

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

EDWARD J. KERBER, *et al*, Individually,
and as Representatives of plan participants
and plan beneficiaries of the
QWEST GROUP LIFE INSURANCE PLAN,

Plaintiffs,

vs.

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

Defendants.

FINAL PRETRIAL ORDER

I. DATE OF CONFERENCE AND APPEARANCE OF COUNSEL.

A final pretrial conference in the above case was held on March 17, 2009, at 9:00 a.m. in Courtroom C-204 of the United States Courthouse, 1929 Stout Street, Denver, CO. Appearing for the Parties were:

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2. STATEMENT OF JURISDICTION and VENUE.

The Parties agree that the Court has subject matter jurisdiction over Plaintiffs' claims and that this is the proper venue.

The Court has jurisdiction of the claims for relief based upon the civil enforcement provisions of ERISA, 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), 1132(a)(3), 1132(e)(1), 1132(f), 1132(g) and upon 28 U.S.C. §§ 1331.

Venue of this action lies in the District of Colorado, pursuant to 28 U.S.C. § 1391(b) and 29 U.S.C. § 1132(e)(2), in that acts complained of herein occurred within this District and the subject employee benefit plan is administered in this District.

3. STATEMENT OF CLAIMS AND DEFENSES.

A. Plaintiffs' Statement of Their Claims.

This case involves legal challenges brought pursuant to the Employee Retirement Income Security Act ("ERISA") contesting decisions made and actions taken concerning the Qwest Group Life Insurance Plan ("Plan"), an employee welfare benefit plan which provides "Basic Life Insurance Coverage" for "Eligible Retirees." The Plaintiffs include five Plan participants (Kerber, Phelps, Meister, West and Ingemann) and two persons (Lensink and Strizich) who are beneficiaries of deceased "Eligible Retirees," a group defined by the June 12, 1998 Plan Document.¹ Collectively, Plaintiffs assert in the Second Amended Complaint (SAC) eight claims for relief based upon ERISA. Plaintiffs have moved for class certification, seeking to

¹ Plaintiff Samuel G. Strizich is a beneficiary of Sharon Strizich, a deceased former U S WEST management worker. Mr. Strizich is also a retired former U S WEST Executive Director and, he too, is a Plan participant. Therefore, he brings suit in both capacities, as a plan participant and as a plan beneficiary.

benefit a proposed class of at least 48,000 Eligible Retirees scattered all over the United States. (Doc. # 63 and #64).

The dispute concerns the Plan's "Basic Life Insurance Coverage" which benefit has long been a stable feature of retirement from Qwest and predecessors-in-interest (U S WEST, Mountain Bell, Northwestern Bell, Pacific Northwest Bell and AT&T) (Doc. # 69, Second Amended Complaint, ¶¶ 14 and 29). The Basic Life Insurance Coverage benefit is payable no matter what the underlying cause of the death of the Eligible Retiree. (*Id.* ¶ 31). For decades, this benefit has been the monetary equivalent of the Eligible Retiree's last annual salary before his or her retirement date. Starting at age 66 years and one month, the benefit is reduced by 10% each year until at age 70, when the benefit is decreased to the equivalent of one half the person's former last annual salary. (*Id.*).

The group life insurance plan is controlled by a June 12, 1998 Plan document, together with appendices created by former Plan sponsor U S WEST. (hereinafter called "1998 Master Plan Document."). The 1998 Master Plan Document expressly incorporates the terms of the Company's group insurance contract, thereby requiring the Plan sponsor to comply with the terms of the Group Contract between Qwest and Prudential Insurance Company.

In year 2005, Qwest leadership decided to *reduce* basic life insurance coverage to a mere \$10,000 and apply that change effective January 1, 2006 as to Post-1990 Occupational Retirees. However, no purported Plan amendment was adopted until more than a year later, on December 13, 2006. (*Id.* ¶¶ 58-60). Plan Amendment 2006-1 adopted by members of the Qwest Plan Design Committee on December 13, 2006 states:

Effective January 1, 2006, with respect to Occupational Employees upon their retirement, the Basic Life Coverage is a flat \$10,000 Benefit. **Effective January 1, 2006, with respect to Post-1990 Occupational Retirees, the Basic Life**

Coverage is a flat \$10,000 Benefit. To the extent a Post-1990 Occupational Retiree has elected and maintained participation in Supplemental Life Coverage, the amount of such Benefit shall not be impacted due to this change in Basic Life Coverage.

(DN 16-31, QL02127 [**emphasis added**]). Accordingly, the purported Plan amendment was applied retroactively, despite prohibiting language in both the 1998 Master Plan Document and the Group Contract.

Before this litigation was commenced, there was a massive outcry in which Qwest leadership (officers and members of the Board of Directors) received countless written impassioned protestations from retirees. Qwest leadership did not respond to any of the thousands of letters and email messages and complaints received from the retirees and there is no effective internal claims process to address the Plaintiffs' claims. Hundreds of persons, perhaps a thousand beneficiaries and estates, received less than the proper amount of Basic Life Insurance benefits payable at the deaths of Eligible Retirees. This litigation commenced in March 2007.

Before there could be any formal discovery, Defendants filed a motion for partial dismissal. Defendants moved to dismiss Plaintiffs' claim that Qwest, as Plan sponsor, was barred from reducing Eligible Retirees' benefits. Defendants also moved to dismiss Plaintiffs' ERISA equitable estoppel claim. While the motion to dismiss was pending, there was a stay of all formal discovery.

Plaintiffs opposed the motion for partial dismissal arguing, *inter alia*, that rules set forth on Appendix 7 to the 1998 Master Plan Document served as a restraint on the Plan's sponsor's right to reduce benefits. Plaintiffs also argued that a "Prior Loss Proviso" set forth within the "Reservation of Rights" clause (ROR) to the 1998 Master Plan Document also serves as a

restraint on the right of the Plan sponsor to reduce benefits since the proviso protects Plan participants' benefits from being reduced before a Plan amendment is "adopted."

By Amended Order dated February 27, 2008 (Docket 47), the Court granted Defendants' motion for partial dismissal. The Court interpreted the 1998 Master Plan Document's ROR and ruled that Plaintiffs' claims asserting that Qwest was contractually barred from reducing Plaintiffs' Basic Life Insurance benefits to a flat \$10,000 did not state a claim upon which relief could be granted. The Court ruled that the rules set forth on Appendix 7 were specifically tied to the formula for determining Eligible Retirees' benefits, since Appendix 7 is referenced within the 1998 Master Plan Document's text setting forth the formula for calculating Eligible Retirees' benefits. The Court refers to the rules set forth in Appendix 7 providing Eligible Retirees minimum life insurance benefits as the "Minimum Benefit Promise." The Court ruled that while Appendix 7 does not restrain the Plan sponsor's rights under the ROR, the "Prior Loss Proviso" does serve as a restraint on the Plan sponsor's rights to reduce benefits. The Court also ruled that Plaintiffs' claims of equitable estoppel under ERISA failed to state a claim upon which relief could be granted. The Court ruled Plaintiffs' other asserted claims remain pending in this case.

Then, the parties engaged in further disclosures and formal discovery proceedings. Formal discovery reveals that the 1998 Master Plan Document, from the date it was originally drafted until June 7, 2007, included an additional Appendix 8 also states rules forbidding reduction of Eligible Retirees' benefits below stated minimums. (DN 95-3; DN 102-2, at QL10151). But, unlike Appendix 7, which this Court ruled was specifically tied to the formula for Eligible Retirees' benefits, Appendix 8 is not tied to any formula. Appendix 8 was the subject of the only discovery dispute between the parties to this case, which dispute was brought

to the attention of Magistrate Judge Mix who held a hearing and then ruled. Defendants were ordered to respond to Plaintiffs' discovery requests concerning Appendix 8. (DN 124).

Defendants contend Appendix 8 is a "mistake" and should be disregarded. But, at no time in this action did Defendants ask this Court to reform the 1998 Master Plan Document so as to disregard Appendix 8. Plaintiffs contend that the Plan with all its Appendices, just like a contract, should be read as a whole with all its parts given effect. Plaintiffs contend the rules set forth in Appendix 8 evinces an intent on the part of the Plan sponsor to protect Eligible Retirees' rights to minimum benefits and this Court should enforce the rules.

Plaintiffs were granted leave to file a Second Amended Complaint which was deemed filed on April 3, 2008 (Docket #69). Plaintiffs seek for themselves and a proposed class of all other Eligible Retirees-Plan Participants and their beneficiaries a panoply of declaratory, injunctive and other equitable relief under ERISA. Plaintiffs vehemently disagree with Defendants' re-characterization of Plaintiffs' claims in Defendants' pending dispositive motions and as set forth herein in the subsection entitled "Defendants' Statement of Defenses."

In the **First Claim for Relief** - which is a proposed class claim, Plaintiffs seek a declaration of all Eligible Retirees' rights to Plan benefits. Plaintiffs specifically contend that when former Plan sponsor U S WEST carried out "5+5" special early retirement offering in 1990 to which Plaintiffs Kerber, Phelps, Strizich and 3,850 others accepted, the Plan administrator sent a confirmation statement stating the U S WEST Employees Benefit Committee had granted the retirees a special early retirement pension and, more specifically confirmed that, "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 "5+5" recipients does not include any disclaimer suggesting that a Plan document controlled

over the confirmation statement. (DN 79-8, Bates K00419). Furthermore, when persons retired before January 1991, they were not provided a Summary Plan Description (“SPD”) for the group insurance plan. Instead, persons retiring from U S WEST companies were habitually provided brochures promising the retiree that after he or she turned age 70 their earned basic life insurance benefit would no longer be reduced, but remain at that set level for the rest of his or her life. During four consecutive years after Plaintiffs Kerber, Phelps, Strizich retired, Plan fiduciaries sent them and all other Pre-1991 Retirees a confirmation statement representing that their basic life insurance benefits could *not* be amended, suspended or discontinued. Plaintiffs contend this action demonstrated intent on the part of the Plan sponsor to vest the promised group life insurance benefits.

In their dispositive motions and in their “Statement of Defenses” set forth hereinbelow, Defendants grossly mischaracterize Plaintiffs’ First Claim for Relief. Defendants misread Plaintiffs’ contention 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 a declaration that the Plan fails to comply with the requirements of ERISA Section 402(b)(3), § 1102(b)(3), and to declare Eligible Retirees rights to Plan benefits are not governed by documents purporting to be Plan amendments reducing their benefits. Plaintiffs ask the Court to apply principles of *contra proferentum* to conflicting terms of the 1998 Master Plan Document and the terms of any document Defendants contend served as a Plan amendment reducing Eligible Retirees’ Plan benefits.

Plaintiffs contend Defendants failed to have in place and follow an “adoption” procedure for making Plan amendments and that Defendants did not effectively adopt a bona fide plan amendment so as to reduce basic life benefits to a flat \$10,000 before sending reduced payments

to beneficiaries of retirees who deceased after January 1, 2006.

ERISA Section 402(b)(3) requires that every employee benefit plan “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). *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 80 (1995). “Requiring every plan to have a coherent amendment procedure serves several laudable goals[,]” including “increas[ing] the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve.” *Id.* at 82.

Accordingly, Plaintiffs contend that a proposed amendment not done in accordance with a plan's amendment procedure is ineffective and does not amend a plan. See *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 516 (1997) (“the ‘cognizable claim [under ERISA] is that the company did not [amend its welfare benefit plan] in a permissible manner’ ”) (quoting *Curtiss-Wright Corp.*, 514 U.S. at 78) (alterations in original); see also *Depenbrock v. Cigna Corp.*, 389 F.3d 78, 82 (3d Cir.2004) (“an amendment is ineffective if it is inconsistent with the governing instruments”); *Miller v. Coastal Corp.*, 978 F.2d 622, 624 (10th Cir.1992) (“An employee benefit plan cannot be modified ... by informal communications, regardless of whether those communications are oral or written, [because] ERISA requires all modifications to an employee benefit plan to ... conform to the formal amendment procedures”) (citations omitted).

Accordingly, Plaintiffs contend that the 1998 Master Plan Document, when read together with the Group Contract, requires the following several conjunctive conditions precedent to a valid plan amendment reducing Plan benefits payable to beneficiaries of deceased retirees:

First, there must be a valid amendment, not a mere recommendation for a proposed amendment. Plaintiffs contend the October 14, 2005 document signed by members of the Qwest Plan Design Committee was a “recommendation,” unfinished business. The

recommendation for a proposed amendment was not properly carried out before January 1, 2006 when Qwest started paying beneficiaries reduced life insurance benefits.

Second, under the terms of the Group Contract, which insurance contract is expressly made part of the 1998 Master Plan Document, before paying out reduced benefits there must be an amendment to the Group Contract executed by both an officer of Qwest and an officer of Prudential. The 1998 Master Plan Document expressly incorporates the Group Contract terms: “Plan” means the U S WEST Group Life Insurance Plan set forth herein, together with the Contracts, if any, and the Appendices attached hereto, as amended from time to time.”(DN 108-2, at QL10119). See also Section 5.2 of the 1998 Master Plan Document stating “payment of benefits shall be in accordance with the Plan and the applicable Contracts” (*Id.* , at QL10132). “Contract” means and includes the insurance policy agreement between the Plan sponsor and an insurance company. (*Id.* at QL10116). The Group Contract expressly states there can be no change in benefits unless there is an amendment executed by both Qwest and Prudential. (DN 108-6 at QL08262 “an amendment will not affect a claim incurred before the date of change.”). There was no valid amendment signed by both parties until January 21, 2009, well after the fact. ²

Third, due to the 1998 Master Plan Document’s “Prior Loss Proviso” which is a restraint on the power of Qwest to make benefit changes, any bona fide amendment allowing for payment of reduced benefits must first be “adopted.” The Plan’s Prior Loss Proviso set forth in the reservation of rights provision (ROR) prohibited Defendants from:

“reduc[ing] the benefits of any Participant with respect to a loss incurred prior to the date such amendment is adopted.” (DN, at QL10139).

