IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

EDWARD J. KERBER, et al,

Plaintiffs,

vs.

QWEST PENSION PLAN, et al,

Defendants.

PLAINTIFFS' OPPOSITION TO [Docket No. 150]
Defendants' MOTION TO FILE SUPPLEMENTAL AUTHORITY

Last night, Defendants' third team of defense counsel filed Docket No. 150, "Defendants' Motion to File Supplemental Authority", and they submitted the case of *Robinson v. Sheet Metal Workers' Nat. Pension Fund, Plan A*, --- F.3d ----, 2008 WL 302610 (2nd Cir. February 5, 2008). Plaintiffs hereby respond in opposition because the *Robinson* appellate decision is inapposite for a number of reasons, as follows:

1. The *Robinson* case concerned the status of a disability benefit and the legality of a plan amendment. The dispute in this case concerns the status of a fixed amount of pension death benefit and the legality of a plan amendment. The *Robinson* case is the third in a trio of cases that focused on whether the disputed employee benefit is a "welfare benefit," and Defendants desperately need this Court to be myopic and adopt the same reasoning so as to declare "case over." That simply cannot happen, because the facts and claims in this case are remarkably different than those facts and claims in either of the *Robinson, Chastain* and *Foss* cases.

2. As explained in Plaintiffs' brief (Docket 146) opposing the pending motion for summary judgment, unlike the situation in *Robinson,* the PDB at issue in this case was represented and treated by Plan sponsor U S WEST to be a protected defined pension benefit. Moreover, when U S WEST created a new optional form of early retirement benefit - a single sum payment - the PDB was made an **integral** part of the lump sum payment. From 1997 through 2003, the Plan stated:

> If a Participant . . . elects a lump sum (or a partial lump sum) benefit at his retirement, then the ***lump sum paid*** to the Participant ***shall be increased by the DLS Equivalent of the Death Benefit*** described in Section 7.3(a). For this purpose, only, the DLS Equivalent shall include an assumption that the Participant will be survived by a Beneficiary. . . If such an increase is paid, no other Death Benefit shall be payable pursuant to this Article VII at any time, including the Participant's death. . .

(emphasis added) (Docket 144-2, p. 14, Defts' **Ex. A-1**, Bates 4716-17, Section 7.3(c)). Since the formula devised by U S WEST for calculating the optional form of benefit required the added dollar value of the PDB, U S WEST considered the PDB to be a protected benefit. Furthermore, the PDB, upon becoming a necessary component of the optional early retirement benefit, became protected by operation of both IRS Section 411(d)(6) and ERISA Section 204(g).[1] During a 7 year span (1997-2003), the optional lump sum early retirement benefit was provided to well over 10,000 Plan participants.

3. The Second Circuit's decision in *Robinson* confirming the lower court's

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[1] Both of those provisions state: "(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section §302(d)(2) [i.e., approved by the Secretary of Treasury] or 4281 [benefits under certain terminated plans]. (2) For purposes of paragraph (1), **a plan amendment which has the effect of— (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits**...." (emphasis and bracketed portions added) 26 U.S.C. Section 411(d)(6) , 29 U.S.C. Section 1154(g).

ruling that the disability benefit at issue was a welfare benefit is simply irrelevant to this litigation. Besides, the operative pension plan language in *Robinson* always specifically excluded any protection for the disability benefit.

4. In contrast, the historic Plan documents in this case classified the PDB as not being an unfunded welfare benefit. Moreover, even if the Court were to look only at the Governing Plan Document in effect when Plan Amendment 2003-5 was adopted in December 2003, the rules clearly prohibited Qwest from eliminating or reducing an early retirement benefit or retirement-type subsidy. The rules forbid Qwest from eliminating an optional form of benefit. As Defendants point out, the restated Governing Plan Document executed and adopted on December 19, 2002 states in Section 11.4:

> . . . amendments may not diminish the accrued benefit (as defined in Section 411(d)(6) of the Code) of any Participant as of the effective date of such amendment.

(Docket 144, p. 6; Docket 144-2, p. 21, Defts' **Ex. A-1**, Bates 4730).

5. Both IRS Section 411(d)(6) and ERISA Section 204(g) plainly state that eliminating or reducing an *early retirement benefit* is the same as cutting back an accrued benefit. Both provisions say that eliminating or reducing a *retirement-type subsidy* is the same as cutting back an accrued benefit. Both provisions prohibit the elimination of an *optional form of benefit*. When Qwest implemented Plan Amendment 2003-5, which amendment is challenged in this lawsuit, Qwest violated then existing Plan Section 11.4. By ending the long standing practice of providing Plan participants the option of receiving a single sum distribution enhanced by the dollar value of the PDB, Qwest effectively: 1) reduced an early retirement benefit; 2) eliminated a retirement-type subsidy; and 3) eliminated the U S WEST designed optional form of benefit and

substituted a new lesser valued optional form of lump sum benefit as of January 1, 2004. The *Robinson* case provides no guidance about the issues unique to this case.

6. The *Robinson* appellate decision is further inapposite to this litigation because the appellate panel specifically proclaimed:

> We decide only the case before us and deal just with the aforementioned amendments to the IRD [the disability benefit]. We have no occasion to consider, for example, whether ERISA would place restrictions on other types of amendments or would require particular language in SPDs when dealing with changes that could be draconian, e.g., a total elimination of benefits to people who, by joining the Plan, forewent other, **guaranteed**, benefits. All that is beyond the scope of the present case, and we express no view on it either way.

(bracketed portion and emphasis added) (*Robinson*, Slp. Op., p.6, f.5).

7. In this case, there are thousands of putative class members who, like Named Plaintiffs Kerber and Phelps, elected to receive a monthly annuity distribution with the promise that the PDB would be paid to a qualified beneficiary, and those retirees forewent the optional single sum distribution which payment would have **guaranteed** the added PDB dollar value. The *Robinson* decision brings nothing new to the table to address the issue whether the PDB should be deemed protected for those annuitants who chose not to take an immediate lump sum distribution.

WHEREFORE, Plaintiffs oppose Docket No. 150, Defendants' Motion to File Supplemental Authority.

DATED: February 9, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of February, 2008, 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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