IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:05-cv-00478-BNB-PAC

EDWARD J. KERBER,
NELSON B. PHELPS,
JOANNE WEST,
NANCY A. MEISTER,
THOMAS J. INGEMANN, JR.,
Individually, and as Representative of plan participants and plan beneficiaries of the QWEST PENSION PLAN

Plaintiffs,

v.

QWEST PENSION PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PENSION PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, Qwest Pension Plan, Qwest Employees Benefit Committee, Qwest Pension Plan Design Committee, and Qwest Communications International, Inc. (collectively, "Qwest"), by and through undersigned counsel hereby move the Court for summary judgment on all of Plaintiff's claims.

As grounds therefore, Qwest states as follows:

1. Pursuant to Fed. R. Civ. P. 56, a defending party may at any time move for a summary judgment in the party's favor as to all or any part of a plaintiff's complaint.

2. This Motion is based on the supporting Brief, including exhibits, filed and served concurrently with this Motion.

3. Specifically, Defendant moves for summary judgment on all of Plaintiffs' claims for the following reasons:

a. Plaintiffs Edward Kerber, Nelson Phelps, Joanne West and Nancy Meister all lack standing to assert their claims.

b. The death benefit was an ancillary pension benefit (which can be reduced or eliminated), not an accrued pension benefit (which cannot be). Defendants' decision to terminate the death benefit was a settlor, not a fiduciary, decision.

c. The Plan (and Summary Plan Documents describing it) expressly authorize QCI (and its designees) to eliminate non-vested Plan benefits such as the death benefit. The 2003 Plan amendment was consistent with this authorization.

d. QCI's transfer of excess Plan assets to pay certain benefits for retired employees was authorized by 26 U.S.C. §§ 401 and 420. Contrary to Plaintiffs' allegation, such transfers do not transform ancillary benefits funded by Plan assets into accrued benefits.

e. Plaintiffs' breach of fiduciary duty claim(s) fail because there is no evidence that any fiduciary misled or misinformed any plan participant into believing that the death benefit was an "accrued" rather than an "ancillary" benefit.

f. Plaintiffs' estoppel claim is not permitted by ERISA or the Tenth Circuit. Plaintiffs have not and cannot show that the relevant Plan documents are ambiguous. In a case where plan documents are clear, no oral statements (even if such statements had been made) can amend the written terms of the plan.

WHEREFORE, Qwest prays that the Court grant its Motion for Summary Judgment, as well as fees and costs as allowed by law.

Respectfully submitted this 30th day of August, 2006.

s/ Elizabeth Kiovsky
Elizabeth I. Kiovsky
Baird & Kiovsky, LLC
2036 East 17th Avenue
Denver, CO 80206
Telephone: (303) 813-4500
Facsimile: (303) 813-4501
e-mail: bdq@bairdkiovsky.com

s/ Sherwin Kaplan
Sherwin Kaplan
Thelen Reid & Priest, LLP
701 Eighth Street NW
(Eighth & G)
Washington D.C. 20001-3721
Telephone: (202) 508-4218
Facsimile: (202) 654-1845
email: skaplan@thelenreid.com

Attorneys for Defendants

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 30th day of August, 2006, I electronically filed the foregoing **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

Curtis L. Kennedy, Esq. at CurtisLKennedy@aol.com
Sherwin Kaplan, Esq. at skaplan@thelenreid.com
Sara Pikofsky, Esq. at spikofsky@thelenreid.com

and, I also certify that I have served a copy of the document upon the following non-CM/ECF participants:

Cynthia Delaney
Qwest Communications, Corp.
1801 California Street, Suite 900
Denver, CO 80202

s/ Carla A. Chiles
Carla A. Chiles, Paralegal
Baird & Kiovsky, LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:05-cv-00478-BNB-PAC

EDWARD J. KERBER,
NELSON B. PHELPS,
JOANNE WEST,
NANCY A. MEISTER,
THOMAS J. INGEMANN, JR.,
Individually, and as Representatives of plan participants and plan beneficiaries of the QWEST PENSION PLAN,

Plaintiffs,

vs.

QWEST PENSION PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PENSION PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT
OF THEIR MOTION FOR SUMMARY JUDGMENT

I. Preliminary Statement

This lawsuit concerns the elimination of a "death benefit" from the Qwest Pension Plan ("the Plan"). Until 2004 the death benefit had been available to employees of Qwest Communications International Inc.'s ("QCI") predecessor corporations who were hired prior to March 1, 1993 and who retired with a service or disability pension. A 2003 Plan amendment

eliminated the benefit for employees who retired on or after January 1, 2004. Plaintiffs challenge the 2003 Amendment.[1] The benefit remains available to the vast majority of retirees.