Defendants agree that this is an express limitation on Qwest’s rights under the ROR clause. (DN 16 at p. 16; See also DN 47, Amended Order at pp. 10-11). The 1998 Master Plan Document expressly requires an adoption date for a plan amendment, presumably so that every beneficiary can definitely determine whether his or her right to receive an unreduced benefit payment vested before

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Defendants cannot now change their position and argue the document signed by Prudential on February 7, 2007 (again, after the fact) is not really an “amendment” but, instead is an “endorsement” that need only be signed by an officer of Prudential. Defendants should be estopped, as Defendants, *and* Prudential have repeatedly called that very document an “amendment.” In several filings with this Court, Defendants characterized the document as an amendment and they submitted an affidavit from a Prudential representative saying “Qwest did not sign the 2007 Amendment.” (DN 108-14, Ewing Dec. at ¶ 6). Moreover, the document on its face says it is an “AMENDMENT TO GROUP CONTRACT NO. G-93634.” It does not purport to be an “endorsement.”

the operative adoption date. Thus, the key date for this Court to consider is the date of “adoption” of a plan amendment, not some other date.³

To date, there has not yet been an amendment executed by *both* Qwest and Prudential and, then, adopted by Qwest. The January 21, 2009 amendment to the Group Contract signed by both Qwest and Prudential has not yet been “adopted” by the Company.

Defendants cannot succeed with their argument in defense that, while the Plan’s documents have not been in order, there has been ‘substantial compliance’ and that there was a good faith effort to try and inform affected retirees that Qwest intended to reduce life insurance benefits. Plaintiffs contend that written representations from the employer to employees and retirees, such as the letters signed by Qwest EVP Teresa Taylor, do not effectively modify or supersede existing Plan document terms.

The Tenth Circuit opines that ERISA “leaves no room for a substantial compliance argument given the requirement that a fiduciary apply the terms of a written plan and the unambiguous nature of the provision before us.” *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002). Moreover, the Tenth Circuit has recognized that 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) (stating that ERISA requires all modifications to an employee benefits plan to be

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Defendants’ argument about corporate *ratification* via subsequent acts is not in conformity with the specific requirements of either the Prior Loss Proviso’s “adoption” date requirement or the Group Contract’s requirement for an amendment executed by both Qwest and Prudential. Here, the issue is not when a purported amendment was made, but whether or not an amendment was properly executed by both parties and whether or not it was *adopted* for purposes of the Prior Loss Proviso. A Plan beneficiary should not be required to make a guess about the actual adoption date of any purported Plan amendment.

written and must conform to the formal amendment procedures). Any implied contract or 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.” *Averhart v. U S WEST Mgmt. Pension Plan*, 46 F.3d 1480, 1485 (10th Cir. 1994) (noting that ERISA preempts any state law case decisions to the contrary). ERISA Section 514(a) , 29 U.S.C. § 1144(a), preempts any state law that Defendants might rely upon to argue there was an implied contract or informal oral agreement to change and reduce retiree benefits. Although state common law sometimes fills the gaps of ERISA to assist in the interpretation of ERISA plans, federal courts may not apply common law theories to alter the express terms of written benefit plans. Plaintiffs contend that where the common law and the terms of the trust conflict, the terms of the trust instrument control.

Indeed, the express terms of the Plan must be enforced, no matter whom those terms benefit. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002) (“we have been most reluctant to enforce deviations from plan language (whether considered plan amendments, modifications or deviations) on estoppel theories”).

When making the limited \$10,000 payment to well over a thousand beneficiaries, Defendants acted contrary to the express terms of the Group Contract and contrary to favorable terms existing in the 1998 Master Plan Document. The ERISA statute requires plan fiduciaries to act solely “in accordance with the *documents and instruments* governing the plan” 29 U.S.C. § 1104(a)(1)(D) (emphasis added).

Plaintiffs contend all of Defendants’ purported *post hoc* amendments must be declared invalid because 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 court 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 do not affect plan terms existing when insured died).

Plaintiffs invoke the teachings and pronouncements by the United States Supreme Court in the case of *Kennedy v. Plan Administrator for DuPont Savings and Investment*, --- S.Ct. ----, 2009 WL 160440, Case No. 07-636 (January 26, 2009), where the Court confirmed that ERISA provides no exception to the plan administrator's duty to act in accordance with plan documents:

The plan administrator is obliged to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA]," § 1104(a)(1)(D), and the Act provides no exemption from this duty when it comes time to pay benefits.

(*Id.*, Slip Op. at p. 11). In *Kennedy*, the Court also confirmed that ". . . ERISA forecloses any justification for enquiries into nice expressions of intent.," (*Id.*). Due to ERISA preemption, and the Supreme Court's recent ruling in *Kennedy*, Defendants cannot rely upon their argument state case law support their proposition that, notwithstanding express governing terms of the Group Contract requiring amendments be signed by both Qwest and Prudential and the express terms of the Prior Loss Proviso in the 1998 Master Plan Document requiring any amendment to reduce benefits be "adopted", there is some circumstantial evidence that proves Prudential and Qwest had an informal understanding that retiree benefits were reduced. *Kennedy* mandates that

Plan benefits should have been paid out in exact compliance with Plan terms existing when Eligible Retirees died. Plaintiffs also invoke *Phillips v. Teamster Local 639*, 79 F.Supp.2d 847, 852-53 (N.D. Ohio 2000), where the court declined to enforce an amended pension policy provision because the administrator had failed to follow the required procedures for amending the plan.

Finally, to the extent there is an ambiguity between favorable terms existing in both the 1998 Master Plan Document and the unamended Group Contract and less favorable terms set forth in any attempted amendment to reduce benefits, Plaintiffs contend this Court should apply principles of *contra proferentum*, and construe the ambiguities and inconsistencies in favor of the Plan beneficiaries and against the drafter. *Miller v. Monumental Life Ins. Co.*, 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”). See also *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518 (10th Cir.1996) (holding that drafter of the plan document must bear the burden of any uncertainty created by “careless or inaccurate drafting.”).

In summary, Plaintiff contend that, to the extent the Group Contract had not been properly amended and the 1998 Master Plan Document continued to have more favorable benefit terms for Eligible Retirees’ beneficiaries, which terms conflicted with the terms of the attempted ‘amendments,’ this Court should declare that all Plan beneficiaries should have been paid benefits fully in accordance with the more favorable terms.

In their **Second Claim for Relief**, which also incorporates the factual and legal allegations of the First Claim for Relief, Plaintiffs seek relief for a series of breaches of ERISA

fiduciary duties. Plaintiffs ask for removal of the conflicted Plan administrators, appointment of an independent fiduciary, equitable relief as allowed under ERISA Section 502(a)(3)⁴ 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 a ROR;
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.

Contrary to Defendants’ contention in their “Statement of Defenses” set forth hereinbelow, the Second Claim for Relief is not a ‘repackaging’ of the estoppel claim previously dismissed by this Court. The Second Claim for Relief is based upon facts beyond those alleged in support of the estoppel claim.

When Plaintiffs Kerber, Phelps and Strizich, all participants in U S WEST’s “5+5 early retirement program” were being courted and asked to accept the offer, U S WEST put out a video broadcast for the specific purpose of informing the workers about their rights under the early retirement offer. In so doing, U S WEST interpreted and explained the ROR as follows:

Moderator Don Johnson: Charlie, 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

⁴ ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3) authorizes a civil action:

“by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter 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 subchapter or the terms of the plan.”

some people worried about that. Can you speak to that statement?

H. R. Executive Director Charlie Kamen: Sure. That's 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. *It's really intended to make the plans more meaningful and more affordable not only for the employee but for the company.*

(emphasis in original voice recording) (DN 107-33 at 17 mins., 37 secs. through 18 mins, 34 secs). At the same time, Plaintiffs Phelps and Kerber received further assurances, including a direct pledge made to Mr. Phelps from the Chairman of the U S WEST Employee Benefits Committee, J. Thomas Bouchard, that none of the promised benefits under the “5+5” could be taken away from Mr. Phelps if he accepted the early retirement offer.

Mr. Bouchard, Mr. Kamen and others were clearly acting as fiduciaries for purposes of communicating with Plan participants. In *Varity Corp. v. Howe*, 516 U.S. 489, 497-504, 116 S.Ct. 1065, 1071-73, (1996), the Supreme Court held that an employer acted in a fiduciary capacity when making misrepresentations to its employees about their benefit plan; *In re Unisys Corp. Retiree Med. Benefits “ERISA” Litig.*, 57 F.3d 1255, 1261 n.10 (3d Cir.1995) (concluding that conflicting statements give rise to an ERISA action because ERISA plan administrators have an independent fiduciary obligation “not to misinform employees through material misrepresentations and incomplete, inconsistent, or contradictory disclosures.” *Id.* at 1264). Plaintiffs contend that U S WEST’s explanation about the ROR was either intended to fully defuse any worker’s or retiree’s concerns about the ROR or evinces an intent to confuse or deceive on U S WEST’s part, since there was a very positive spin given to the ROR.

Plaintiffs contend that members of the Qwest EBC, the successor fiduciary, should be

charged with knowledge of the predecessor fiduciary's decisions, explanations and actions. Yet, the seriously conflicted members of the successor Qwest EBC do not continue to honor U S WEST EBC's decisions with respect to Pre-1991 Retirees.

In addition, if the Plan benefits were not, in fact, vested or an entitlement for the 5+5 program participants and other Pre-1991 Retirees, Qwest fiduciary/plan administrators exacerbated the situation by negligently allowing confirmation notices to be sent four successive years to thousands of Plan participants. Plaintiffs Kerber, Phelps and Strizich seek an order declaring Plan fiduciaries and administrators breached their fiduciary duty under ERISA Section 404(a)(1) to act in the best interests of Plan participants, since Plan fiduciaries and administrators repeatedly sent Plaintiffs Kerber, Phelps and all other Pre-1991 retirees official written representing that their basic life insurance benefits could *not* be amended, suspended or discontinued. Plaintiffs contend those confirmation notices were meant to reassure Pre-1991 Retirees about their Plan benefits. See *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 492 (3d Cir.2000) (recognizing breach of fiduciary duty where there were misrepresentations that would confuse a reasonable beneficiary about his or her benefits). Since Qwest has taken the position that the life insurance can be reduced, it was just plain wrong to say the opposite and confuse thousands of retirees.

Plaintiffs have presented to Defendants affidavits explaining the harm to Plaintiffs and their spouses. Plaintiffs discussed with their spouses the coverage under the U S WEST group life insurance and they gave up an opportunity to accommodate their estate planning and insurance needs through an independent insurance carrier because of their reasonable reliance on U S WEST's representations. In addition, they made choices about the form of pension payment and survivor's options in reasonable reliance on U S WEST representations about the life

insurance. It is too late for Plaintiffs to either make a different pension selection or make other life insurance arrangements. For these reasons, the Court should conclude that Plaintiffs have shown harm and detrimental reliance. *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 237 (3rd Cir. 1994) (ruling that “giving up an opportunity to accommodate their insurance needs through an independent insurance carrier” to be detrimental reliance).

The facts show extraordinary circumstances, as Plaintiffs Kerber, Phelps, Strizich and numerous other 5+5 retirees were being enticed to end their employment careers early and accept promised benefits. They were especially vulnerable due to the importance of the choices they had to make - whether to accept the pension payment in a lump sum fashion or select a monthly annuity and whether to select a survivor’s annuity factoring in the promised life insurance.

Plaintiffs contend that since Plan sponsor U S WEST intended to vest life insurance benefits, certainly for all those persons who retired under the 5+5 early retirement offering, the Court may reform the Plan so that it properly reflects Plaintiffs’ entitlement as confirmed by the March 26, 1990 official notice. The Court should also direct there be notice sent to the putative class.

Should the Court not issue orders and declare, as part of the First Claim for Relief, that Plaintiffs Kerber, Phelps, Strizich 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 correct the wrong and adequately explain the retirees’ rights and their 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, including removal of conflicted Plan fiduciaries, appointment of an independent fiduciary and notice to the proposed class.

In their **Third Claim for Relief** for declaratory relief under ERISA Section 502(a)(1)(B), Plaintiffs contend the October 14, 2005 dated document, a recommendation by the Qwest Plan Design Committee, did not amount to an “adopted” Plan amendment. Plaintiffs have moved for summary judgment on this issue.

Defendants contend that Qwest Plan Design Committee members *intended* the October 14, 2005 dated document to serve as an amendment to the Plan so as to reduce life insurance benefits to \$10,000 for Post-1990 Occupational Retirees effective January 1, 2006.” (Docket 91-2, Ammidown declaration, ¶ 7; Docket 91-9, O’Herron declaration, ¶ 3; and Docket 91-20, Taylor declaration, ¶ 5). But those sworn statements lack credibility because the October 14, 2005 dated document represented unfinished business and it was not adopted. Moreover, the Supreme Court has stated clearly that “. . . ERISA forecloses any justification for enquiries into nice expressions of intent.” *Kennedy v. Plan Administrator for DuPont Savings and Investment*, --- S.Ct. ----, 2009 WL 160440, Case No. 07-636 (January 26, 2009). Thus, this Court cannot consider the intent of the Qwest Plan Design Committee members.

Instead, the October 14, 2005 dated document “must be examined and construed in harmony with the plain and generally accepted meaning of the words used.” *East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.*, 109 P.3d 969, 974 (Colo. 2005). That document does not state what recommendations were then approved. The document is missing language such as “RESOLVED, that the Plan Design Committee approves of the proposed plan design recommendations for the 2006 plan year,” so as to make clear what, if anything, was actually

approved. Moreover, the October 14, 2005 specifically contemplates that a final form of Plan amendment and restatement would be approved and executed, which is exactly what happened on December 13, 2006. Thus, the document unambiguously proves it is a recommendation and unfinished business. The Court should not consider Defendants' *ad hoc* extrinsic evidence.

Defendants' witnesses declarations should also be disregarded because a credibility issue lies at the heart of their *ad hoc* testimony. Defendants' records belie the *ad hoc* testimony. The Agenda for the October 14, 2005 meeting refers to their being "resolutions" concerning the Qwest Group Life Plan, whereas there was an "amendment" to the Qwest Savings and Investment Plan. (Exhibit ___, Bates QL07222). It was specifically contemplated there would be a new Plan document, a plan restatement to be prepared by Mr. Ammidown. (Exhibit ___, Bates QL07254). Mr. Ammidown's states he thought about drafting a new restated Plan document in its entirety, one that would incorporate the terms of the October 2005 Resolutions, but that job was never carried out. (Docket 91-2, ¶ 12).

Lastly, the October 14, 2005 dated document was not considered to be an effective and adopted plan amendment because Qwest failed to say anything about the matter when the Company sent out a Summary of Material Modifications (SMM) two months later. In the December 2005 distributed SMM there were no disclosures about any material changes for the Plan to be effective in year 2006. (DN ___, K01618-1633). That's simply because the Plan had not yet been properly amended.

