IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

vs.

QWEST GROUP LIFE INSURANCE PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,
PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION To [Docket No. 79]
QWEST DEFENDANTS' May 16, 2008 MOTION TO DISMISS

Plaintiffs, through their counsel, respectfully submit their brief in opposition to Docket 79, Qwest Defendants' Fed. R. Civ. P. Rule 12(b)(6) Motion to Dismiss filed on May 16, 2008. For all the reasons stated herein, Qwest Defendants' motion should be denied, as Plaintiffs' claims should not be dismissed as a matter of law. Defendants' motion requesting dismissal of Plaintiffs' First, Second and Seventh Claims of Relief is the product of either: 1) a failure to review and consider the allegations set forth in Paragraphs 1-75 of the Second Amended Complaint; or 2) a very concerted effort to deliberately recast Plaintiffs' claims and cherry pick few of Plaintiffs' factual and legal allegations.

I. PRELIMINARY STATEMENT.

By Amended Order dated February 27, 2008 (Docket 47), this Court ruled, *inter alia*, that "as a matter of law, the Plan unambiguously reserves Qwest's right to amend the Plan including reducing the amount of the life insurance benefits for retired employees." (Docket 47, p. 12). The Court also ruled that the Plan document's "Prior Loss Proviso" in Article 10.1 stating that no amendment "shall reduce the benefits of any Participant with respect to a loss incurred prior to the date such amendment is adopted" is an express limitation on Qwest's rights under the "Reservation of Rights" clause. (*Id.* pp. 10-11).

The Court has neither ruled whether any subsequent Plan amendment is enforceable, nor has the Court declared the benefit rights of Eligible Retirees and their beneficiaries, central issues encompassed within Plaintiffs' Amended Complaint, and now reasserted within Plaintiffs' Second Amended Complaint ("SAC") (Docket 69). Likewise, the Court did not rule upon Plaintiffs' claims of ERISA fiduciary breaches which claims have been reasserted.

In Defendants' latest motion to dismiss filed on May 16, 2008, Defendants attack Plaintiffs' First, Second and Seventh Claims for Relief.

II. LEGAL STANDARD.

The purpose of a motion to dismiss for failure to state a claim is to test the legal sufficiency of the complaint. A complaint must be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face." *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir.2007) (quoting *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S.Ct. 1955, 1969, 1974 (2007)). A plaintiff need not provide specific facts in support of his allegations, *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (per curiam), but must include

sufficient factual information to provide the "grounds" on which the claim rests, and "to raise a right to relief above a speculative level." *Twombly*, 127 S.Ct. at 1964-65 & n. 3. This obligation requires a plaintiff to plead "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1965. A complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Id*. at 1969 (quoted case omitted).[1]

When ruling on a motion to dismiss, this Court "must accept as true all well pleaded facts, and construe all reasonable allegations in the light most favorable to the plaintiff." *United States v. Colorado Supreme Court*, 87 F.3d 1161, 1164 (10th Cir. 1996). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999) (quotation omitted).

Pursuant to Federal Rule of Civil Procedure 8, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." This statement does not require detailed factual allegations so long as it "give[s] the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Because Plaintiffs have complied with Fed.R.Civ.P. Rule 8 and stated facts entitling them to relief allowable under the Employee Retirement Income Security Act ('ERISA"), dismissal of

[1] *Twombly* rejected and supplanted the "no set of facts" language of *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99 (1957). The clarified standard, "plausibility," and its meaning were addressed by the Tenth Circuit in the March 21, 2008 dated decision issued in *Robbins v. Oklahoma*, 519 F.3d 1342, 1347-48 (10th Cir.2008).

their First, Second and Seventh Claims for Relief, pursuant to Fed.R.Civ.P. 12(b)(6), would be most inappropriate. *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 870 (10th Cir.1992).

