life insurance benefit to $10,000 for the specified retirees effective January 1, 2006, (2) notifying those retirees of the amendment via SMMs, and (3) notifying its insurer and administering the Group Policy in accordance with the amendment. (*See* UF ¶¶ 24-33.)

In the face of Qwest's overwhelming, undisputed evidence, plaintiffs advance four feeble arguments. First, they argue that Qwest's manifestation of its intent to amend the

Plan was ambiguous, because the Oct. 2005 Resolutions did not expressly strike the prior Plan provision specifying that retirees would receive life insurance benefits in varying amounts all substantially in excess of $10,000. (Res. at 6.) But resolutions stating that specified retirees' life insurance benefits are *reduced to $10,000* cannot reasonably be construed to leave intact prior Plan provisions affording those same retirees a life insurance benefit that *substantially exceeds $10,000*. *See McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1202 (10th Cir. 1992) (holding that language in an ERISA plan should be construed "*as a reasonable person in the position of the . . . participant,* not the actual participant, would have understood the words to mean") (emphasis in original). And because the amended Plan is unambiguous, the doctrine of *contra proferentum*, which plaintiffs urge this Court to apply, has no application. *See id.* at 1200.

Second, plaintiffs argue that, even though the Oct. 2005 Resolutions stated that the Plan "be and hereby is amended" to reduce life insurance benefits to $10,000, those resolutions represented "unfinished business," because when it approved these resolutions the PDC intended to later restate the entire Plan. (Res. at 9.) The PDC's future intention to restate the Plan does not render ineffective a current amendment. To accept otherwise would mean that countless legitimate ERISA plan amendments would not become effective on the date intended by the plan sponsor.

Third, plaintiffs argue that the PDC did not "adopt" the 2005 Amendment by means of the Oct. 2005 Resolutions because the term "adopt" does not appear in those resolutions. (*Id.* at 9-10.) But the term "adopt" means "[t]o accept, consent to, and put into effective operation" (*Black's Law Dictionary* (5th ed. 1979)), which is indisputably what Qwest did by means of the Oct. 2005 Resolutions (*see* UF ¶¶ 24-25). Neither ERISA, nor the

1998 Plan Document, nor applicable case law mandates that the word "adopt" appear in resolutions by which a plan sponsor approves plan amendments.

Fourth, plaintiffs argue that the letters Qwest sent to the AUSWR and the Minnesota PUC in October 2005, and the Form 10-K it filed with the SEC in February 2006, do not satisfy the requirements of ERISA Section 104(b)(1)(B). (Res. at 14.) Qwest does not argue to the contrary. It instead cites these documents to show that, far from concealing the 2005 Amendment, Qwest timely disclosed it to all interested parties. Moreover, Qwest indisputably *did* satisfy Section 104(b)(1)(B) by means of its October 2005 SMMs. (*See* UF ¶¶ 27-29.) ERISA requires only that SMMs be "written in a manner calculated to be understood by the average plan participant" (29 U.S.C. § 1022(a)), and the October 2005 SMMs satisfy that requirement. Finally, even if plaintiffs sought to dispute specified retirees' receipt of the SMMs, the legal standard is not whether the retirees received the SMMs, but whether the SMMs were distributed using a method reasonably calculated to ensure such receipt. 19 C.F.R. § 2520.104b-1(b); *Williams v. Plumbers & Steamfitters Local 60 Pension Plan*, 48 F.3d 923, 926 (5th Cir. 1995). Plaintiffs do not (and cannot) challenge Qwest's method of distributing the SMMs. (*See* UF ¶¶ 27-28.) In sum, plaintiffs have not presented the slightest quantum of evidence to support a finding that Qwest did not "sufficiently manifest its intention" to amend the Plan in October 2005.

**2. Even If Qwest Failed To Approve the 2005 Amendment by Means of the Oct. 2005 Resolutions, Qwest Ratified that Amendment.**

Plaintiffs do not dispute that a plan sponsor can render a defective plan amendment effective through ratification. *See Curtiss-Wright*, 514 U.S. at 85. Nor do plaintiffs dispute the overwhelming evidence demonstrating that Qwest ratified the 2005

Amendment before its January 1, 2006 effective date. *See* UF ¶¶ 22 & 26-36. Plaintiffs' sole response to Qwest's ratification argument is that the only pertinent date is the date an amendment is properly "adopted," not the date an allegedly defective amendment is ratified. (Res. at 12.) This is just another way of saying that a defective plan amendment cannot be made effective through ratification, even though the Supreme Court held precisely to the contrary in *Curtiss-Wright*. Because Supreme Court decisions trump the arguments of litigants, Qwest is entitled to summary judgment on plaintiffs' Third, Fourth and Fifth Claims because it ratified the 2005 Amendment before its effective date.