In their **Fourth Claim for Relief** for declaratory relief under ERISA Section 502(a)(1)(B), Plaintiffs contend that the document labeled as Amendment 2006-1 executed and adopted by the Qwest Plan Design Committee on December 13, 2006 left in place inconsistent terms within the 1998 Master Plan Document and, accordingly, due to the conflicting terms and

ambiguity, the more favorable terms concerning Eligible Retirees' basic life insurance coverage continued to govern. Not only did Amendment 2006-1 fail to remove prior more favorable terms, it failed to serve as an amendment to the Group Contract which continued to state more favorable terms for Eligible Retirees. Plaintiffs have moved for summary judgment on this issue.

To the extent that Defendants hang their hats on the December 13, 2006 adopted Plan Amendment 2006-1, it was improperly applied retroactively to January 1, 2006 in violation of the ROR's Prior Loss Proviso. Furthermore, Amendment 2006-1 left in place the more favorable terms of the 1998 Master Plan Document, which terms were not removed until adoption of Amendment 2007-1 on July 6, 2007. Still yet, in order to effectuate a change so as to reduce Plan benefits, *all* of the pertinent Plan documents had to be in order and properly adopted. That the Group Policy was not properly and timely amended. In harmony with the Prior Loss Proviso, Group Policy G-93634 states that "an amendment will not affect a claim incurred before the date of change." (DN — at QL08262). Without a properly executed amendment, there could be no change reducing life insurance benefits paid to beneficiaries of deceased retirees.

Defendants cannot minimize Plaintiffs' claims by asserting their failure to have their documents in order is a "technical violation", especially in light of the Supreme Court's recent pronouncement in *Kennedy* upholding the 'plan documents rule.' Likewise, Defendants cannot take refuge behind a dissenting opinion in *Allison*. The majority in *Allison* wrote, "Even were we to assume, but not decide, that a plan fiduciary could rely on *Peckham's* substantial compliance analysis, we would conclude that the law of ERISA, applied to this record, leaves no room for a substantial compliance argument given the requirement that a fiduciary apply the

terms of a written plan and the unambiguous nature of the provision before us.” *Allison*, 289 F.3d at 1227. Likewise, the Tenth Circuit’s opinion in *Peckham v. Gem State. Mut. Of Omaha*, 964 F. 2d 1043 (10th Cir. 1992) is not helpful to Defendants because the case concerned whether a claimant submitted a claim in substantial compliance, not whether ERISA statutory requirements fiduciary obligations were met by the plan administrators.

Finally, Defendants’ argument and proffered evidence about “ratification” via subsequent acts is not in conformity with the terms of the Group Policy that Qwest had to comply with. Neither the Prior Loss Proviso in the 1998 Master Plan Document nor the terms of the Group Policy allow for “ratification” to trump the express requirements of the Plan documents. Therefore, the Court should declare the December 13, 2006 dated Plan Amendment 2006-1 to be null and void.

In their **Fifth Claim for Relief** for declaratory relief under ERISA Section 502(a)(1)(B), Plaintiffs contend Defendants violated the Prior Loss Proviso in the ROR and illegally reduced benefits that should have been paid to beneficiaries of Retirees who died after January 1, 2006, Plaintiffs have moved for summary judgment on this issue.

Plaintiff Lensink, individually and on behalf of a proposed class, asks this Court to declare her rights to Plan benefits pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and to enter an order declaring any purported Plan amendment retroactively applied to be in violation of the Plan’s Prior Loss Proviso and, therefore, null and void. Ms. Lensink, as surviving spouse of deceased Plan participant Joseph Lensink, seeks a declaration of her rights as a Plan beneficiary. She seeks a determination that her benefit payment should have been based upon more favorable Plan terms existing in January 2006 when Joseph Lensink passed away. In January 2006, the controlling terms of Plan documents provided that Mr.

Lensink's beneficiary would receive a payment calculated in accordance with the salary based formula for Eligible Retirees. Those terms continue to govern to this date because no purported Plan amendment reducing benefits has been executed by both Qwest and Prudential and adopted so as to change both the Group Contract and the 1998 Master Plan Document. Prudential did not execute the June 7, 2007 dated Plan Amendment 2007-1 document, and Qwest did not execute any purported amendment to the Group Contract until January 21, 2009. To date, no amendment executed by both Qwest and Prudential has been "adopted" by the Company. Thus, in accordance with the terms of the Group Contract and the 'Prior Loss Proviso' in the ROR of the 1998 Master Plan Document, Ms. Lensink's benefit payment should not have been limited to \$10,000.

Ms. Lensink seeks an order declaring Defendants' reduction of basic life insurance benefits to be illegal, null and void, as applied to beneficiaries of Eligible Occupational classified Retirees who died since January 1, 2006. Ms. Lensink asks the Court to direct notice to be sent to beneficiaries who received only \$10,000 in Plan benefits informing them that they are entitled to receive a corrected payment, together with interest. Ms. Lensink seeks an order requiring Plan administrators to make corrected benefit payments. Also, Ms. Lensink contends the Court should declare the more favorable terms within the 1998 Master Plan Document and more favorable terms within the Group Contract continued to govern the rights of beneficiaries of deceased Eligible Retirees after January 1, 2006.

In the **Sixth Claim for Relief**, Plaintiff Strizich,⁵ individually and on behalf of a

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Mr. Strizich, like Plaintiffs Kerber and Phelps, is a Pre-1991 Retiree who took retirement under the "5+5" early retirement offering made by U S WEST during December 1989 through March 1990. He is one of those persons the U S WEST EBC declared to be "entitled" to the Plan benefits. (DN __, Ex. 3, Shea Aff. at ¶¶ 10-11). These facts and claims with respect to his

proposed class, asks this Court to declare his rights to Plan benefits pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and to enter an order declaring any purported Plan amendment retroactively applied to be in violation of the Plan's Prior Loss Proviso and, therefore, null and void. Mr. Strizich, as surviving spouse of deceased Plan participant Sharon Strizich who also retired under the 5+5 early retirement program, seeks a declaration of his rights as a Plan beneficiary. He seeks a determination that his benefit payment should have been based upon more favorable Plan terms existing in March 2007 when Sharon Strizich passed away. In March 2007, the controlling terms of Plan documents provided that Ms. Strizich's beneficiary would receive a payment calculated in accordance with the salary based formula for Eligible Retirees. Those terms continue to govern to this date because no purported Plan amendment reducing benefits has been executed by both Qwest and Prudential and adopted so as to change both the Group Contract and the 1998 Master Plan Document. Prudential did not execute the June 7, 2007 dated Plan Amendment 2007-1 document, and Qwest did not execute any purported amendment to the Group Contract until January 21, 2009. To date, no amendment executed by both Qwest and Prudential has been "adopted" by the Company. Thus, in accordance with the terms of the Group Contract and the 'Prior Loss Proviso' in the ROR of the 1998 Master Plan Document, Mr. Strizich's benefit payment should not have been limited to \$10,000.

Mr. Strizich seeks an order declaring Defendants' reduction of basic life insurance benefits to be illegal, null and void, as applied to beneficiaries of Eligible Management classified Retirees who died since January 1, 2007. Mr. Strizich asks the Court to direct notice to be sent to beneficiaries who received only \$10,000 in Plan benefits informing them that they are entitled

being declared "entitled" to the benefits are addressed in the Second Claim for Relief.

to receive a corrected payment, together with interest. Mr. Strizich seeks an order requiring Plan administrators to make corrected benefit payments. Also, Mr. Strizich contends the Court should declare that more favorable terms of the 1998 Master Plan Document and more favorable terms of the Group Contract continued to govern the rights of beneficiaries of deceased Eligible Retirees after January 1, 2007.

The **Seventh Claim for Relief**, pursued by all Plaintiffs, individually and on behalf of a proposed class, is directed against the designated Plan fiduciaries, members of the Qwest Employees Benefit Committee.⁶ Plaintiffs' chief complaint made part of their Seventh Claim for Relief is that, although the Plan fiduciaries had plenty of time after learning Qwest intended to reduce Eligible Retiree's benefits, they did absolutely nothing to promote the best interests and protect the welfare of Plan participants and their beneficiaries, many of whom are elderly and terminally ill. Plan fiduciaries did not investigate or advocate any means for Plan participants to secure conversion or continuation privileges with either Prudential, the current group policy insurer, or some other insurer. (SAC ¶¶ 104-105).

During formal discovery, Defendants were asked to explain what action, if any, Qwest EBC members took "to inquire about, investigate and/or consider conversion or continuation privileges for Plan participants with respect to the reduction of Basic Life Insurance coverage to \$10,000.00." Defendants' responded that "Ammidown learned that under the terms of the Group Contract, any amendment of the Plan which altered or reduced Plan benefits (and not

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Two of the three Qwest EBC members, Erik Ammidown and Felicity O'Herron, were serving the Plan sponsor as members of the Qwest PDC. The Tenth Circuit has said in *In re Luna*, 406 F.3d 1992, 1207 (10th Cir. 2005), that a person may assume both the role of the named fiduciary of an ERISA plan and act as an officer of the employer sponsoring that plan. However, the Tenth Circuit has not resolved the issue of what happens when a conflict between the two roles arises. In a nutshell, that is the core issue Plaintiffs' Seventh Claim presents.

involving a complete end of Plan benefits) would not create any opportunity for Plan participants to convert their group life insurance to individual life insurance.” (Exhibit 7, Deft’s Resp. Interrog. No. 4). Looking solely at the Group Contract is hardly any effort put forth by Mr. Ammidown. Apparently, no effort was made by the other Qwest EBC members. ERISA fiduciaries are “. . . obliged at a minimum to engage in an intensive and scrupulous independent investigation . . . to insure that they act in the best interests of the plan beneficiaries.” *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1013 (10th Cir. 2004) (citing *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1148 (7th Cir. 1998)).

When Mr. Ammidown and other EBC members began working on a mission to save Qwest money and to reduce Plan participants’ basic life insurance benefits, he and the other EBC members should have (1) resigned from the EBC, quit serving as a Plan fiduciary and obtained the appointment of persons or an entity free from a conflict of interest, and (2) informed the Plan participants and all *known* designated beneficiaries that the Plan was not a reliable source of life insurance benefits and that they might need to make alternative arrangements. See *Holdeman v. Devine*, 474 F.3d 770, 782-83 (10th Cir. 2007) (remanding and instructing trial court to consider those issues). By not taking any such action, all three Qwest EBC members violated their duty of loyalty to the Plan participants and beneficiaries.

Plaintiffs contend a prudent Plan fiduciary charged with a duty of loyalty and having responsibility to act in the best interests of Plan participants and beneficiaries would want to use all available time to try via any means available to protect the Plan participants’ expected life insurance interests, especially since many Plan participants are elderly with preexisting medical conditions. 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, supra, 919 F. 2d at 752 (citing *Globe Woolen Co.*, 224 N.Y. at 489, 121 N.E. at 380).

Plaintiffs contend that removal of conflicted Plan fiduciaries is an appropriate remedy. 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.

On top of all the previously discussed ERISA fiduciary violations set forth in the First through Sixth Claims for Relief, at least one member of the Qwest EBC has displayed in this litigation just how severely conflicted he is when trying to serve two masters. Qwest EBC member Erik Ammidown states that “if plaintiffs prevail in their efforts to invalidate the 2005 Amendment in its entirety, Qwest would need to consider. . . eliminating all life insurance benefits for such retirees. . .” (DN 86-12, Ex. 10, at ¶ 8). Mr. Ammidown serves as member of the Qwest EBC, a named fiduciary role, and as member of the Qwest Plan Design Committee, a plan sponsor role. Mr. Ammidown has chosen to act as an adversary as he took to the bully

pulpit and threatened Plaintiffs and all putative class members.

As recently suggested by the United States Supreme Court in *Metropolitan Life Insurance Co. v. Glenn*, 128 S.Ct. 2343 (2008), plan sponsors should minimize such conflicts by separating and isolating personnel that serve their benefit plan administration. Qwest should not have the same individuals (i.e., Erik Ammidown and Felicity O'Herron) who serve as employer representative in its Plan sponsor capacity also serve in the capacity of Plan fiduciary. Mr. Ammidown is the quintessential example of why employers should take active steps to prevent a conflict of interest, for example, "by walling off claims administrators from those interested in firm finances." *Id.* at 2351.

Plaintiffs claim and contend that an appropriate remedy would be for the Court to order Qwest to assign fiduciary tasks to persons who are not at all involved in a plan sponsor capacity, such as the duties carried out by the Qwest PDC. The Plan fiduciary should be a person with a single eye towards the interests of Plan participants and beneficiaries. "There is no balancing of interests; ERISA commands undivided loyalty to the plan participants." *McGraw v. Prudential Ins. Co of America*, 137 F.3d 1253, 1263 (10th Cir. 1998) (citation omitted). The Plan fiduciary cannot be a person with loyalties directed at achieving corporate profit at the expense of the very Plan participants and beneficiaries whose best interests he should be looking out for. See *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-330, 101 S.Ct. 2789, 2794-2795 (1981) ("To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.' (citation omitted). A fiduciary cannot contend 'that, although he had conflicting interests, he served his masters equally well or that his primary loyalty was not weakened by the pull of his secondary one'"). See also G. Bogert & G. Bogert, *Law of Trusts and Trustees* §§ 121, 543 (rev.2d

ed.1993).

Therefore, in view of the laundry list of Defendants' ERISA breaches of fiduciary duties carried out by Qwest EBC members, coupled with Mr. Ammidown's most recent threat to the Qwest retiree community, Plaintiffs contend this Court should grant Plaintiffs appropriate equitable relief and order the appointment of an independent fiduciary. At the very least, Qwest should be ordered to remove conflicted fiduciaries - Erik Ammidown and Felicity O'Herron - and provide suitable replacements to serve the Plan and its participants and beneficiaries.

In the **Eighth Claim for Relief** - which is not a class claim, Plaintiff Phelps contends that despite his written requests of November 15, 2006 and February 28, 2007, the defendant Plan Administrator failed to timely comply with ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4), which statutorily requires Defendant Qwest Employee Benefits Committee, the Plan administrator, to honor within 30 days a written request of any participant or beneficiary for a copy of all "instruments under which the plan is established or is operated." Therefore, pursuant to ERISA Section 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), Mr. Phelps asks this Court to assess civil penalties up to \$110 a day against defendant Plan Administrator for the failure or refusal to timely provide Mr. Phelps all instruments under which the Plan is established or is operated.