III. ARGUMENT.

A. Plaintiffs Have Sufficiently Stated Their First Claim for Relief.

In attacking the sufficiency of Plaintiffs' First Claim for Relief, Defendants boil down the claim to this simple statement:

> Plaintiffs First Claim alleges that the Plan violates the requirement, set forth in ERISA Section 402(b)(3), that every employee benefit plan "provide a procedure for amending such plan." *See Comp.* ¶ 79. Plaintiffs allege that the 1998 Plan Document lacks such a procedure, and accordingly ask this Court to declare that the Disputed Amendments, and all other amendments post-dating the 1998 Plan Document, are null and void. *Id.*

(emphasis added) [2] (Docket 79, Defts' Brief, p. 6). Defendants grossly mischaracterize the First Claim for Relief, borrow a snippet from a single paragraph of the Second Amended Complaint and distort that allegation. Defendants' erstwhile litigation tactic should cause the Court to impose sanctions. The obligatory response to this Rule 12(b)(6) motion necessitated Plaintiffs' counsel to unnecessarily expend a good deal of time and effort. Defendants deliberately ignored the fact that Plaintiffs' First Claim for Relief specifically incorporates all of the detailed factual and legal allegations set forth in paragraphs 1 through 75. Furthermore, Defendants ignore the Prayer for Relief, the last section of the Second Amended Complaint.

In short, for their First Claim for Relief, Plaintiffs have asked for a declaration of all Eligible Retirees' (and their beneficiaries) rights to Plan benefits. In the paragraphs supporting

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[2] In paragraph 79, Plaintiffs do not contend that all post-1998 Plan amendments are null and void. (SAC ¶ 79 stating ". . . any subsequent document purporting to reduce Eligible Retirees' benefits payable to their beneficiaries be declared null and void."). For instance, there is a Plan document entitled "Appendix 8", a document not yet considered by the Court because there currently is no stipulation respecting the date of that document which is the subject of ongoing formal discovery, and Plaintiffs do not contend it should be declared null and void.

their First Claim for Relief, Plaintiffs contend that Defendants' actions violated ERISA's provisions and the more favorable Plan terms when Defendants were paying out only $10,000 to Plan beneficiaries. In particular, Plaintiffs seek relief pursuant to ERISA Section 502(a)(1)(B) [3] and ERISA Section 502(a)(3) which statutory provisions state as follows:

> (a) Persons empowered to bring a civil action. A civil action may be brought-
>
> (1) by a participant or beneficiary-
> ...
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
> ...
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

29 U.S.C. § 1132(a)(1)(B) and (a)(3). See *Tomlinson v. El Paso Corp*., Slip Copy, 2008 WL

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[3] Plaintiffs make clear, not only within the allegations comprising their First Claim for Relief, but also in their Prayer for Relief, they are asking the Court:

> Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), declare the PLAN fails to comply with the requirements of ERISA Section 402(b)(3), § 1102(b)(3), and, pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), declare Named Plaintiffs' and Eligible Retirees' rights to PLAN benefits are not governed by documents purporting to be PLAN amendments reducing their benefits. (SAC, Prayer ¶ B) (emphasis added);
>
> Pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), declare the Named Plaintiffs' and Eligible Retirees' rights to PLAN benefits and, applying principles of *contra proferentum* to conflicting terms of the Governing PLAN Document and the terms of any document (including the October 14, 2005 dated minutes and PLAN Amendment 2006-1) Defendants contend served as a PLAN amendment reducing Eligible Retirees' PLAN benefits, declare that the more favorable terms of the Governing PLAN Document govern the rights of Eligible Retirees and their beneficiaries. (SAC, Prayer ¶ C) (emphasis added); and
>
> Grant Plaintiffs and the proposed class members such other and further class-wide and plan-wide relief under ERISA § 502(a)(1)(B) as more specifically pled and requested within their Claims for Relief. . ." (SAC, Prayer ¶ L) (emphasis added).

762456 (D. Colo., J. Miller, March 19, 2008).