Congress enacted the Employee Retirement Income Security Act ("ERISA") in 1974 to not only assure that certain promised benefits were paid, but also to foster a voluntary benefit system in order to encourage employers to offer benefits to their employees. While fiduciary duties lie at the core of ERISA, courts have clearly and repeatedly recognized the distinction between fiduciary and non-fiduciary, also called settlor, functions. *See Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) (plan amendments made by settlor, not fiduciary); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995) (adoption, modification or termination of plans is not a fiduciary function). Tasks such as amending plans fall within the scope of settlor functions, not fiduciary functions. *See Averhart v. U S WEST Management Pension Plan*, 46 F.3d 1480, 1488 (10th Cir. 1994). QCI amended the Plan to eliminate the death benefit for post-2003 retirees in its capacity as settlor. This action in no way triggered any fiduciary duties that QCI may have.

ERISA governs employee benefits, including both pension and welfare benefits. *See Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510-1511 (10th Cir. 1996) for an overview of ERISA. An "employee pension benefit plan" includes any plan to the extent such plan provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). ERISA provides for two types of pension benefits: accrued or ancillary. Accrued pension benefits are required by statute to vest, *see* 29 U.S.C. § 1053, and once vested (typically

[1] Plaintiffs also assert a claim for declaratory judgment on behalf of employees who retired prior to 2004 and for whom the benefit remains available. As discussed below and in Defendants' pending Motion to Dismiss, Plaintiffs do not have standing to bring such a claim.

based on years of service) cannot be reduced or eliminated. That concept is codified in what is commonly referred to as the "anti-cutback rule" contained in ERISA and the Internal Revenue Code ("IRC"). *See* 29 U.S.C. § 1054(g); I.R.C. § 411(d)(6). The term vest means that a benefit is irrevocable. The only benefits that are vested by law are accrued pension benefits.[2] While an accrued and vested pension benefit cannot be cut back, a pension benefit may be frozen or terminated prospectively at any point in time at the discretion of the sponsor of the plan. *See generally* 29 U.S.C. § 1054(g); I.R.C. § 411(d)(6).

Pension benefits which do not vest are considered "ancillary" pension benefits and may be cut back at the will of the employer. *See generally* I.R.C. § 411(a)(7) and ERISA §3(23), 29 U.S.C. § 1002(23). The treasury regulations further explain the difference providing that:

> In general, the term "accrued benefit" refers only to pension or retirement benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits such as payment of medical expenses (or insurance premiums for such expenses), disability benefits not in excess of the qualified disability benefit . . ., life insurance benefits payable as a lump sum, *incidental death benefits*, current life insurance protection, or medical benefits described in section 401(h).

Treas. Reg. § 1.411(a)-7(a)(1)(emphasis added). Recent regulations restate existing law, clearly confirming that a death benefit that is not an optional form of benefit[3] is an ancillary benefit that is not protected by anti-cutback rules. *See* Treas. Reg. § 1.411(d)-3(g)(2)(v).

---

[2] Ancillary pension and welfare benefits may also become contractually vested by the conduct of the plan fiduciary or sponsor through formal plan documents demonstrating a clear and unmistakable intent to vest an otherwise non-vested benefit. This concept of contractual vesting is referenced in Section D at p. 22 and is not applicable here.

[3] The death benefit offered by QCI is not an optional form of benefit as defined in the regulation. Treas. Reg. § 1.411(d)-3(g)(6)(ii)(B).

An "employee welfare benefit plan," on the other hand, includes any plan to the extent such plan provides, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment. ERISA § 3(1), 29 U.S.C. §1002(1). Welfare benefits typically include things such as disability, health, life and death benefits and, unlike pension benefits, do not vest by operation of statute (although in some cases an employer can be contractually bound to continue providing them). Like ancillary pension benefits, and unlike accrued pension benefits, welfare benefits do not vest by statute.

In summary, ERISA makes clear that while accrued pension benefits may not be cut back, both welfare benefits and ancillary pension benefits may be cut back at the will of the employer. While a death benefit can take the form of a welfare benefit or an ancillary pension benefit, the death benefit in question here is an ancillary pension benefit and was treated as such by the Plan sponsor.