Among the Plan documents and instruments that should have been produced but were not produced to Mr. Phelps on December 18, 2006 are the following:

1. The Plan amendment that was scheduled to be effective January 1, 1999 to allow domestic partners to be treated in the same manner as spouses. Defendants produced a heavily redacted document which is minutes of the U S WEST Employee Benefits Committee on

November 30, 2008. (K01138-1140). That document states that the EBC “RESOLVED. . . Also effective January 1, 1999, the U S WEST Group Life Insurance Plan and other welfare plans *will be amended* to treat domestic partners in the same manner as spouses.” (emphasis added). (*Id.*, at K01138). Plaintiffs wonder, does this mean the change is applicable to both employed workers and retirees or is it applicable to only employed Plan participants? Does this mean that same-sex domestic partners are to be treated the same for purposes of “Dependent Coverage” or for purposes of surviving spouse beneficiary status, or both? The EBC document does not state the Plan “is hereby amended,” it states the Plan “will be amended.” In any event, the actual subsequent Plan amendment setting forth necessary clarification and any rules about domestic partners has never been produced to Mr. Phelps.

2. The September 2000 Plan amendment changing the Plan to provide management employees with a basic life insurance benefit based upon 1.5 times his or her base pay. (DN 108-13). The document was not produced until May 29, 2008. (DN 125-3, at ¶ 25(a)). It was produced over 17 months past the December 18, 2006 deadline. The document constitutes the most basic and informative document subject to ERISA disclosure requirements. ERISA requirements mandate that a fiduciary have procedures in place so that compliance with document requests is timely. There is no excuse for the Qwest EBC not keeping track of crucial Plan amendments. In addition, when produced, the document was heavily redacted. That information is not privileged information and it is an act of bad faith on the part of the Qwest EBC not to freely disclose that information. ERISA Section 104(b)(4), 29 U.S.C. § 1104(b)(4), does not permit redaction of employee benefit plan instruments;

3. When Qwest issued Mr. Phelps and all other Pre-1991 Retirees a replacement SPD, sent out with Erik Ammidown’s April 30, 2003 dated letter, the SPD states it is effective

January 1, 2001. (See, e.g., K06218 (Erik Ammidown letter) and K06233-6244 (Pre-1991 Retirees' SPD). This January 1, 2001 SPD states that:

Any amount of insurance for which there is no beneficiary at your death will be payable to the first of the following:

- * Your surviving Spouse, if none, then
- * Your estate.

Effective January 1, 2002, any amount of insurance for which there is no beneficiary at your death will be payable to first of the following:

- * Your surviving Spouse, if none, then
- * Surviving children in equal shares, if none, then
- * Your estate.

(*Id.*, at K06224). Nevertheless, to date, the Qwest EBC has not produced to Mr. Phelps any Plan Amendment that made the change in beneficiary payment priority effective January 1, 2002.⁷

4. The attachment to Plan Amendment 2004-1. (DN 125-13). Plan Amendment 2004-1 states in part that the Life Plan “be and hereby is amended to incorporate the amendment and modifications outlined above and in substantially the form attached hereto.” (*Id.*, at QL06618) (emphasis added). Yet, to date, that attachment has never been produced. (DN 125-3, at ¶ 25(b)). Defendants contend in a previously filed brief that Amendment 2004-1, as produced to Mr. Phelps, is an “incomplete copy.” (DN 91-1, p. 3 at ¶ 3).

5. The minutes and resolutions of the Plan Design Committee dated December 13, 2006. (DN 125-5, at QL07001). The document, which conclusively shows the PDC’s adoption date of Plan Amendment 206-1 on December 13, 2006, was not produced until well after this litigation was underway. It was first produced in redacted form, hiding the declaration with respect to the “adoption” of the Plan amendment. (DN 125-3, at ¶ 25(c)). The complete

⁷ Plaintiffs also note that there is no mention of “domestic partners” even though the U S WEST EBC said domestic partners were to be treated the same as spouses. This makes Plaintiffs wonder how many Eligible Retirees’ and their domestic partners were uninformed and did not receive proper payment of benefits.

unredacted document was not produced until January 8, 2008 (*Id.*). Mr. Phelps and other Plaintiffs were prejudiced by the Qwest EBC's deliberate delay and effort to redact the document because they could not fully assess the merits of any claims about Qwest's violations of the Prior Loss Proviso in the 1998 Plan Document and whether or not Prudential and Qwest had jointly adopted a purported Plan amendment to reduce benefits without seeing the complete unredacted document. (*Id.* at ¶ 18).

6. Prior to January 21, 2009, the required written amendment executed by both Qwest and Prudential amending the terms of Group Policy Contract G-93634 so as to change benefits to a flat \$10,000 payment was not produced. (DN 125-3, at ¶ 25(d)). The Group Contract expressly states “[n]o change in the Group Contract is valid unless shown in . . . an amendment to it signed by the Contract Holder and an officer of Prudential.: (DN 108-6, at QL08262). Until their October 16, 2008 filing - DN 122 - Defendants emphatically stated and argued that the Group Contract was amended. (DN 101 at pp. 9-10; DN 108 at p. 5 ¶ 56; DN 108-4, Ammidown Dec. at ¶ 6). Yet, the Qwest EBC had only produced a document purported to be an amendment signed only by an officer of Prudential. (DN 125-3, at ¶ 22; DN 108-8 at QL08374). In view of Defendants' decision to pay out reduced benefits as if the Group Contract had, in fact been amended, when there was no such document until January 21, 2009, the Qwest EBC should be penalized for not producing the required amendment.

This is not the first time Mr. Phelps and the Qwest EBC have skirmished about non-production and nondisclosure of ERISA governed documents. (DN 125-3, at ¶ 26). On March 14, 2006, Judge Babcock entered his order accepting Magistrate Judge Hegarty's recommendation for imposition of an ERISA Section 502(c)(1)(B) penalty due to Qwest EBC's non production of documents associated with the Qwest Pension Plan. (DN 125-14, Order

entered in *Phelps v. Qwest Employee Benefits Committee*, Case No. 04-cv-02042-LTB-MEH). The same EBC members involved in the *Phelps* case are involved in this case.

Plaintiffs believe a statutory penalty is warranted here. The Tenth Circuit states that in exercising discretion to award a statutory penalty under ERISA Section 502(c)(1), the court may consider a variety of factors, including whether the untimely production of the requested documents prejudiced the participant or was the result of the plan administrator's bad faith. *Deboard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1244 (10th Cir. 2000) ("Although plaintiffs are correct that neither prejudice nor bad faith is required for a district court to impose penalties under 29 U.S.C. § 1132(c), the presence or absence of these factors can certainly be taken into account by a district court in deciding whether to exercise its discretion and impose a penalty. *See Moothart*, 21 F.3d at 1506."). In *Deboard*, the Tenth Circuit did not elaborate on every factor that a trial court can consider.

Other appellate courts state that "[w]hen considering whether to impose such penalties, the court can consider (1) bad faith or intentional conduct of the plan administrator, (2) length of delay, (3) number of requests made, (4) documents withheld, and (5) prejudice to the participant." *Romero v. Smith Kline Beecham*, 309 F.3d 113, 120 (3rd Cir. 2002). "Although an 'employer's good faith and the absence of harm are relevant in deciding whether to award a statutory penalty,' . . . 'neither [a defendant's] good faith nor the absence of actual injury to [the plaintiff] precludes the award of a statutory penalty.'" *Brown v. Aventis Pharmaceuticals, Inc.*, 341 F.3d 822, 825 (8th Cir. 2003) (citation omitted).

In this case, relevant factors in Plaintiff Phelps's favor that the Court should consider include: (1) the fact that Plaintiff Phelps made two separate requests; (2) the 17 month delay from December 2006 to May 2008 before the Qwest EBC produced the 2000 Plan amendment;

(3) the fact that the Qwest EBC impermissibly redacted both the 1998 EBC Minutes and the 2000 Plan amendment, instruments under which the Plan is operated; (4) the fact the clarifying Plan amendment about domestic partners having the same rights as spouses has never been produced; (5) the fact that Plaintiff Phelps was prejudiced by Defendants hiding the December 13, 2006 Minutes and Resolutions of the Plan Design Committee which document conclusively establishes the PDC's adoption of Plan Amendment 2006-1; and (6) the fact that the Qwest EBC has previously been penalized by this District Court for failing to produced employee benefit plan documents to Plaintiff Phelps.

The penalty should run from the date that Plaintiff Phelps was deprived of the particular information, *Cherry v. Toussaint*, 126 Fed. Appx. 496, 497 (2nd Cir. Feb. 11, 2005), or in this case, from December 18, 2006, 30 days after Mr. Phelps requested the documents.

B. Defendants' Statement of Defenses

In June 2007, Defendants (jointly, "Qwest") moved for dismissal of all claims in Plaintiffs' (First) Amended Complaint asserting that the Plan's language bars Qwest from reducing Plaintiffs' life insurance benefits to \$10,000, on the ground that such claims failed to state a claim upon which relief can be granted. See Doc. No. ("DN") 16. On February 27, 2008, the Court entered an Amended Order granting Qwest's Motion To Dismiss in its entirety ("Dismissal Order," DN 47.) Plaintiffs subsequently filed a Second Amended Complaint (the "Complaint") that asserts eight claims for relief. Qwest describes below its principal defenses to these claims.

Plaintiffs' **First Claim** alleges that all amendments to the Plan since 1998, including two amendments in 2005 and 2006 that reduced life insurance benefits to \$10,000 (the

"Amendments"), are null and void because the 1998 Plan Document does not specify a procedure for amending the Plan that complies with ERISA Section 402(b)(3). But the U.S. Supreme Court has expressly held that an ERISA plan document containing language identical in all material respects to the amendment language in the 1998 Plan Document does specify a procedure for amending an ERISA plan that complies with Section 402(b)(3). *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 75 (1995). Moreover, Plaintiffs' current position that the Plan cannot be amended flatly contradicts Plaintiffs' repeated statements earlier in this case that the Plan has been amended.

Plaintiffs' **Second Claim**, entitled "Breach of Fiduciary Duty-Material Misrepresentations," alleges that Qwest deceived pre-1991 retirees by failing to "truthfully represent and explain the risk that their PLAN benefits might be reduced pursuant to the [Plan's] 'reservation of rights' clause." (Complaint 87.) To prevail on this claim, Plaintiffs must prove, inter alia, that Qwest made a material misrepresentation upon which Plaintiffs detrimentally relied. See, e.g., *Owen v. Regence BlueCross BlueShield of Utah*, 388 F. Supp. 2d 1335 (D. Utah 2005). This claim is simply a repackaging of Plaintiffs' prior estoppel claim, and is based on no facts beyond those alleged in support of that prior claim. But the Court dismissed plaintiffs' estoppel claim on the ground, inter alia, that Plaintiffs had "not identified any 'lies, fraud, or an intent to deceive.'" See Dismissal Order at 14. Moreover, in light of the Court's holding that the Plan documents' reservation of rights provisions unambiguously reserved Qwest's right to amend the Plan (see *id.* at 14-15), Plaintiffs could not reasonably have relied on Qwest's alleged failure to explain that it might amend the Plan.

Plaintiffs' **Third and Fourth Claims** allege that documents dated October 14, 2005 and December 13, 2006, which Qwest contends effectuated and confirmed a Plan Amendment

reducing life insurance benefits to \$10,000 for post-1990 occupational retirees, were in fact ineffective to amend the Plan, so that the more favorable terms of the 1998 Plan Document continue to govern those retirees' benefit rights. But the October 14, 2005 Minutes and Resolutions to which Plaintiffs refer expressly stated that "the Qwest Group Life Insurance Plan be and hereby is amended and restated to incorporate" a reduction in life insurance benefits for such retirees to \$10,000 effective January 1, 2006 (emphasis added). And the December 13, 2006 Minutes and Resolutions likewise state that the Plan "was amended to incorporate changes to retiree coverage which are effective January 1, 2006" (emphasis added). Plaintiffs are not entitled to a declaration that these documents failed to do what they said they did, i.e., effectuate and confirm a Plan Amendment reducing life insurance benefits for post-1990 occupational retirees effective January 1, 2006.

Plaintiffs' **Fifth Claim** alleges that although the October 14, 2005 Minutes and Resolutions stated that the Plan was amended to reduce life insurance benefits for post-1990 occupational retirees to \$10,000 effective January 1, 2006, that amendment did not actually become effective until December 13, 2006, and is therefore null and void as applied to the estates and beneficiaries of post-1990 occupational retirees who died between January 1 and December 12, 2006. This claim is a variant of Plaintiffs' Third and Fourth Claims, and fails for the same reasons those claims fail.

Plaintiffs' **Sixth Claim**, which is asserted solely by plaintiff Samuel Strizich ("Strizich"), alleges that although September 14, 2006 Minutes and Resolutions stated that the Plan was amended to reduce life insurance benefits for all retirees other than post-1990 occupational retirees to \$10,000 effective January 1, 2007, that document did not suffice to amend the Plan, and is therefore null and void as applied to the estates and beneficiaries of such retirees who died

after January 1, 2007. Those Minutes and Resolutions stated that the Plan "be and hereby is amended and restated to incorporate" a reduction in life insurance benefits for such retirees to \$10,000 effective January 1, 2007 (emphasis added). June 7, 2007 Minutes and Resolutions likewise stated that the Plan was "previously amended" to incorporate a reduction in life insurance benefits effective January 1, 2007. Strizich is not entitled to a declaration that these documents failed to do what they said they did, i.e., effectuate and confirm a Plan Amendment reducing life insurance benefits for the specified retirees effective January 1, 2007.