In making their First Claim for Relief - for a declaration of all Eligible Retirees' rights to Plan benefits -, Plaintiffs specifically incorporated the allegations set forth in paragraphs 1 through 75, which allegations are summarized as follows: To begin with, Plaintiffs contend that when former Plan sponsor U S WEST made a special early retirement offering in 1990 to Plaintiff Kerber, Plaintiff Phelps and 3,850 others, the Plan administrator sent a confirmation statement stating the retirees had been granted an early retirement pension and, more specifically, "You are **entitled** to the benefits paid under the Group Life Insurance Program." (SAC ¶ 32) (emphasis added). Notably, the March 26, 1990 confirmation statement sent to all "5 + 5" recipients does not include any disclaimer suggesting that Plan documents control over the confirmation statement. (See Defts' Ex. 6, Docket 79-8, Bates K00419).

Eight years later, U S WEST memorialized Plan terms in a document the parties to this case refer to as the "Governing Plan Document," a document executed in June 1998. (SAC ¶ 30). The Governing Plan Document includes rules providing Eligible Retirees minimum life insurance benefits, what the Court refers to as the "Minimum Benefit Promise." (*Id.* ¶ 31). The Governing Plan Document contains what the Court refers to as the "Prior Loss Proviso." (*Id.* ¶ 35). The Governing Plan Document does not state any procedure for amendment of the Plan and there is no procedure for 'adoption' of a Plan amendment. (*Id.* ¶¶ 22, 39 and 41).

In October 2005, the Qwest Plan Design Committee documented a recommendation to reduce life insurance benefits but that document was not "adopted" as a Plan amendment changing the Governing Plan Document. (*Id.* ¶¶ 46-55). Fourteen months later in December 2006, the Committee members adopted to the Governing Plan Document a document entitled "Plan Amendment 2006-1" which states "Effective January 1, 2006, with respect to Post-1990 Occupational Retirees, the Basic Life Coverage is a flat $10,000 Benefit." (*Id*. ¶¶ 58-62).

Despite the October 2005 dated recommendation document and the December 2006 Plan Amendment 2006-1, there continued to exist terms in the Governing Plan Document more favorable for all Eligible Retirees, including the terms set forth in Section 2.2, Appendix 2 and Appendix 7. [4] (*Id.* ¶¶ 63-65). Plaintiffs contend that, as between the terms of Plan Amendment 2006-1 and the terms of the Governing Plan Document, Plan administrators should have acted in the best interests of Plan beneficiaries, as required by ERISA Section 404(a)(1), and they should have applied principles of *contra proferentum* [5] and carried out the more favorable terms when making life insurance payments to beneficiaries of deceased Eligible Retirees. (*Id.* ¶ 66). Plaintiffs contend that Plan administrators violated the Prior Loss Proviso and did not act in conformity with the more favorable terms of the Governing Plan Document. (*Id.* ¶ 67-68).

More specifically, Plaintiffs Lensink and Strizich (both beneficiaries of deceased Plan participants) contend the Prior Loss Proviso was violated and they are entitled to a declaration of their right to receive additional Plan benefits (*Id.* ¶¶ 69 and 73).[6] The remaining Plaintiffs and

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[4] Again, there is also an "Appendix 8", the subject of ongoing formal discovery.

[5] Plaintiffs ask the Court to apply principles of *contra proferentum*, and construe the ambiguities and inconsistencies in favor of beneficiaries of Eligible Retirees and against the drafter. See *Miller v. Monumental Life Insurance Company*, 502 F.3d 1245, 1253 (10th Cir. 2007) ("Failure to employ contra proferentem would "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted. . .").