Plaintiffs' four count Second Amended Complaint ("Complaint") alleges (1) that the death benefit is an "accrued benefit" under ERISA and therefore cannot be eliminated and (2) that Qwest is estopped from eliminating the benefit because of its conduct, including alleged representations that it made about the benefit. For relief, Plaintiffs ask the Court, in effect, to declare the benefit cannot be eliminated and to order Defendants to issue Plan documents that state as much.

As a preliminary matter, Kerber and Phelps[4] are not proper parties to this action. Defendants have previously filed a Motion to Dismiss regarding the Kerber and Phelps claims,

[4] The Plaintiffs' last names are used for ease of reference. No disrespect is intended.

and respectfully renew the request set forth in their Motion.[5] Defendants are entitled to summary judgment against Kerber and Phelps for the reasons set forth in the Defendants' Motion to Dismiss, for the reasons set forth below, *and* because the undisputed facts show that (1) they each retired in 1990 and (2) the Plan modification does not implicate the rights of their qualified beneficiaries to receive a death benefit when they die. The amendment, as described in the Summary of Material Modifications distributed to participants, holds that

> participants who are eligible to receive service pensions who retire on or after January 1, 2004, will no longer be eligible for a Sickness Death Benefit in the event of death on or after January 1, 2004. Similarly, participants who terminate on or after January 1, 2004 and elect a lump sum or partial lump sum with respect to their regular pension will not receive a lump sum attributable to the Sickness Death Benefit even if they qualify for a service pension.

See Exhibit I. This amendment has no impact on Kerber and Phelps, both of whom retired prior to January 1, 2004. They lack standing. Their claims should be dismissed as a matter of law.

Defendants now move for summary judgment on all of Plaintiffs' claims for the following reasons:

- The death benefit is an ancillary pension benefit (which can be reduced or eliminated), not an accrued pension benefit (which cannot be).
- Defendants' decision to terminate the death benefit was a settlor, not a fiduciary, decision.
- The Plan (and Summary Plan Documents describing it) expressly authorize QCI (and its designees) to eliminate non-vested Plan benefits such as the death benefit. The 2003 Plan amendment was consistent with this authorization.
- QCI's transfer of excess Plan assets to pay certain benefits for retired employees was authorized by 26 U.S.C. §§ 401 and 420. Contrary to

[5] The Court has not yet ruled on the Motion to Dismiss. In addition, neither Meister nor West are currently Plan participants, having both taken lump sum distributions and therefore do not have standing to bring an ERISA claim. *See* ERISA § 502(a); 29 U.S.C. § 1132(a).

Plaintiffs' allegation, such transfers do not transform ancillary benefits funded by Plan assets into accrued benefits.

- Plaintiffs' breach of fiduciary duty claim(s) fail because there is no evidence that any fiduciary misled or misinformed any plan participant into believing that the death benefit was an "accrued" rather than an "ancillary" benefit.
- Plaintiffs' estoppel claim is not permitted by ERISA or the Tenth Circuit. Plaintiffs have not and cannot show that the relevant Plan documents are ambiguous. In a case where plan documents are clear, no oral statements (even if such statements had been made) can amend the written terms of the plan.

II. Undisputed Material Facts

A. The Parties

1. QCI is a Delaware corporation in good standing in Colorado, with its principal place of business in the District of Colorado. QCI was created in 1995 when SP Telecom (a subsidiary of Southern Pacific Railroad) combined with Qwest Corporation, a Dallas-based digital microwave firm. In 2000, QCI acquired and merged with U S WEST, which at that time provided local telephone services in 14 Western States. *Second Am. Compl. at ¶ 16.*

2. As a result of the merger, QCI became and remains to this day the Plan sponsor of the Qwest Pension Plan, which is the successor to U S WEST's pension plan. *Exhibit A: Qwest Pension Plan (without appendices) effective January 1, 2001, Bates Stamp 4562-4751 at 4569-70.* The Plan provides eligible QCI employees with "employee pension benefits" and "employee welfare benefits." *Exhibit A at Bates Stamp 4562-4751.*

3. The "Qwest Employee Benefit Committee" is the Plan's "named fiduciary" and is responsible for, among other things, administration of the Plan including appointment of other fiduciaries and interpretation of the Plan's provisions. The "Qwest Pension Plan Design

Committee" has been given authority by the Plan sponsor to make amendments to the Plan. *Exhibit A at Bates Stamp 4720-4721*. The Plan Design Committee is not a Plan fiduciary.