Plaintiffs' **Seventh Claim**, which is asserted solely against Defendant Qwest Employee Benefits Committee (the "EBC"), alleges that the EBC breached its fiduciary duties under ERISA Section 404(a)(1). Plaintiffs allege, correctly, that the Amendments reducing life insurance benefits to \$10,000 contain no provisions allowing participants to convert their pre-amendment life insurance benefits into individual policies or to pay premiums sufficient to continue their pre-amendment benefit levels ("Plaintiffs' Desired Provisions"). Plaintiffs indisputably cannot contend that the EBC breached its fiduciary duties under Section 404(a)(1) by adopting Plan amendments that omitted Plaintiffs' Desired Provisions. See *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 442-445 (1999) (holding that amendment of an ERISA benefits plan is a non-fiduciary "settlor function" which does not give rise to any claim for breach of fiduciary duty under section 404(a)(1)). Plaintiffs nevertheless allege that the EBC breached its fiduciary duties, not by adopting Amendments that omitted Plaintiffs' Desired Provisions, but by failing to "advocate" for the inclusion of those provisions in the Amendments. Plaintiffs thus claim that the EBC breached its fiduciary duties by failing to seek the inclusion of language in Plan Amendments that the EBC indisputably had no duty to include. But because there was no fiduciary duty to include Plaintiffs' Desired Provisions in the Amendments, there could not

possibly be a fiduciary duty to advocate for their inclusion.

Plaintiffs' **Eighth Claim**, which is asserted solely by Plaintiff Nelson Phelps ("Phelps") solely against the EBC, alleges that the EBC failed to respond properly to requests Phelps made under ERISA Section 104(b)(4) for copies of Plan documents. This claim fails for numerous reasons, including because copies of the EBC's written responses to the relevant requests conclusively establish that the EBC timely provided the very documents that Phelps alleges the EBC failed to provide.

Five of Plaintiffs' eight claims seek to invalidate the Plan Amendments reducing life insurance benefits to \$10,000 based on alleged technical deficiencies in the language of either the 1998 Plan Document (First Claim) or the documents by which Qwest sought to amend the Plan (Third, Fourth, Fifth and Sixth Claims). Even assuming arguendo the existence of such deficiencies, they would invalidate the Amendments only upon a showing of detrimental reliance by Plaintiffs or bad faith or active concealment by Qwest. See, e.g., *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 569 (7th Cir. 1995) ("[T]echnical violations of ERISA requirements do not justify relief absent a showing of bad faith, active concealment, or detrimental reliance. . . . And, like other circuits, we agree that this principle should apply in cases where a plan fails to comply with § [402(b)(3)]."); *Loskill v. Barnett Banks, Inc. Severance Pay Plan*, 289 F.3d 734, 738-739 & n. 5 (11th Cir. 2002) (explaining that courts typically will not invalidate a Plan amendment for technical deficiencies "absent a showing of bad faith or active concealment on the part of the sponsor or detrimental reliance on the part of the beneficiaries"). Plaintiffs can make no such showing.

Moreover, even assuming arguendo that the Amendments were not adopted in accordance with valid amendment procedures, the Amendments are nevertheless valid if

subsequent actions demonstrate they were ratified. *Curtiss-Wright*, 514 U.S. at 85. Qwest's subsequent actions, including numerous actions preceding the Amendments' effective dates, overwhelmingly demonstrate ratification of the Amendments. For example, Qwest ratified the 2005 Amendment by, inter alia, sending all retirees affected by that Amendment two separate documents in October 2005—a letter and a benefits guide with incorporated Summary of Material Modifications—stating that their life insurance benefits would be reduced to \$10,000 effective January 1, 2006. Qwest likewise ratified the 2006 Amendment by, inter alia, sending all retirees affected by that Amendment two separate documents in October 2006—a Summary of Material Modifications and a benefits guide—stating that their life insurance benefits would be reduced to \$10,000 effective January 1, 2007.

Qwest asserts additional defenses in this case beyond those described above, including that: (1) this action should not be certified or maintained as a class action because the requirements for a class action have not been and cannot be satisfied; (2) one or more of Plaintiffs' claims are barred by statute of limitations, waiver, estoppel and/or laches; and (3) certain named defendants are not proper defendants in this case.

4. STIPULATIONS - UNDISPUTED FACTS

The Parties agree that the following facts are undisputed:

- A. U S WEST, Inc. was a corporation qualified to do business in Colorado. U S West, Inc.'s principle place of business was within this district.
- B. Qwest Communications International, Inc. (“QCII”) is a Delaware corporation qualified to do business in Colorado. QCII's principle place of business is in this district.
- C. Qwest Group Life Insurance Plan (the “Plan”) is an “employee welfare benefit

plan,” pursuant to ERISA § 3(1), 29 U.S.C. § 1002(1).

D. The Plan provides a life insurance benefit payable to the estate or beneficiaries of Plan participants who retired from QCII or predecessor companies after becoming eligible for a service or disability pension.

E. Defendant Qwest Plan Design Committee is the entity to which the QCII’s Board of Directors has delegated certain authority to make changes to the Plan. This entity is comprised of QCII officers and/or director-level management employees.

F. U S WEST, Inc. was the plan sponsor of the Plan prior to the Merger. QCII has been the plan sponsor of the Plan since approximately the time of the Merger.

G. The Parties have entered into and filed a Stipulation Regarding Authenticity and Admissibility of Certain Documents Produced by the Parties (the “Stipulation”), in which they have stipulated that certain documents are authentic under Federal Rule of Evidence (“FRE”) 901 and are non-hearsay under FRE 801 to 805.5.

5. PENDING MOTIONS.

A. Plaintiffs' Second Amended Motion for Class Certification ("Class Certification Motion"). Plaintiffs filed this motion on April 1, 2008 (DN 63-64), Qwest filed its brief in opposition to this motion on June 30, 2008 (DN 86), and Plaintiffs filed their reply brief in support of this motion on July 15, 2008 (DN 92).

B. Plaintiffs' Amended Motion for Summary Judgment. Plaintiffs filed this motion on April 1, 2008 (DN 65-66), Qwest filed its brief in opposition to this motion on July 14, 2008 (DN 91), and Plaintiffs filed their reply brief in support of this motion on July 29, 2008 (DN 98).

C. Qwest's Motion To Dismiss the First, Second and Seventh Claims for Relief in Plaintiffs' Second Amended Complaint. Qwest filed this motion on May 16, 2008 (DN 79), Plaintiffs filed their brief in opposition to this motion on June 5, 2008 (DN 80), and Qwest filed its reply brief in support of this motion on June 20, 2008 (DN 81).

D. Qwest's Motion for Summary Judgment on Plaintiffs' First, Third, Fourth and Fifth Claims for Relief. Qwest filed this motion on July 14, 2008 (DN 90), Plaintiffs filed their brief in opposition to this motion on August 4, 2008 (DN 99), and Qwest filed its reply brief in support of this motion on August 19, 2008 (DN 101).

E. Plaintiffs' Motion to Strike Defendants' Motion for Summary Judgment on First, Third, Fourth and Fifth Claims. Plaintiffs filed this motion on July 21, 2008 (DN 93), Qwest filed its brief in opposition to this motion on July 22, 2008 (DN 94).

F. Qwest's Motion for Summary Judgment on Plaintiffs' Second Claim for Relief. Qwest filed this motion on September 12, 2008 (DN 107), Plaintiffs filed their brief in opposition to this motion on October 1, 2008 (DN 113), and Qwest filed its reply brief in support of this motion on October 16, 2008 (DN 122).

G. Qwest's Motion for Summary Judgment on Plaintiffs' Sixth, Seventh and Eighth Claims for Relief. Qwest filed this motion on September 15, 2008 (DN 108), Plaintiffs filed their brief in opposition to this motion on October 21, 2008 (DN 125), and Qwest filed its reply brief in support of this motion on November 20, 2008 (DN 129).

6. WITNESSES

A. Plaintiffs *will* call the following nonexpert witnesses:

- (1) Plaintiff Edward Kerber, 33302 Neacoxie Lane, Warrenton, OR 97146.

Mr. Kerber will testify about the allegations and claims set forth in the Second Amended Complaint, in accordance with his affidavit(s), his responses to Defendants' written discovery, including interrogatories. He will also testify about documents received during his employment and retirement about the group life insurance benefits and his separation from employment and decisions about retirement benefits, including survivor's benefits.

(2) Plaintiff Nelson B. Phelps, 1500 So. Macon St., Aurora, CO 80012-5141.

Mr. Phelps will testify about the allegations and claims set forth in the Second Amended Complaint, in accordance with his affidavit(s), his responses to Defendants' written discovery, including interrogatories. He will also testify about documents received during his employment and retirement about the group life insurance benefits and his separation from employment and decisions about retirement benefits, including survivor's benefits.

(3) Plaintiff Joanne West, 10172 South Miner Drive, South Jordan, UT 84095-2421.

Ms. West will testify about the allegations and claims set forth in the Second Amended Complaint, in accordance with her responses to Defendants' written discovery, including interrogatories. She will also testify about documents received during her employment and retirement about the group life insurance benefits and her separation from employment and decisions about retirement benefits, including survivor's benefits.

(4) Plaintiff Nancy Meister, 12400 48th Ave., N. Plymouth, MN 55442-2008.

Ms. Meister will testify about the allegations and claims set forth in the Second Amended Complaint, in accordance with her responses to Defendants' written discovery, including interrogatories. She will also testify about documents received during her employment and retirement about the group life insurance benefits and her separation from employment and decisions about retirement benefits, including survivor's benefits.

(5) Plaintiff Thomas Ingemann, 955 Ford Road, Newport, MN 55055-1515.

Mr. Ingemann will testify about the allegations and claims set forth in the Second Amended Complaint, in accordance with his responses to Defendants' written discovery, including interrogatories. He will also testify about documents received during his employment and retirement about the group life insurance benefits and his separation from employment and decisions about retirement benefits, including survivor's benefits.

(6) Plaintiff Martha A. Lensink, 1309 Campbell Ave., Prescott, AZ 86301-1503.

Ms. Lensink will testify about the allegations and claims set forth in the Second Amended Complaint, in accordance with her affidavit(s), her responses to Defendants' written discovery, including interrogatories. She will also testify about documents received during her former spouse Joseph Lensink's employment and retirement about the group life insurance benefits and his separation from employment and decisions about retirement benefits, including survivor's benefits. She will further testify about her claim for group life insurance benefits, her knowledge about the group life insurance benefits at that time, what was told to her and the outcome of her claim.

(7) Plaintiff Sam Strizich, 27605 N. 61st Place, Scottsdale, AZ 85262-6741.

Mr. Strizich will testify about the allegations and claims set forth in the Second Amended Complaint, in accordance with his affidavit(s), his responses to Defendants' written discovery, including interrogatories. He will testify about his role as a plan administrator for several Mountain Bell and U S WEST early retirement programs and the information provided to participants explaining their rights to group life insurance benefits. He will also testify about documents received during his employment and retirement about the group life insurance benefits and his separation from employment and decisions about retirement benefits, including

survivor's benefits. He will further testify about his former spouse, Sharon Strizich's separation from employment and decisions about retirement benefits and her decisions about retirement benefits, including survivor's benefits. He will further testify about his claim for group life insurance benefits, his knowledge about the group life insurance benefits at that time, what was told to him and the outcome of his claim.

(8) John G. Shea, 3070 Oak Street, Lakewood, CO 80215-7176. Mr. Shea will testify about the allegations and claims set forth in the Second Amended Complaint, in accordance with his affidavit. He will also testify about his administration of the "5+5" early retirement offering made by U S WEST during 1989-1990 and the representations made to employees about the benefits provided under the 5+5 early retirement offering, including the group life insurance benefits.

(9) Eric Ammidown, Director of Employee Benefits, Qwest Services Corporation, c/o Christopher J. Koenigs, Esq., Sherman & Howard LLC, 633 17th Street, Denver, CO 80202. He will testify about his role as Plan administrator for Qwest employee benefit plans including the Plan and his activities in connection with administration of the Plan, including his role with respect to purported plan amendments to reduce Plan benefits for Eligible Retirees. He will also testified about his responses to ERISA Section 104(b)(4) requests for Plan documents, and he will identify the various Plan documents he has produced to Plaintiff Phelps and others. He will testify about the Plan's several SMMs and SPDs sent out to Eligible Retirees. He will also testify about various matters and comments set forth in his several affidavits/declarations submitted in this case. He will also testified about his efforts, if any, to promote the best interest and welfare of Plan participants and their beneficiaries and his conflicted roles serving both Qwest leadership and Plan participants in two opposing capacities.

(10) Felicity O'Herron, Vice President-HR Compensation, Qwest Services Corporation, c/o Christopher J. Koenigs, Esq., Sherman & Howard LLC, 633 17th Street, Denver, CO 80202. She will testify about her role as Plan administrator for Qwest employee benefit plans including the Plan and her activities in connection with administration of the Plan, including her role with respect to purported plan amendments to reduce Plan benefits for Eligible Retirees. She will testify about the Plan's several SMMs and SPDs sent out to Eligible Retirees. She will also testify about various matters and comments set forth in any affidavits/declarations she submitted in this case. She will also testified about her efforts, if any, to promote the best interest and welfare of Plan participants and their beneficiaries and her conflicted roles serving both Qwest leadership and Plan participants in two opposing capacities.

(11) Any witness whose testimony is needed to authenticate documents.

(12). Any witness needed for rebuttal or impeachment purposes.

B. Plaintiffs *will* call the following expert witness:

(1) Donald T. Bogan, Esq., Professor, University of Oklahoma School of Law, 300 Timberdell Rd, Norman, OK 73019-5082. He will testify in accordance with his deposition testimony and concerning his expert report findings and conclusions.

C. Defendants *may* call the following nonexpert witnesses at trial if the need arises:

1. Erik P. Ammidown, Director of Employee Benefits, Qwest Services Corporation, c/o Christopher J. Koenigs, Esq., Sherman & Howard LLC, 633 17th Street, Denver, CO 80202, (303) 297-2900. Mr. Ammidown may testify regarding: (a) the intent of the PDC, of which he is a member, with respect to the effective dates of the Amendments; (b) the ways in which employees and retirees were notified of the Amendments; (c) circumstances relating to issuance

of the Confirmation Statements referred to in Plaintiffs' Complaint (the "Confirmation Statements"); and (d) the EBC's responses to Phelps' requests for copies of Plan documents under ERISA Section 104(b)(4).

2. Felicity O'Herron, Vice President-HR Compensation, Qwest Services Corporation, c/o Christopher J. Koenigs, Esq., Sherman & Howard LLC, 633 17th Street, Denver, CO 80202, (303) 297-2900. Ms. O'Herron may testify regarding the intent of the PDC, of which she is a member, with respect to the effective dates of the Amendments.

3. Teresa A. Taylor, Executive Vice President, Chief Human Resources Officer [new title?], Qwest Services Corporation, c/o Christopher J. Koenigs, Esq., Sherman & Howard LLC, 633 17th Street, Denver, CO 80202, (303) 297-2900. Ms. Taylor may testify regarding the intent of the PDC, of which she is a member, with respect to the effective dates of the Amendments.