[6] Plaintiffs contend the purported Plan amendments were illegally applied retroactively so as to defeat the rights of beneficiaries to receive higher life insurance pay-outs. Surely, Plaintiffs have stated a claim for declaration of their rights. The Tenth Circuit adheres to the principles that a *post hoc* amendment cannot alter a plan provision in effect at the time performance under the plan became due. In *Gorman v. Carpenters' & Millwrights' Health Benefit Trust Fund*, 410 F.3d 1194, 1200-01 (10th Cir. 2005), the appellate approved the district court's nullification of new provisions entered into the health benefits plan after the plan participant had become injured and sought benefits. The Tenth Circuit said "welfare benefits vest when performance is due." *Id.* at 1198 (citing *Member Services, Life Ins. Co. v. American Nat. Bank and Trust Co of Sapulpa*, 130 F.3d 950, 957 (10th Cir. 1997). See also *Bartlett v. Martin Marietta Oper. Supp., Inc. Life Ins. Plan*, 38 F.3d 514, 517 (10th Cir.1994) (subsequent modifications to the plan do not affect the terms plan existing when insured died).

the proposed class of Eligible Retirees contend they are entitled to have this Court enforce their rights under the terms of the Governing Plan Document, or to clarify their rights to future benefits under the terms of the Plan. (*Id.* ¶ 75).

Now, in order for the Court to make a full and complete declaration of Plaintiffs' right to Plan benefits, Plaintiffs request the Court apply its power under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3). (*Id.* ¶ 78). That statutory provision empowers this Court to enjoin any act or practice which violates any provision of ERISA Title 1 or the Governing Plan Document terms. That ERISA provision also allows the Court to grant other appropriate equitable relief to redress such violations or to enforce any provisions of ERISA Title 1 or the terms of the Governing Plan Document. Accordingly, as part of the Court's process to declare all Eligible Retirees' rights to Plan benefits, it would be appropriate to grant equitable relief requiring the Governing Plan Document be reformed to reflect the prior Plan sponsor's intent and the confirmation sent out by the prior Plan Administrator that Plaintiff Kerber, Plaintiff Phelps and 3,850 other recipients of the "5 + 5" early retirement program are "entitled" to Plan benefits.

Also, Plaintiffs ask the Court to declare the Plan fails to comply with the requirements of ERISA Section 402(b)(3), 29 U.S.C. § 1102(b)(3).[7] (*Id.* ¶ 77-78). Plaintiffs contend the Governing Plan Document does not provide a procedure for amending the Plan and there are no Qwest corporate by-laws or corporate resolutions that provide a procedure for amending the Plan. (*Id.*). Finally, Plaintiffs ask this Court to declare that their rights to Plan benefits remain governed by the more favorable terms of the Governing Plan Document, as executed in June 1998, and that any subsequent document purporting to reduce Eligible Retirees' benefits payable

[7] ERISA Section 402(b)(3) states that "every employee benefit plan shall– provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3).

to their beneficiaries be declared null and void. (*Id.* ¶ 79).

Alas, paragraph 79 is the *only* paragraph that Defendants' motion to dismiss the First Claim for Relief focuses upon. (See Docket 79, Defts' Brief, p. 6). Having chosen only paragraph 79 to distill and attack, Defendants contend that the failure to comply with ERISA Section 402(b)(3), does not entitle Plaintiffs to any relief. In so doing, Defendants cite to *Curtiss-Wright Corporation v. Schnoonejongen.*, 514 U.S. 73, 115 S.Ct. 1223, (1995). But, Defendants have sorely misconstrued the Supreme Court's ruling and the disposition of that case. *Curtiss-Wright* was remanded for a determination on whether Curtiss-Wright's stated amendment procedure - amendment "by the Company" - was actually complied with. The Court stated:

> The answer will depend on a fact-intensive inquiry, under applicable corporate law principles, into what persons or committees within Curtiss-Wright possessed plan amendment authority, either by express delegation or impliedly, and whether those persons or committees actually approved the new plan provision contained in the revised SPD.