### 3. Even If the Oct. 2005 and Dec. 2006 Resolutions Were Defective, Plaintiffs Have Not Proven Bad Faith or Active Concealment by Qwest.

Plaintiffs do not dispute that a plan amendment that suffers from the deficiencies alleged by plaintiffs is nevertheless effective absent detrimental reliance by plaintiffs or bad faith or active concealment by the plan sponsor. Plaintiffs do not allege detrimental reliance; instead, they allege concealment and bad faith by Qwest. These allegations are baseless on their face, given Qwest's uncontroverted evidence of the good faith and candor with which it approved and implemented the 2005 Amendment. Plaintiffs nevertheless make a series of arguments that are unsupported by *any* evidence presented in conformance with this Court's rules.

Plaintiffs first allege that Qwest acted in bad faith because "[a]ction taken in violation of the Prior Loss Proviso is the quintessential proof of Defendants acting in bad faith." (Res. at 11.) This argument assumes the very fact plaintiffs must prove—that Qwest violated the Prior Loss Proviso, which bars retroactive application of Plan amendments. Qwest did not violate that proviso as a matter of law, because three months *before* the

effective date of the 2005 Amendment, it (1) signed resolutions stating that the Plan "be and hereby is amended" to reduce the life insurance benefit for specified retirees, and (2) notified those retirees via SMMs that their benefit would be reduced.

Plaintiffs next allege that Qwest concealed its intent to amend the Plan to reduce benefits effective January 1, 2006 because the "December 2005 SMM sent to each Plan participant says nothing about there being any material changes to the Qwest Group Life Insurance Plan for the upcoming 2006 Plan year." (Res. at 13 (emphasis in original).) But the December 2005 SMM to which plaintiffs refer states: "This SMM is provided to notify you of certain changes to the **Qwest Health Care Plan**, the **Qwest Savings & Investment Plan**, and the **Qwest Pension Plan**"—*i.e.*, *not* to the Life Plan. (*See* Ex. 8, p. LQ07913 (emphasis in original).) Qwest didn't need to issue an SMM in December 2005 describing changes to the Life Plan because it had already issued SMMs in October 2005 describing those changes. (*See* UF ¶¶ 27-29.)

Plaintiffs next allege that Qwest "concealed" the 2005 Amendment because it "never sent retirees and beneficiaries the required formal notice due 210 days after adoption of Plan Amendment 2006-1." (Res. at 13.) This allegation is suspect on its face, because plaintiffs' Complaint, which alleges every conceivable form of misdeed by Qwest, nowhere claims that Qwest failed to provide such allegedly required notice. In any event, because Qwest sent the requisite SMMs to all affected retirees in October 2005, it did not need to send them redundant SMMs thereafter.

Finally, plaintiffs argue that the Group Policy was not amended in conformance with the 2005 Amendment because (1) it includes a "no oral amendments" provision, and (2) Qwest has not presented an amendment signed by both it and Prudential.

(Res. at 18-19.) This argument is foreclosed by plaintiffs' failure to dispute in conformance with this Court's Rules Undisputed Fact 32, which states that "the group life insurance policy was amended to reflect the terms of the 2005 Amendment." *See* pp. 1-2 *supra*. In any event, the Group Policy's provision barring oral amendments does not disprove the Group Policy amendment to which Mr. Ammidown has attested, for several reasons. First, "a subsequent oral agreement between the parties may modify a provision of an earlier written contract, even in the face of a provision in the original contract that modification must be in writing." *Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187, 1193 (Colo. 2001); *accord* 2 *Corbin on Contracts* § 7.14 (rev. ed. 1995). Second, "a provision requiring modifications to a contract to be in writing can be waived . . . by conduct." *Williams v. Colorado Springs College of Business*, 736 P.2d 419, 420 (Colo. App. 1987). That happened here, since Qwest and Prudential indisputably "administered the Plan in accordance with the 2005 Amendment by providing beneficiaries of Post-1990 Occupational Retirees who died on and after January 1, 2006 with a life insurance benefit at the reduced $10,000 level." (UF ¶ 33.) Finally, third parties such as plaintiffs cannot challenge the validity of an agreement between two other parties on the ground that the agreement should have been reduced to writing when those parties do not so challenge it. *See, e.g., Houtchens v. United Bank of Colorado Springs, N.A.*, 797 P.2d 814, 815 (Colo. App. 1990); 73 Am. Jur. 2d, *Statute of Frauds* § 486 (2001).

## IV. CONCLUSION

For the reasons set forth above, Qwest respectfully requests that this Court enter summary judgment for Qwest on plaintiffs' First, Third, Fourth, and Fifth Claims.

DATED: August 19, 2008.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 19, 2008, I electronically filed the foregoing **Qwest's Reply Brief in Support of Motion for Summary Judgment on Plaintiffs' First, Third, Fourth, and Fifth Claims** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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s/Patricia Eckman
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