4. Shannon Bryant, Manager of Employee Benefits, Qwest Services Corporation, c/o Christopher J. Koenigs, Esq., Sherman & Howard LLC, 633 17th Street, Denver, CO 80202, (303) 297-2900. Ms. Bryant may testify regarding the ways in which employees and retirees were notified of the Amendments and the circumstances surrounding issuance of the Confirmation Statements.

5. Wendy Haan, Hope Health, 350 East Michigan Avenue, Suite 301, Kalamazoo, Michigan 49007 (800) 334-4094. Ms. Hann may testify regarding mailings to relevant retirees of various written items providing notice concerning the Amendments, including mailings that pre-dated the effective dates of the Amendments.

6. Judy Osse, Lead Benefits Professional, Qwest, c/o Christopher J. Koenigs, Esq., Sherman & Howard LLC, 633 17th Street, Denver, CO 80202, (303) 297-2900. Ms. Osse may

testify regarding U S West's 5+5 retirement offer, including information regarding pertinent events in 1989-90 and U S West's use of reservation of rights statements when making the 5+5 retirement offer. Ms. Osse may provide testimony responsive to subjects addressed in the August 4, 2008 Affidavit of Plaintiff Nelson B. Phelps previously filed in this action.

7. Kelly Candelaria, Lead Benefits Professional, Qwest, c/o Christopher J. Koenigs, Esq., Sherman & Howard LLC, 633 17th Street, Denver, CO 80202, (303) 297-2900. Ms. Candelaria may testify regarding Plaintiffs' apparent allegation that the one page document titled "Appendix 8" was incorporated into the text of the governing Plan document. Some of Ms. Candelaria's information on this subject was disclosed in the August 12, 2008 Declaration of Kelly Candelaria previously filed in this action.

8. Carla A. Laudel, Senior Benefits Analyst, Qwest Corporation, c/o Christopher J. Koenigs, Esq., Sherman & Howard LLC, 633 17th Street, Denver, CO 80202, (303) 297-2900. Ms. Laudel may testify regarding the approximate number of individuals who have retired from Qwest and its predecessors, including the approximate number of such retirees who fall into potentially relevant groupings of such retirees (e.g., the number who are eligible for Plan benefits, who retired before or after January 1, 1991 or other dates, and/or who were management or occupational employees).

9. Michael B. Ward, Director, Risk Management, Qwest Corporation, c/o Christopher J. Koenigs, Esq., Sherman & Howard LLC, 633 17th Street, Denver, CO 80202, (303) 297-2900. Mr. Ward may testify regarding the approximate number of individuals who have retired from Qwest and its predecessors who executed various types of agreements releasing claims against Qwest and/or requiring arbitration of future purported claims against Qwest. Mr. Ward may also testify regarding the content and purpose of those agreements and the

time periods when such agreements were executed.

10. Christopher Doherty and/or Jill Peach, Prudential Insurance, c/o Brian T. Ortelere, Esq., Morgan, Lewis & Bockius, 1701 Market Street, Philadelphia, PA 19103, (215) 963-5150. Mr. Doherty and Ms. Peach may testify regarding the group insurance contract between Qwest and Prudential and the amendments thereto reflecting that the Plan benefit was changed to \$10,000 in 2005 (effective January 1, 2006) for post-1990 occupational retirees and was changed to \$10,000 in 2006 (effective January 1, 2007) for other retirees.

11. Edith Ewing, Prudential Insurance, c/o Brian T. Ortelere, Esq., Morgan, Lewis & Bockius, 1701 Market Street, Philadelphia, PA 19103, (215) 963-5150. Ms. Ewing may testify regarding the group insurance contract between Qwest and Prudential and the amendments thereto reflecting that the Plan benefit was changed to \$10,000 in 2005 (effective January 1, 2006) for post-1990 occupational retirees and was changed to \$10,000 in 2006 (effective January 1, 2007) for other retirees. Ms. Ewing has provided some of her information on these subjects in her September 11, 2008 declaration previously filed in this action.

12. John T. "Tom" Bouchard, P.O. Box 1855, 44 South Street, Litchfield, CT 06759-4022, (860) 567-5798. Mr. Bouchard may testify regarding his response to Phelps' statements concerning Phelps' alleged conversation with Mr. Bouchard in late 1989 or early 1990 concerning benefits to be provided under the U S West 5+5 retirement offer.

13. Cynthia Dorroh (formerly Cynthia Kok), former Director, Labor Relations, Qwest Communications International Inc., currently an attorney at Baird & Kiovisky, LLC, 2036 E. 17th Avenue, Denver, Colorado 80206, (303) 813-4500. Ms. Dorroh may testify regarding the August 14, 2005 letter from Ms. Dorroh to LeRoy Christensen of the Communications Workers of America ("CWA") regarding life insurance benefits.

14. LeRoy Christensen, former Assistant to the Vice President, CWA-District 7, 8085 East Prentice Avenue, Greenwood Village, CO 80111. Mr. Christensen may testify regarding the August 14, 2005 letter from Ms. Dorroh to Mr. Christensen regarding life insurance benefits.

15. Any witness listed by Plaintiffs as either a "will call" or a "may call" witness.

16. Any witness whose testimony is needed to authenticate documents.

17. Any witness needed for rebuttal or impeachment purposes.

D. Defendants *will* call the following expert witness:

None.

7. EXHIBITS

A. Stipulated Documents

The Parties stipulate that the exhibits characterized as "stipulated" on Attachments 1 and 2 hereto are authentic under FRE 901 and are non hearsay under FRE 801 to 805. The Parties reserve the right to object to the admissibility of these documents on grounds of relevance, including because the relevance of these documents may depend on which of Plaintiffs' eight claims for relief will be at issue in the trial of this case

B. Plaintiffs' Additional Exhibits are set forth on Attachment 1 hereto.

C. Defendants' Additional Exhibits are set forth on Attachment 2 hereto.

8. DISCOVERY

Discovery has been completed.

9. SPECIAL ISSUES

A. Issues raised by Plaintiffs - None.

Plaintiffs further state that all purported “special” issues raised by Defendants in the following Subsection B.2. have already been addressed in the parties’ briefing with respect to the pending motion for class certification and the parties’ five separate dispositive motions all of which motions are still pending. These are redundant issues.

With respect to Defendants’ issue in the following Subsection B.3 wherein Defendants state they may make a *Daubert* challenge concerning Plaintiffs’ expert witness, that matter, if raised by Defendants, will be responded to by Plaintiffs.

B. Issues raised by Defendants

1. “Plaintiffs' Statement of Their Claims.” (Section 3(A) Above) Is Improper. This section of the Pretrial Order has one function: to “[s]ummarize the claims and defenses of all parties.” D.C.COLO.LCivR 16.3 and Appendix G. An Order issued by a Court is not a place for argument by the parties.

2. The Scope and Duration of Any Trial Depends on the Court's Disposition of the Pending Class Certification and Summary Judgment Motions. Qwest believes it is impossible to estimate the duration of any trial in this case, and equally impossible to proceed with any such trial, until the Court decides Plaintiffs' Class Certification Motion and the parties' motions for summary judgment.

The evidence relevant to this case, and hence the duration of any trial, will depend on: (a) whether the Court grants Plaintiffs' Class Certification Motion in any part; and (b) if so, the manner in which it defines any class(es) to be certified with respect to any of the seven claims as to which certification is sought. As Qwest stated in its Response to the Class

Certification Motion (DN 86), that motion should be denied for (inter alia) the following reasons, all of which potentially impact the scope and duration of any trial.

* To obtain the relief sought in Plaintiffs' First, Second, Third, Fourth, Fifth, and Sixth Claims, putative class members must individually prove that they detrimentally relied on the alleged ambiguities, inaccuracies, and other defects in the Plan and other documents that are the subject of those claims. See, e.g., *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 569 (7th Cir. 1995) (holding that a violation of ERISA Section 402(b)(3), which is alleged in Plaintiffs' First Claim, does not justify relief "absent a showing of bad faith, active concealment, or detrimental reliance"); *Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 949 (6th Cir. 1990) (same; upholding plan amendment where plaintiffs failed to show detrimental reliance on defendant's failure to comply with Section 402(b)(3)); *Aldridge v. Lily-Tulip, Inc.*, 40 F.3d 1202, 1211-12 (11th Cir. 1994) (same; reversing district court's order invalidating plan amendments where plaintiffs failed to show detrimental reliance); *Burstein v. Retirement Acct. Plan*, 334 F.3d 365, 387 (3rd Cir. 2003) (to prove a breach of fiduciary duty for misrepresentations, as alleged in Plaintiffs' Second Claim, "a plaintiff must establish . . . detrimental reliance by the plaintiff on the misrepresentation"); *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 578 (3rd Cir. 2006) (same); *Loskill v. Barnett Banks, Inc. Severance Pay Plan*, 289 F.3d 734, 738-739 & n. 5 (11th Cir. 2002) (holding that plan amendment would be invalidated for alleged ambiguities and other deficiencies, as alleged in Plaintiffs' Third, Fourth, Fifth and Sixth Claims, only if plaintiffs established bad faith or active concealment on the part of the sponsor or detrimental reliance on the part of the beneficiaries). Thus, if this Court were to certify the classes and subclasses Plaintiffs seek with respect to these six claims, there would need to be individual "mini-trials" regarding the issue of detrimental reliance for each of the alleged 50,000 putative class members

before any adjudication of liability under those claims could be made.

* The class proposed for Plaintiffs' **First, Third, Fourth, Fifth, and Seventh Claims** includes more than 1,400 retirees who have executed agreements requiring that they arbitrate any ERISA claims against Qwest, as well as approximately 150 retirees who have executed written releases of all ERISA claims they may have against Qwest. A number of these retirees are also members of the subclass proposed for plaintiffs' Sixth Claim. Plaintiffs contend that the agreements to arbitrate and the releases signed by these putative class members are not binding on them. Qwest disagrees. Thus, if the Court certifies the classes and subclasses Plaintiffs seek with respect to these six claims, there would need to be individual "mini-trials" regarding the enforceability of the agreements to arbitrate and releases signed by these putative class members before any adjudication of liability with respect to those individuals could be made.

As Qwest argued in its response to Plaintiffs' Class Certification Motion, the preceding circumstances are among those demonstrating that the motion should be denied. Less than two months ago, the Third Circuit declared: "Because the decision whether to certify a class requires a thorough examination of the factual and legal allegations . . . the court may consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take." *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305, 317 (3d Cir. 2009) (citation and quotation marks omitted; emphasis added). And "[i]f proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." *Id.* at 310 (citation and quotation marks omitted).

In this case, resolution of any common issues would be overwhelmed by resolution of the individual issues identified above. If the Court nevertheless decides to certify

one or more of the classes or subclasses sought by Plaintiffs, the scope and duration of any trial will expand tremendously.

The difficulties with class certification described above would disappear to the extent the Court grants Qwest's motions for summary judgment on the claims as to which class certification is sought. As Qwest explained in its response to Plaintiffs' Class Certification Motion, if classes were certified with respect to any of Plaintiffs' claims, different classes or subclasses would need to be certified with respect to each such claim. Qwest has filed motions for summary judgment on all eight of Plaintiffs' claims, including the seven claims as to which class certification is sought. Plaintiffs' Class Certification Motion will be moot if, as Qwest believes should occur, this Court grants Qwest's motions for summary judgment. Thus, as a practical matter it is impossible to estimate the duration of any trial in this case, or to proceed with any such trial, until the Court decides the parties' motions for summary judgment as well as Plaintiffs' Class Certification Motion.

3. Qwest Intends To File a Daubert/in Limine Motion Regarding Plaintiffs' "Legal" Expert. Qwest intends to file a motion in limine and/or under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), seeking to exclude the proposed testimony of Plaintiffs' putative expert, University of Oklahoma Law Professor Donald Bogan, on the ground that such testimony is neither relevant nor reliable under Fed. R. Evid. 702 and is not admissible under the standard enunciated in *Daubert* and its progeny. If this Court denies Qwest's motion to exclude Professor Bogan's proposed testimony, Qwest will seek leave to use legal authorities (e.g., case law, statutes and regulations) as exhibits during its cross-examination of Professor Bogan, because Professor Bogan's "expert" testimony consists principally of an (inaccurate) description of the law applicable to this case.

10. SETTLEMENT

The undersigned counsel for the parties stipulate that:

- a. Throughout this case, counsel for the parties have discussed both by telephone and in person in good faith proposals for settlement of the case.
- b. The participants in the settlement discussions included counsel and party representatives.
- c. The parties were promptly informed of all offers of settlement.
- d. Defendants believe that any future settlement conference should await resolution of the pending motions for class certification and for summary judgment, because it is extremely difficult to determine any settlement value of this case until those motions have been decided.
- e. Defendants believe the possibility of settlement cannot accurately be determined until the Court rules on the pending dispositive motions and motion for class certification. Until immediately after such time as the Court rules upon the pending dispositive motions, Counsel for the parties do not intend to hold future settlement conferences.
- f. For the reasons set forth above, the Parties believe that any further settlement conference before the magistrate judge or other alternative dispute resolution method should await resolution of the pending motions for class certification and for summary judgment.
- g. Counsel for the parties have considered ADR in accordance with D.C.COLO.LCivR.16.6.

11. OFFER OF JUDGMENT

Counsel acknowledge familiarity with the provision of rule 68 (Offer of Judgment) of the Federal Rules of Civil Procedure. Counsel have discussed it with the clients against whom

claims are made in this case.

12. EFFECT OF FINAL PRETRIAL ORDER

Hereafter, this Final Pretrial Order will control the subsequent course of this action and the trial, and may not be amended except by consent of the parties and approval by the court or by order of the court to prevent manifest injustice. The pleadings will be deemed merged herein. This Final Pretrial Order supersedes the Scheduling Order. In the event of ambiguity in any provision of this Final Pretrial Order, reference may be made to the record of the pretrial conference to the extent reported by stenographic notes and to the pleadings.

**13. TRIAL AND ESTIMATED TRIAL TIME;
FURTHER TRIAL PREPARATION PROCEEDINGS**

All the claims and defenses in this case will be tried to the Court.

A. Plaintiffs' Estimate

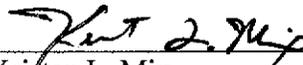
Plaintiffs estimate the trial can be completed within less than four (4) days.