115 S.Ct. at 1231. As in *Curtiss-Wright,* Plaintiffs make challenges to Defendants' purported Plan amendment documents. Plaintiffs contend the October 2005 dated recommendation document was never adopted and made part of the Governing Plan Document. Furthermore, Plaintiffs contend that, since Defendants retroactively applied Plan Amendment 2006-1 adopted by the Qwest Plan Design Committee on December 13, 2006, Defendants violated the Prior Loss Proviso and short changed hundreds of Plan beneficiaries.

By explicitly requiring that each employee benefit plan provide for an amendment procedure, Congress rejected the use of informal written amendments, such as oral agreements and letters sent to plan participants. See *Hozier v. Midwest Fasteners, Inc*., 908 F.2d 1155, 1163 (3d Cir. 1990) (citing *Nachwalter v. Christie,* 805 F.2d 956. 960 (11th Cir.1986). A plan sponsor is "bound" to "whatever level of specificity [the] company ultimately chooses in an

amendment procedure." *Curtiss-Wright, supra,* 115 S.Ct. at 1231. The requirement of formal amendments reflects ERISA's overall goal of protecting "the interests of participants in employee benefit plans and their beneficiaries." *Miller v. Coastal Corp*., 978 F.2d 622, 624 (10th Cir. 1992) (quoting 29 U.S.C. § 1001(b)); *Cirulis v. Unum*, 321 F.3d 1010, 1014 (10th Cir. 2003) (right to amend requires compliance with amendment procedures) (citing *Krumme v. WestPoint Stevens, Inc*., 143 F.3d 71, 84 (2d Cir.1998). Therefore, when a purported Plan amendment document is being challenged, as it is in this case, Plaintiffs contend the Court should determine whether the challenged document complies with the Plan's stated amendment "procedure" and whether it was actually adopted and made part of the controlling Governing Plan Document.

Defendants end their argument for dismissal of the First Claim for Relief by stating "plaintiffs' First Claim does not merely fail to state a claim upon which relief can be granted; it is frivolous." (Docket 79, Defts' Brief, p. 9). That's worse than the pot calling the kettle black. Upon review of all the factual and legal allegations set forth in paragraphs 1 through 79 incorporated into the First Claim for Relief, it could not be any clearer that Plaintiffs have, indeed, stated a claim for declaratory and equitable relief that the Court has jurisdiction to provide pursuant to ERISA Section 502(a)(1)(B) and ERISA Section 502(a)(3). Therefore, Defendants' motion to dismiss the First Claim for Relief must be denied as frivolous.

B. Plaintiffs Have Sufficiently Stated Their Second Claim for Relief.

In Their Second Claim for Relief, which also incorporates the factual and legal allegations set forth in Paragraphs 1 through 80 of the Second Amended Complaint, Plaintiffs seek relief for a series of breaches of ERISA fiduciary duties. Plaintiffs ask for removal of the Plan administrators, appointment of an independent fiduciary and notice to the class. To re-cap,

Plaintiffs have alleged and detailed the following fiduciary breaches:

1. Making misrepresentations which deceived Pre-1991 Retirees and their beneficiaries, such as telling them they were "entitled to the benefits paid under the Group Life Insurance Program" while, if they were not "entitled", not ever clearing up the error by properly and timely representing and explaining the risk that their Plan benefits might be reduced pursuant to the 'reservation of rights' clause set forth within the Governing Plan Document;

2. Violating the Prior Loss Proviso and short changing hundreds of beneficiaries; and

3. Not acting in accordance with controlling Plan terms more favorable to the interests of Eligible Retirees and their beneficiaries.

In their motion to dismiss the Second Claim for Relief, Defendants focus only on the alleged misrepresentations set forth in paragraphs 84 through 86 and contend either Plaintiffs have not alleged reliance or that the Court has already foreclosed Plaintiffs, by virtue of dismissing their equitable estoppel claims, from receiving any relief due to any alleged misrepresentations. Contrary to Defendants' argument, the Second Claim for Relief is not a 'repackaging' of the estoppel claim. This claim is based upon facts beyond those alleged in support of the estoppel claim. Defendants do not address the other fiduciary breaches which are set forth in paragraphs 1 through 80 which, together with allegations of paragraphs 82 through 88, form Plaintiffs' Second Claim for Relief and their basis for seeking equitable relief under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), including removal of Plan fiduciaries.