4. Plaintiffs Kerber and Phelps both retired effective February 28, 1990 from U S WEST. They are each receiving "service pension annuities" from the Plan. *Second Am. Compl. at ¶¶ 5, 7*. Generally speaking (and subject to terms and conditions of Plan documents) the service pension annuity provides eligible retired employees with monthly installment payments from retirement through death. Depending on the type of annuity option chosen, the retiree's beneficiaries may be entitled to continued payments after the retiree's death. *Exhibit A at 4647, 4702-4706*.

5. The remaining Plaintiffs each retired from QCI after January 1, 2004. West and Meister each received lump sum payments that did not include a death benefit payment. *Second Am. Compl. at ¶¶ 9, 11*. Neither West nor Meister are Plan participants as they are no longer entitled to any benefits from the Plan. ERISA § 3(7), 29 U.S.C. § 1002(7). Ingemann is currently receiving a service pension annuity and is a Plan participant. *Second Am. Compl. at ¶ 13*.

B. The Plan

6. Years before its acquisition by QCI, U S WEST, Inc. ("Old U S WEST") had established two pension plans, effective January 1, 1984, as successors to the Bell System Pension Plan: the U S WEST Pension Plan (the "Occupational Plan") and the U S WEST Management Pension Plan (the "Management Plan"). *Exhibit B: U S WEST Pension Plan, Bates Stamp 3221-3387 and Exhibit C: U S WEST Management Pension Plan, Bates Stamp 3543-3661*.

7. The Occupational Plan and the Management Plan merged into a single plan, named the U S WEST Pension Plan (the "U S WEST Plan"), effective January 1, 1993. *Exhibit D: U S WEST Pension Plan amended January 1, 1993, Bates Stamp 4453-4561*. In 1998, Old U S WEST transferred sponsorship of the U S WEST Plan to USW-C, Inc. (which was renamed U S WEST, Inc.) ("U S WEST"). *Exhibit A at Bates Stamp 4570*.

8. On or about July 1, 2000, U S WEST merged into QCI, which became the sponsor of the U S WEST Plan. QCI became a "participating company" on January 1, 2001. *Exhibit A at Bates Stamp 4570*.

9. Effective January 1, 2001, the U S WEST Plan was renamed the Qwest Pension Plan. *Exhibit A at Bates Stamp 4571*.

C. The Death Benefit

10. The U S West Plan included a "death benefit" equal to a year's base salary and payable on death to beneficiaries of retired employees receiving a "service pension" or "disability pension." *Exhibit D at Bates Label 4499-4500; for predecessor plans see Exhibit B at Bates Label 3332-33 and Exhibit C at Bates Label 3631-32.* The U S WEST Plan was amended by action of the U S WEST Board of Directors in December 1992, effective February 28, 1993, however, to limit eligibility for the death benefit to individuals hired on or before March 1, 1993. *Exhibit E: Board of Director Minutes dated December 4, 1992 and Exhibit D at Bates Label 4502*. Consistent with this modification, subsequent U S WEST Plans and the Qwest Pension Plan have always limited the death benefit to individuals first hired before March 1, 1993 and frozen the amount of the death benefit to the wages paid during the last twelve

months of employment preceding March 1, 1993. *Exhibit A at Bates Stamp 4719 and Exhibit D at Bates Stamp 4502*.

11. The Qwest Pension Plan and U S WEST predecessor plans both contain definitions of "accrued benefit" that state explicitly that the death benefit is not an accrued benefit. *Exhibit F: U S WEST Pension Plan amended and restated January 1, 1989 (without appendices), Bates Stamp 4318-4378 at 4322, 4360-61* (defining "accrued benefit" as "the benefit to which a Participant is entitled under the Plan, as computed in accordance with Article V as of the applicable date of calculation" and including the death benefit as part of Article VII, not V); *see also Exhibit D (1993 Plan) at Bates Label 4457, 4498-4502* (same structure); *Exhibit G: U S WEST Pension Plan effective January 1, 1997 (without appendices), Bates Stamp 3989-4143 at 3998, 4112-4113* (including in the definition of "accrued benefit" the language "Accrued benefits shall not include any benefits under Article VII . . ." and including the death benefit as part of Article VII); *Exhibit A at Bates Stamp 4572, 4715-4719* (same language and structure).