B. Defendants' Estimate

As discussed in Section 9 above, Qwest believes the estimated trial time will depend heavily on whether the Court grants Plaintiffs' Class Certification Motion and/or the parties' motions for summary judgment. If the Court grants Plaintiffs' Class Certification Motion in any part, then the duration of any trial will depend on the contours of the Court's class certification order, but trial might then reasonably be expected to take several months, assuming putative class members are allowed to present evidence regarding their alleged detrimental reliance and other individual issues. If the Court instead denies Plaintiffs' Class Certification Motion in its entirety, but also denies all pending motions for summary judgment, Qwest believes that

between seven and nine days would be required to try this case. An order granting any of the parties' motions for summary judgment could significantly reduce these estimated trial times.

DATED this 17th day of March, 2009. BY THE COURT:



Kristen L. Mix
United States Magistrate Judge

APPROVED:

s/ Curtis L. Kennedy
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Attachment 1

Kerber, et al., v. Qwest Group Life Insurance Plan, et al PLAINTIFFS' LIST OF TRIAL EXHIBITS

<u>Bates Nos:</u>	<u>Date, Title or Description:</u>	<u>Qwest's Proposed Stipulation, Objection and/or Comment</u>
1982		
K02549-2589	1982, August - Mountain Bell SIPP offering package for Management workforce reduction with letter from John G. Shea and information on benefits provided	Stipulated
1983		
K02634-2645	1983, October - Mountain Bell MIPP offering Q&A	Object
K02654-2666	1983, October - Mountain Bell MIPP offering package for Management workforce reduction	Object
1985		
K03400-3444	1985, November 8 - Letter from Mountain Bell President Bob Blanz to Dear Management employees discussing U S WEST's ("3+3") Early Retirement Enhancement Package with attached information on benefits provided	Object
K03472-3479	1985, November 15 - Letter from Northwestern Bell Vice President Kenneth Power to Dear Management employees discussing U S WEST's ("3+3") Early Retirement Enhancement Package with attached information on benefits provided	Object
1986		

K03855-3857	1986, January 1 - Family Protection Benefits	Object
K03879-3881	1986, November 26 - Mountain Bell Benefits and Compensation News	Stipulated
1987		
K04123-4167 and K04213	1987, January 30 - Letter from Mountain Bell Vice President HR Fred Cook to Dear Mountain Bell Manager discussing Mountain Bell Enhanced Management Transition Program with attached information packet and Q&A	Object
K040704074	1987, April - Mountain Bell Benefits and Compensation News	Object
QL04552-4566	1987, June 1 - SPD issued by U S WEST	Stipulated
K03967-3983	1987, November - Letter from Mountain Bell Director Sam Strizich to Dear Retiree discussing enclosed new SPDs for the benefit plans to be put in "Your Benefits Binder you already have" with SPD for group life insurance	Object
1988		
QL10111-10151	1988, June 19 - Memorandum from Diane Phillips to Dorrie Rauch copied to Jill Sanford Re: "U S WEST Group Life Insurance Plan" ("Attached is the official, original executed copy of the U S WEST Group Life Insurance Plan to be maintained in your office. Please keep the document in a safe place.")	Stipulated.

1989		
QL10050-10051	1989, January - U S WEST INSURANCE PLANS (brochure)	Objection. Qwest believes pages QL10028 through QL10095 should be kept together as one document.
QL10008-10015	1989, December 1 - US WEST TODAY Bulletin "US WEST ANNOUNCES MANAGEMENT EARLY RETIREMENT OPPORTUNITY AS PART OF "HARD LOOK" AT BUSINESS" (packet describing program with Q&A)	Stipulated.
QL10016-10017	1989, December 1 - US WEST TODAY <u>"CONDENSED VERSION OF MANAGEMENT EARLY RETIREMENT OPPORTUNITIES."</u>	Stipulated.
QL10018-10019	1989, December 4 - U S WEST TODAY "Management pension plan enhanced"	Stipulated.
QL10074	1989, December 11 - Memo from Betsey Blakeslee, Executive Director, Human Resources to U S WEST Service Pension Eligible Managers (re: Drake, Beam, Morin, Inc. workshops)	Objection. Qwest believes pages QL10028 through QL10095 should be kept together as one document.
QL10028-10047	1989, December 15 - Letter from J. Thomas Bouchard to Nelson Phelps with information packet on 5+5 early retirement offer	Objection. Qwest believes pages QL10028 through QL10095 should be kept together as one document.
QL10020-10021	1989, December 18 U S WEST TODAY "Info flowing' on early retirement plan"	Stipulated.

1990		
QL10022	1990, January 15 - U S WEST TODAY Colorado Edition "A TV BROADCAST OF THE COMPANY'S 5 PLUS 5 EARLY RETIREMENT OFFERING WILL AIR"	Stipulated.
K05230 (also filed as Docket No. 107-33)	1990, January - All or portions, primarily the segment of DVD recording of Qwest Executive Director Charles Kamen explaining ROR for 5+5 Early retirement program recipients 17 mins, 37 secs. through 18 mins, 34 secs)	Objection. Qwest believes the entire relevant videotape should be used.
QL10023-10024	1990, January 15 - U S WEST TODAY "EARLY RETIREMENT: <i>More questions as decision deadline nears</i> "	Stipulated.
QL10157	1990, January 18 - Nelson B. Phelps early retirement acceptance	Stipulated.
QL10158-10160	1990, January 21 - The Phelps' Application for Service/Disability Pension"	Stipulated.
QL10153-10154	1990, January 21-22 - The Kerbers' "Application for Service/Disability Pension" (last page shows approved April 30, 1990)	Stipulated.
QL10163	1990, January 29 - Sam Strizich early retirement acceptance	Stipulated.
QL10164	1990, January 29 - The Strizich's election for lump sum payment	Stipulated.
QL10165-10166	1990, January 29 - The Strizich's "Application for Service/Disability Pension"	Stipulated.
QL10152	1990, January 31 - Edward J. Kerber early retirement acceptance.	Stipulated.

QL10155-10156	1990, January 31 – Edward J. Kerber’s election of 50% Joint and Survivor Annuity	Stipulated.
K05211-5212	1990, February 6 - U S WEST Today - Special Edition ("3,850 U S WEST Managers Opt For Early Retirement")	Stipulated
QL10179	1990, March 1 - <u>LIFE INSURANCE COVERAGE</u>	Stipulated.
QL10171	U S WEST EARLY RETIREMENT OPPORTUNITY (5+5) <u>STATEMENT OF BENEFITS</u>	Stipulated.
QL10172	IMPORTANT RETIREMENT FACTS	Stipulated.
QL10180	LUMP SUM (your check will be sent to your home)	Stipulated.
QL10169	1990, March 26 - Letter from John G. Shea to “Dear U S WEST Retiree” (Re: annuity recipients)	Stipulated.
QL10170	1990, March 26 - Letter from John G. Shea to “Dear U S WEST Retiree” (Re: lump sum recipients)	Stipulated.
	1997	
K00416	1997, September 25 - Letter from U S WEST Vice President Toni Ozeroff to Plan participants	Stipulated
	1998	
K01138-1140	1998, November 30 - Minutes of U S WEST Employee Benefits Committee (RESOLVED. . effective January 1, 1999, . . .the U S WEST Group Life Insurance Plan. . . will be amended to treat domestic partners in the same manner as spouses)	Stipulated

2000		
QL05654-5672	2000, February 1 - Endorsement 2000, January 24 - Endorsement and attached Principal Mutual Life Insurance Policy GL 2454 CONFIDENTIAL	Stipulated.
QL05679-5718	2000, February 1 - Endorsement 2000, January 24 - Endorsement and attached Principal Mutual Life Insurance Policy GL 82454 CONFIDENTIAL	Objection. Qwest may be willing to stipulate to some form of this document, but this Bates-range does not seem to cover any one single document.
QL05719-5758	2000, February 1 - Endorsement 2000, January 24 - Endorsement and attached Principal Mutual Life Insurance Policy GL 92454 CONFIDENTIAL	Objection. Qwest may be willing to stipulate to some form of this document, but this Bates-range does not seem to cover any one single document.
QL05759-5787	2000, February 1 - Endorsement 2000, January 24 - Endorsement and attached Principal Mutual Life Insurance Policy GL 92455 CONFIDENTIAL	Objection. Qwest may be willing to stipulate to some form of this document, but this Bates-range does not seem to cover any one single document.
QL07151-7194	2000, July 12 - Qwest Board minutes and resolutions CONFIDENTIAL	Stipulated.
QI07195-7216	2000, August 10 - Qwest Board minutes and resolutions CONFIDENTIAL	Stipulated.

2001		
QL07217-7218	2001, May 8 - Certificate of Resolutions of Qwest	Stipulated.
QL07219	2001, October 29 - Certificate of Resolutions of Qwest	Stipulated.
2003		
K06218	2003, April 30 - Letter from Erik Ammidown to Dear Qwest Health Care Participant discussing enclosed January 1, 2001 edition of SPD for group life plan for Pre-1991 Retirees	Object
K06233-6244	2003, April - January 1, 2001 edition of SPD for Pre-1991 Retirees	Object
QL04097-4117	2003, April - January 1, 2001 edition of SPD for Post-90 Retirees and Occupational Employees	Stipulated. This is part of exhibit 20 on Qwest's Preliminary List.
K01176-1129	2003, June 3 - Benefit Services Agreement between Qwest and Prudential, with Exhibits, A, B and C - Group Contract (exactly as produced with Erik Ammidown's letter dated December 18, 2006)	Stipulated
Q106918-7000	2003, June 3 - Benefit Plan Services Agreement between Qwest and Prudential, with Exhibit A (Premiums), Exhibit B (Audit Agreement), Exhibit C (Group Contract) and Exhibit D (Performance Standards) for period January 1, 2001 through December 31, 2005 CONFIDENTIAL	Stipulated.
QL05630-5653	Principal Mutual Life Insurance Group Insurance Policy	Stipulated.
QL06614-6616	2003, December - Plan Amendment 2003-1	Stipulated.

2004		
QL06617-6618	(undated) - Plan Amendment 2004-1	Stipulated.
2005		
QL08832-8835	2005, February 4 - Email from Somer-Larsen of Watson Wyatt to Erik Ammidown, et al. with Final Report on Retiree Design Options CONFIDENTIAL	Stipulated.
QL07220	2005, July 8 - Appointment of Plan Design Committee Members	Stipulated.
QL08839	2005, August 3 - Email from Chris Doherty of Prudential to Erik Ammidown	Stipulated.
QL08861-8876	2005, August 8 - Email from Brian Steele to Erik Ammidown with 2005 Census Data and Cost Chart CONFIDENTIAL	Stipulated.
QL08840-8841	2005, August 9 - Email from Cindy Somer-Larson of Watson Wyatt to Erik Ammidown	Stipulated.
QL08842	2005, August 9 - Email from Erik Ammidown to Leroy Christensen of CWA, et al. CONFIDENTIAL	Stipulated.
QL09408-9442	2005, September 1 - Email from Chris Doherty of Prudential to Erik Ammidown with attached 2005 Qwest Census Data Final Plan Change Pricing Chart and 2006 Prudential Rates Quoted for Qwest CONFIDENTIAL	Stipulated.
QL07221-7265	2005, October 14 - Qwest Plan Design Committee Meeting binder, agenda, minutes and materials	Stipulated.
QL02122	2005, October 14 - PLAN DESIGN COMMITTEE Minutes and Resolutions October 14, 2005	Stipulated. This is exhibit 32 on Qwest's Preliminary List.

QL09450	2005, October 14 - Letter from EVP Teresa Taylor to Post-90 Retirees	Stipulated.
K01618-1633	2005, December - 2004 Summary Annual Reports And Summary of Material Modifications of the Qwest Employee Benefit Plans 2005 and 2006 Plan Years (Distributed December 2005)	Stipulated
2006		
QL08255-8268	2006, January 1 - Restated Group Contract G-93634 between Qwest and Prudential (unamended - "The Group Contract includes these forms with an 83500 prefix: COV 1004, GCS 1027, SPR 1001, GR 5033, MOD 1001, SCH 1001, APP 1001" - See QL08257)	Stipulated.
K00612	2006, May 10 - Prudential/Alliance Payment Notification to Martha A. Lensink	Stipulated
QL09571-9572	2006, July 12 - Misc Rough Estimates Savings 2007 CONFIDENTIAL	Stipulated.
	2006, August 30 - Resolutions of the Plan Design Committee of Qwest Communications International, Inc. (NOW, THEREFORE BE IT RESOLVED, that effective as of September 1, 2006 the Qwest Group Life Insurance Plan. . .are each hereby amended to allow participation by the eligible employees of OnFiber. . .)	Object
QL07266-7314	2006, September 6 - Qwest Plan Design Committee Meeting binder, agendas, minutes and materials	Stipulated.
QL09632-9635	2006, October - SMM of Qwest Health and Life 2007 Plan Year Management and Post – 1990 Management Retirees	Stipulated
QL09636-9639	2006, October - SMM of Qwest Health and Life 2007 Plan Year Occupational and Post-1990 Retirees	Stipulated.
QL09640-9643	2006, October - SMM of Qwest Health and Life 2007 Plan Year Pre-1991 Retirees	Stipulated.

QL09644-9647	2006, October - SMM of Qwest Health and Life 2007 Plan Year 1992 ERO Retirees	Stipulated.
QL08215	2006, October 23 - Letter from Nelson Phelps to Dear Fellow Retiree with text of his letter to Qwest CEO Richard Notebaert	Stipulated
K00758-760	2006, November 6 - Letter from Former Northwestern Bell President Janice D. Stoney to Qwest CEO Richard Notebaert	(Qwest to produce the original signed letter) Object
K07266-6267	2006, November 10 - Letter from AUSWR Board members to Qwest CEO Richard Notebaert	(Qwest to produce the original signed letter) Object
QL07320-7404	2006, December 13 - Qwest Plan Design Committee Meeting binder, agendas, minutes and materials	Stipulated.
QL07408-7416	2006, December 18 - Letter from Qwest Group Life Insurance Plan Administrator Erik Ammidown to CLK	Stipulated. This is exhibit 40 on Qwest's Preliminary List.
2007		
QL08374-8375	2007, February 7 - Amendment to Group Contract G-93634 with Prudential for period January 1, 2006 through December 31, 2009 (signed by Prudential, not signed by Qwest)	Stipulated
QL07417-7418	2007, February 28 - Letter from CLK to Qwest Group Life Insurance Plan Administrator Erik Ammidown	Stipulated.
QL07419-7421	2007, March 26 - Letter from Qwest Group Life Insurance Plan Administrator Erik Ammidown to CLK	Stipulated.
	2007 - Prudential/Alliance Payment Notification to Samuel G. Strizich	Object
QL06596-6598	2007, June 7 - Plan Amendment 2007-1	Stipulated. This is exhibit 43 on Qwest's Preliminary List.
QL07422-7423	2007, November 30 - Letter from CLK to Qwest Group Life Insurance Plan Administrator Erik	Stipulated.