ERISA provides that "[a]ny person who is a fiduciary with respect to [a covered employee benefit] plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title ... shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." ERISA Section 409(a), 29 U.S.C. § 1109(a). The accompanying legislative history expressly contemplated that such "other equitable or remedial relief" would include removal. "It is expected that a fiduciary ...

may be removed for repeated or substantial violations of his responsibilities and that upon removal the court may, in its discretion, appoint someone to serve until a fiduciary is properly chosen in accordance with the plan." S. Rep. No. 383, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 4890, 4989.

It is not necessary to show reliance to get appropriate equitable relief. Courts have recognized that under § 1132(a)(3), a plan participant or beneficiary may have Article III standing to obtain injunctive relief related to violations of ERISA's fiduciary duty requirements without a showing of individual harm. See *Central States SE. & SW. Areas Health & Welfare Funds v. Merck-Medco Managed Care*, LLC, 433 F.3d 181, 199-200 (2d Cir.2005); *Horvath v. Keystone Health Plan East, Inc*., 333 F.3d 450, 456 (3d Cir.2003). The *Horvath* court explained that because the disclosure requirements and fiduciary duties contained in ERISA create certain rights, including the right to receive information and have defendant act as a fiduciary, plaintiffs need not demonstrate actual harm in order to have standing to seek injunctive relief. *Horvath*, 333 F.3d at 456 (citing *Gillis v. Hoechst Celanese Corp*., 4 F.3d 1137, 1148 (3d Cir.1993) (finding "ERISA does not require that harm be shown before a plan participant is entitled to an injunction ordering the plan administrator to comply with ERISA's reporting and disclosure requirements")). See also *Shaver v. Operating Eng. Local 428 Pension Trust Fund*, 332 F.3d. 1198, 1203 (9th Cir. 2003) (holding that plan administrators's failure to have records of expenses listed on Form 5500, Schedule C gave rise to a breach of fiduciary duty claim and since the plan participant was seeking "purely equitable" relief – removal of the fiduciaries or an order requiring adequate record keeping in the future, either of which is permitted under 29 U.S.C. § 1109(a), and not monetary damages – the plan participant was not required to show any loss to the plan as a result of the alleged violation).

Nevertheless, Plaintiffs have alleged harm to themselves and numerous other Plan

participants and beneficiaries. Again, as more fully stated above, such allegations are contained in paragraphs 1 through 88 of the Second Amended Complaint.

For instance, when Plaintiff Kerber, Plaintiff Phelps and about 3,850 other managers ended employment at U S WEST during 1990 as part of their acceptance of the "5 + 5" early retirement program, they were told directly by the Plan administrator that the U S WEST Employees Benefit Committee had granted each an early retirement service pension and, furthermore, they were each entitled to the group life insurance benefits - Plan benefits. The parties and the Court should keep in mind that the Plan administrator's confirmation of the retirees' entitlement to Plan benefits was sent out at least 8 years before the Governing Plan Document was created, the Plan document containing a 'reservation of rights' provision.

Now that Qwest has taken over as Plan sponsor, the Qwest Employees Benefit Committee has refused to honor U S WEST's and the past fiduciary's commitment. Plaintiffs have correctly alleged that the current Qwest Employees Benefit Committee, operating under a serious conflict of interest, has demonstrated a complete breach of the ERISA duty of loyalty and, since January 1, 2007, has repeatedly breached their duty to pay beneficiaries of deceased "5 + 5" early retirement recipients, Pre-1991 Retirees, the full amount of Plan benefits to which the Eligible Retirees became entitled. (SAC ¶¶ 10, 71-72 and 74).

For example, as alleged in SAC ¶ 10, Sharon Strizich, deceased spouse of Plaintiff Samuel G. Strizich, was a Pre-1991 Retiree and she retired as of February 28, 1990. She, too, was a "5 + 5" early retirement recipient, one of the 3,850 persons U S WEST told were entitled to the Plan benefits. Yet, after she died in March 2007, Plan fiduciaries/administrators paid Mr. Strizich only $10,000 in basic life insurance benefits, a clear breach of the past fiduciary's commitment to Sharon Strizich. (SAC ¶ 73). This is one of the reasons Plaintiffs seek removal of Plan fiduciaries/administrators.

In *Farr v. U S WEST Communications, Inc*., 151 F.3d 908 (9th Cir.1998), the appellate court held that the defendant's failure to explain to the plaintiffs in either written or verbal communications the potentially negative tax consequences they might face by choosing to participate in the "5 + 5" early retirement program was a breach of the defendant's fiduciary duties. *Id.* at 914. *Farr* involved the same "5 + 5" early retirement program extended to Plaintiff Kerber and Plaintiff Phelps in 1990. In *Farr*, the fiduciary duty breaches concerned misrepresentations and omissions only with respect to the service pension benefit component of the "5 + 5" program. Now, litigation centers around the group life insurance benefit component.

If the Court does not issue orders and declare, as part of the First Claim for Relief, that Plaintiff Kerber, Plaintiff Phelps and 3,850 early retirement recipients are *entitled* to the Plan benefit component of the "5 + 5" early retirement program, then they ask the Court consider that they were deceived and that there has been a long standing failure of Plan administrators to adequately explain the retirees' rights and the risk of losing their life insurance benefits. Plaintiffs contend those omissions, together with the other alleged misinformation (e.g., 2001-2004 confirmation statements sent out to Pre-1991 Retirees) and other specified breaches of fiduciary duty should be taken into account when the Court grants an appropriate equitable remedy.

Upon review of <u>all</u> of the allegations of paragraphs 1 through 88 made part of the Second Claim for Relief, under the standard articulated in *Twombly*, this Court should find Plaintiffs have set forth sufficient factual information to show a basis for finding breaches of ERISA fiduciary duties under Section 404(a)(1), 29 U.S.C. § 1132(a)(1) and granting them appropriate equitable relief, including removal of Plan administrators, appointment of an independent fiduciary and notice to the proposed class. Therefore, Defendants' motion to dismiss the Second Claim for Relief must be denied.

C. Plaintiffs Have Sufficiently Stated Their Seventh Claim for Relief.

ERISA "was enacted '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 (1989). The statute imposes fiduciary responsibilities for plan administrators. Among the various duties that ERISA imposes on fiduciaries of employee benefit plans is a duty of loyalty, under which a "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA Section 404(a)(1), 29 U.S.C. 1104(a)(1). The statutory section further provides that fiduciaries must discharge their duties "(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . . (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter." ERISA Section 404(a)(1)(B) and (a)(1)(D), 29 U.S.C. § 1104(a)(1)(B) and (a)(1)(D). "As this section suggests, the duties of an ERISA fiduciary are not limited by that statute's express provisions but instead include duties derived from common law trust principles. "[R]ather than explicitly enumerat[e] all of the. . . duties [of ERISA fiduciaries], Congress invoked the common law of trusts to define the general scope of their. . . responsibility." *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990), quoting *Cent. States, SE & SW Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 570, 105 S.Ct. 2833, 2840 (1985) (additional citations omitted).

Contrary to Defendants' twisted argument for dismissal of Plaintiffs' Seventh Claim for Relief, the claim is not directed against Qwest, as Plan sponsor. The claim is directed against the

designated Plan fiduciaries, members of the Qwest Employees Benefit Committee. Plaintiffs do not contend that when Qwest purportedly made changes to the Plan the actors involved were acting in their capacity as Plan fiduciaries. Far from it. It is well established that when the purported Plan amendments were being made the characters involved were acting as the Plan sponsor, in a non-fiduciary role.