	Ammidown	
QL08376-8381	2007, December 19 - Amendment to Business Plan Service Agreement numbered QW03-00209 (See QL06918-7000) between Qwest Business Resources, as agent for Qwest and Prudential Insurance Company (for period 2005, 2006 and 2007 – reflects pricing by age grouping; note: missing Attachments 1-4 which are referenced in this amendment)	Stipulated.
QL07424-7581	2007, December 27 - Letter from Qwest Group Life Insurance Plan Administrator Erik Ammidown, together with all responsive documents to CLK	Stipulated.
	2008	
QL07582-7583	2008, April 10 - Letter from CLK to Qwest Group Life Insurance Plan Administrator Erik Ammidown	Stipulated.
QL07584-7595	2008, May 6 - Letter from Qwest Group Life Insurance Plan Administrator Erik Ammidown, together with all responsive documents to CLK	Stipulated.
QL08503-8510	2008, May 29 - Letter from Erik Ammidown, Qwest Group Life Insurance Plan Administrator to CLK with September 2000 resolutions re: change of basic benefit formula for active Management workers (change from 1 times salary to 1-1/2 times annual salary)	Stipulated. This is exhibit 44 from Qwest's Preliminary List.
QL10194-10221	2008, November 18 - Agreement/ Amendment between Qwest and Prudential Re: Service Agreement concerning Group Contract with Group Contract G-93634 restated as of January 1, 2006	Stipulated.
	2009	
QL10223-10225	2009, January 21 - Amendment to Group Contract G-93634 signed by Erik Ammidown	Stipulated.
	Miscellaneous	
QL08625-8673	Prudential letters denying full benefits to employees	Objection. This

	and retirees – CONFIDENTIAL	document includes a number of hearsay letters from non-party retirees.
	Plaintiffs' Responses to First Set of Discovery	Object
	Plaintiffs' Responses to Second Set of Discovery	Object
	Defendants' Responses to First Set of Discovery	Object
	Defendants' Response to Second Set of Discovery	Object
	Defendants Discovery Response re: Appendix 8 after Order Compelling Response	Object
	Affidavits by Nelson Phelps	Object
	Affidavits by Edward Kerber	Object
	Affidavits by Samuel Strizich	Object
	Affidavits by Martha Lensink	Object
	Affidavit by John G. Shea	Object
Docket No. 86-12	Declaration by Erik P. Ammidown	Objection. Hearsay.
Docket No. 91-2	Declaration by Erik P. Ammidown	Objection. Hearsay.
Docket No. 108-4	Declaration by Erik P. Ammidown	Objection. Hearsay.

BOGAN0017-0029	Expert witness report by Donald T. Bogan	Objection. Qwest will object to Professor Bogan's testimony and any use of his report.
BOGAN0030-0031	Curriculum Vitae for Donald T. Bogan, Esq.	Qwest will object to Professor Bogan's testimony and any use of his Curriculum Vitae.
QL6871-6917	American International Companies Fiduciary Policy No. 672-81-72 for \$25 million	Stipulated.
	Exhibits used for rebuttal purposes	Object.
	Exhibits used for impeachment purposes	Object.

Attachment 2 to Pretrial Order

Qwest's List of Trial Exhibits March 11, 2009

Kerber v. Qwest, 07-cv-00644-WDM-KLM

No.	Bates Nos:	Date, Title or Description	Whether Plaintiffs Stipulate (on Issues Other Than Relevance) or Object to this Exhibit
1.	QL000001-37	U S West Group Life Insurance Plan as Amended and Restated Effective as of June 12, 1998.	Object
2.	K00001-19	SPD issued by Mountain Bell dated December 1, 1974.	Stipulate
3.	QL02791-818	SPD issued by Mountain Bell dated August 7, 1977	Stipulate
4.	K00021-28	SPD issued by Pacific Northwest Bell dated January 1, 1978.	Stipulate
5.	QL03152-269	SPD issued by Pacific Northwest Bell dated December 1978.	Stipulate
6.	K00084-101	SPD issued by Pacific Northwest Bell dated January 1, 1981.	Stipulate
7.	K00029-83	SPD issued by Northwestern Bell dated January 1, 1981.	Stipulate
8.	K00104-20	SPD issued by Pacific Northwest Bell dated May 1, 1982.	Stipulate
9.	K00304-35	SPD issued by Mountain Bell dated October 1, 1982.	Stipulate

10.	K00336-56	SPD issued by U S WEST dated April 1, 1984.	Stipulate
11.	QL05356-70	SPD issued by U S WEST dated July 1984.	Stipulate
12.	K00404-15	SPD issued by U S WEST dated March 1986.	
13.	QL04552-66	SPD issued by U S WEST dated June 1, 1987.	Stipulate
14.	K00417	Letter dated March 26, 1990 sent to (<i>inter alia</i>) Named Plaintiffs Kerber and Phelps discussing, <i>inter alia</i> , "Your pension check".	Stipulate
15.	K00419	Letter dated March 26, 1990 discussing, <i>inter alia</i> , "Your lump sum check".	Stipulate
16.	QL01795-2121	SPD issued by U S WEST dated July 1991.	Stipulate
17.	QL03270-695& QL3718-3904	SPD issued by U S WEST dated January 1994.	Stipulate
18.	QL00092-122	SPD issued by U S WEST dated January 1, 1996.	Stipulate
19.	K00416	Letter dated September 25, 1997 that US West mailed to Plan participants.	Stipulate
20.	QL03905-4123	SPD effective January 2001 that Qwest sent to Post-1990 Retirees.	Stipulate
21.	QL01783-94	SPD effective January 2001 that Qwest sent to Pre-1991 Retirees.	Stipulate
22.	K00368-69	Confirmation Statement for the 2001 Health Care and Group Life Insurance Plans.	Stipulate
23.	K000420-22	Confirmation Statement for the 2002	Stipulate

		Health Care and Group Life Insurance Plans.	
24.	K00370-71	Confirmation Statement for the 2003 Health Care and Group Life Insurance Plans.	Stipulate
25.	K00373-74	Confirmation Statement for the 2004 Health Care and Group Life Insurance Plans.	Stipulate
26.	K00375-403	Material from U S WEST internal website.	Stipulate
27.	QL02126-38	Plan Amendment 2006-1 dated December 13, 2006.	Stipulate
28.	QL07405	Letter dated October 14, 2005 from Qwest to Occupational Post-1990 Retirees regarding Retiree Health & Basic Life Insurance Benefit Changes.	Stipulate
29.	QL06936-89	Group Insurance Contract effective January 1, 2001 through December 31, 2005 between The Prudential Insurance Company of America and Qwest Communications International Inc.	Stipulate
30.	QL08515-17	Benefit Enrollment Statement dated October 13, 2005 addressed to Joseph Lensink.	Object
31.	QL08386-437	Booklet entitled "Your 2006 Occupational Benefit Program Guide".	Stipulate
32.	QL02122	Plan Design Committee Minutes and Resolutions October 14, 2005—Qwest Group Life Insurance Plan.	Stipulate
33.	QL08193-94	Letter that Qwest sent to Mimi Hull, President of the Association of U S WEST Retirees, with a copy to the	Stipulate

Minnesota Public Utilities
Commission, on or about October 20,
2005.

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|-----|-------------|---|-----------|
| 34. | QL08255-373 | Restated Group Contract restated as of January 1, 2006 between The Prudential Insurance Company of America and Qwest Communications International Inc. | Object |
| 35. | QL07602-06 | January 9, 2006 Qwest letter signed by Felicity O'Herron responding to request for documents concerning the Qwest pension plan. | Stipulate |
| 36. | QL02123-24 | Document entitled "Plan Design Committee—Minutes and Resolutions September 14, 2006—Qwest Group Life Insurance Plan". | Stipulate |
| 37. | QL08195-96 | October 30, 2006 letter from Qwest's Teresa Taylor to Mimi Hull, President of the Association of U S West Retirees. | Stipulate |
| 38. | QL07406-07 | November 2006 request for documents from Curtis Kennedy relating to the Life Plan. | Stipulate |
| 39. | QL07004-16 | Document entitled "Resolutions of the Qwest Plan Design Committee, Qwest Group Life Insurance Plan, Amendment 2006-1," which the PDC executed on December 13, 2006. | Stipulate |
| 40. | QL07408-16 | December 18, 2006 EBC letter (without enclosures) responding to a request for documents concerning the Life Plan. | Stipulate |
| 41. | QL07001-02 | December 2006 PDC Minutes. | Stipulate |
| 42. | QL08374-75 | Amendment/Rider to the Restated Group Contract executed by Prudential on or about February 7, | Object |

2007.

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|-----|-------------|--|-----------|
| 43. | QL06596-98 | Resolutions of the Qwest Plan Design Committee—Qwest Group Life Insurance Plan Regarding Amendment 2007-1 dated June 7, 2007. | Stipulate |
| 44. | QL08503-10 | Letter dated May 29, 2008 with enclosed copy of the Sept. 2000 Resolutions. | Stipulate |
| 45. | K05230 | January 1990 video of a U S West video conference made available for viewing by management employees eligible for the 5+5 program. | Stipulate |
| 46. | QL00148-151 | Summary of Material Modifications of the Qwest Health Care and Qwest Life Insurance Plan 2007 Plan Year. | Stipulate |
| 47. | QL06715-54 | 2007 Pre-1991 Benefit Program Guide. | Stipulate |
| 48. | QL08530-33 | Document addressed to Sharon Strizich entitled “2007 Qwest Health and Life Benefit Enrollment Statement for Pre-1991 Retirees—Retired prior to 1/1/91. | Stipulate |
| 49. | QL10028-95 | Packet of 5+5 documents sent to 5+5 eligible management employees of Mountain Bell | Stipulate |
| 50. | K05112-13 | Insurance Plan Descriptions contained in the 5+5 Packet sent to eligible Pacific Northwest Bell management employees. | Stipulate |
| 51. | QL10025-26 | Insurance Plan Descriptions sent to eligible Northwestern Bell management employees. | Stipulate |

52.	QL10152-56	Signed and completed forms maintained in the retirement file of Edward J. Kerber.	Object
53.	QL10157-62	Signed and completed forms maintained in the retirement file of Nelson B. Phelps.	Object
54.	QL10163-65	Signed and completed forms maintained in the retirement file of Samuel G. Strizich.	Object
55.	QL10167-68	Signed and completed forms maintained in the personnel file of Edward J. Kerber.	Object
56.	QL10166	Signed and completed form maintained in the personnel file of Samuel G. Strizich.	Object
57.	QL08571-72	Letter regarding the Health Plan signed by representatives of QCII and the CWA on or about August 14, 2005.	Stipulate
58.	QL06593	Letters regarding the Life Plan signed by representatives of QCII and the CWA on or about August 14, 2005.	Stipulate
59.	QL08674-75	Resolutions of the Qwest Communications International Inc. Employee Benefits Committee adopted March 23, 2004.	Stipulate
60.	QL08237-38	Item dated October 1, 2005 posted on the website of the Communications Workers of America entitled "Tough Bargaining Produces Settlement for 25,000 Members at Qwest".	Stipulate
61.	QL08676-818	Form 10-K that QCII filed with	Stipulate

the Securities and Exchange Commission on February 16, 2006.

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|-----|--------------|--|-----------|
| 62. | | Document entitled "Legal Activities Extra by Curtis Kennedy, AUSWR Litigation Counsel." | Stipulate |
| 63. | | E-mail from Plaintiffs' attorney Curtis Kennedy dated January 10, 2008. | Stipulate |
| 64. | QL10221-356 | January 21, 2009 letter from Qwest's Erik P. Ammidown to Prudential's Christopher Doherty with enclosures. | Stipulate |
| 65 | | Exhibit Deleted | |
| 66 | | Exhibit Deleted | |
| 67 | | Exhibits used for rebuttal purposes. | Object |
| 68 | QL10189-92 | Excerpts from the Qwest Health Plan | Stipulate |
| 69 | QL06755-6810 | 2007 Management Benefit Program Guide for employees, post-1990 retirees, COBRA, LTD and direct bill participants, distributed October 2006. | Stipulate |
| 70 | QL06675-6714 | 2007 Enhanced Retirement Offer in 1992 (ERO '92) Benefit Program Guide for retirees and COBRA, LTD and direct bill participants, distributed October 2006. | Stipulate |

71	QL08515-8564	Confirmation Statements sent to the named plaintiffs in 2005 and 2006 concerning, <i>inter alia</i> , benefits under the Life Plan.	Stipulate
72	QL09457-9567	Email chain and attachments ending with email from Christopher Doherty of Prudential to Debra Conley of Qwest, with a copy to others, dated January 17, 2006.	Stipulate
73		Retiree Guardian, 2008 Issue 2, Newsletter article titled “Curtis Kennedy Update, Kerber v. Qwest Group Life Ins Plan, Group Life Insurance”	Stipulate
74		Email dated October 23, 2006 from Nelson B. Phelps addressed to “Dear Fellow Retiree” and discussing a letter sent to Qwest’s Richard Notebaert.	Stipulate
75		Retiree Guardian newsletter, 2006 Issue 4, Oregon Washington edition with first page title “Retiree Benefit Cutbacks!”	Stipulate
76		Retiree Guardian newsletter, 2006 Issue, 4, Arizona edition, with first page title “Retiree Benefit Cutbacks!”	Stipulate
77		Retiree Guardian newsletter, 2006 Issue, 4, Utah, Idaho, Montana edition with first page title “Retiree Benefit Cutbacks!”	Stipulate

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Qwest will file a motion to exclude Professor Donald Bogan's proposed testimony and objects to such testimony, but to the extent he may be allowed to testify, Qwest will use as trial exhibits the following deposition exhibits from his deposition: 3 through 5, 7 through 13 and 15 through 23.

Object