Plaintiffs' chief complaint made part of their Seventh Claim for Relief is that, although the Plan fiduciaries had plenty of time before the recommended benefit reduction change was memorialized into a Plan amendment and action carried out, they did absolutely nothing to promote the best interests and protect the welfare of Plan participants and their beneficiaries, many of whom are elderly. The Plan fiduciaries did not investigate or advocate a means for Plan participants to secure either conversion or continuation privileges with either Prudential, the current insurer of the group policy, or some other insurance provider. (SAC ¶¶ 104-105). Wouldn't a prudent Plan fiduciary charged with a duty of loyalty and having responsibility to act in the best interests of Plan participants and beneficiaries want to use all available time (at least several months) to try via any means available to protect their expected life insurance interests, especially since many are elderly and have preexisting medical conditions? Plaintiffs believe so, and that's their contention in this case. Certainly, Plan fiduciaries were not ignorant of the loss of life insurance predicament facing many elderly and seriously ill Plan participants. (SAC ¶ 106). Considering these special circumstances, the duty to take action is well rooted in the common law of trusts, as reiterated by the distinguished appellate panel in *Eddy*:

> as Judge Cardozo noted more than 70 years ago: "The trustee is free to stand aloof, while others act, if all is equitable and fair. He cannot rid himself of the duty to warn and to denounce, if there is improvidence or oppression, either apparent on the surface or lurking beneath the surface, but visible to his practiced eye."

Eddy, 919 F.2d at 752 (citing *Globe Woolen Co*., 224 N.Y. at 489, 121 N.E. at 380).

Moreover, in support of this claim, Plaintiffs incorporate all the allegations of their First through Sixth Claims for Relief, paragraphs 1 through 99 of the Second Amended Complaint. The allegations bear out that Qwest Employees Benefit Committee members, the successor fiduciary, had direct knowledge that the predecessor fiduciary, U S WEST Employees Benefit Committee members, directed official confirmation notice sent in 1990 to Plaintiff Kerber, Plaintiff Phelps and 3,850 others stating that each was, indeed, entitled to Plan benefits as a component to the "5 + 5" early retirement program. Yet, the seriously conflicted Plan fiduciary sat idle, awaiting adoption of a known recommendation to reduce benefits. The Plan fiduciary did nothing to protect the long standing commitment U S WEST made to thousands.

Accordingly, Plaintiffs on behalf of themselves and the proposed class of Eligible Retirees and their beneficiaries, ask this Court to declare Plan fiduciaries/administrators breached their ERISA fiduciary duties under ERISA Section 404(A)(1), 29 U.S.C. § 1132(a)(1), to act in the best interest of Plan participants and their beneficiaries, and to order appropriate equitable relief, including removal of Plan fiduciaries/administrators, appointment of an independent fiduciary and notice to the proposed class. (SAC ¶ 107).

Plaintiffs have sufficiently stated numerous allegations and instances of breaches of ERISA fiduciary duties in support of their viable claim. Therefore, Defendants' motion to dismiss the Seventh Claim for Relief must be denied.

IV. CONCLUSION and REQUEST FOR ORAL ARGUMENT

For all the foregoing reasons, the Court should deny Docket 79, Qwest Defendants' Motion to Dismiss filed on May 16, 2008. Due to the importance of the issues in this civil action, which case is being monitored by thousands of putative class members, an oral argument hearing is requested.

DATED this 5th day of June, 2008.

s/ *Curtis L. Kennedy*
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 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. I also certified that on this 5th day of June, 2008, a true and correct copy of the above and foregoing document was delivered to Qwest Defendants' counsel of record via email as follows:

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Also, copy of the same was delivered via email to all Named Plaintiffs.

s/ *Curtis L. Kennedy*