12. The Qwest Pension Plan was amended, effective December 1, 2003, to eliminate the death benefit for employees retiring after January 1, 2004:

> (e)(1) Notwithstanding any other provision of this Article VII, no Death Benefits shall be made under Section 7.3(a), (b) or (d) with respect to a Former Participant who Terminates on or after January 1, 2004. Accordingly, no Death Benefit shall be paid under Section 7.3 (or otherwise) with respect to any Former Participant who Terminates on or after January 1, 2004 and who dies on or after January 1, 2004.
>
> (2) Notwithstanding any other provision of this Article VII, no lump sum payments shall be made under Section 7.3(c) on or after January 1, 2004, except to the extent the Participant Terminates prior to January 1, 2004 and meets the conditions for a payment under Section 7.3(c) (other than an election of a lump sum or partial lump sum) prior to January 1, 2004, provided that the Participant elects a lump sum or partial lump sum with respect to his regular pension benefit

> during the Special Election Period as specified in Section 6.5 (as amended by Amendment 2003-2). Accordingly, no lump sum shall be paid under Section 7.3(c) to any Participant who Terminates on or after January 1, 2004.

Exhibit H: Qwest Pension Plan Amendment 2003-5, Bates Stamp 4961-4963.

13. Plan participants were advised in a "summary of material modification" to the Plan dated December 2003 that the death benefit would be eliminated for all eligible participants who terminate employment on or after January 1, 2004:

> Under the Plan, employees hired prior to March 1, 1993 have generally been eligible for a Sickness Death Benefit if they die while actively employed or, in some cases, after termination of employment. The Plan has been amended to eliminate the Sickness Death Benefit for employees who terminate employment on or after January 1, 2004. Thus, participants who are eligible to receive service pensions who retire on or after January 1, 2004, will no longer be eligible for a Sickness Death Benefit in the event of death on or after January 1, 2004.
>
> Similarly, participants who terminate on or after January 1, 2004 and elect a lump sum or partial lump sum with respect to their regular pension will not receive a lump sum attributable to the Sickness Death Benefit even if they qualify for a service pension. Eligible participants who terminate prior to that date will receive an amount attributable to the death benefit in a lump sum if they elect a lump sum or partial lump with respect to their regular pension on a timely basis (generally no later than 120 days after termination of employment.)
>
> The Plan has provided an Accidental Death Benefit to certain active employees hired before March 1, 1993 who die solely as a result of accident or injury during the course of employment. As noted above, the Plan has also provided a Sickness Death Benefit for certain eligible employees hired before March 1, 1993 who die while in active employment for reasons other than accident or injury. These two benefits for eligible active employees have not been changed. In addition, life insurance benefits for employees provided through the Qwest Group Life Insurance Plan are not affected by this change.
>
> Please note that these changes do not affect the survivor benefits that may be payable under the form of pension you elected. For example, if you retired with a service pension and you elected a 50% survivor annuity for your spouse, the 50% survivor annuity will still be paid after your death. However, if you terminate employment on or after January 1, 2004, your spouse will not receive the Sickness Death Benefit upon your death.

Exhibit I: 2003 Summary of Material Modifications, Bates Stamp 175-178 at 176.

D. Plan Modification

14. The U S WEST Plan documents and the Qwest Pension Plan documents consistently allow the Plan Sponsor (or its designee) to modify or terminate the benefits provided by the Plan, as long as those benefits had not previously "accrued". The following provision appears in the Plan, as well as in U S WEST Plan documents dating back to at least 1997:

> The Company expects this Plan to be permanent, but as future conditions cannot be foreseen **it reserves the right to amend the Plan at any time, without prior notice to anyone**. The Plan may be amended by a writing approved by the Company's Board of Directors and signed on behalf of the Company by an officer of the Company duly authorized by the Board of Directors. The Plan may also be amended in writing by the Plan Design Committee or other person(s) to the extent authority to amend the Plan has been delegated to the Plan Design Committee or such person(s) by the Board of Directors. Each amendment shall be effective on such date as the Company or its delegee may determine. No amendment or modification that affects the rights, power, privileges, immunities or obligations of the Trustee may be made without the consent of the Trustee. **Amendments may modify the rights and interests of Employees who are Participants in the Plan at the time thereof as well as future Participants but amendments may not diminish the accrued benefit (as defined in Section 411(d)(6) of the Code) of any Participant as of the effective date of such amendment.**

(emphasis added). *Exhibit A at Bates Stamp 4730* (Qwest Pension Plan) *and Exhibit G at Bates Stamp 4128-4129* (1997 U S WEST Plan, nearly identical language) *and Exhibit D at Bates Stamp 4508* (1993 U S WEST Plan, similar language).

15. U S WEST Plan participants and QCI Plan participants have had the right to review Plan documents at their request. ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4); *see also Exhibit J (described below)*. In addition, U S WEST Plan participants and QCI Plan participants were regularly provided with "Summary Plan Descriptions" ("SPDs") that provided a summary of Plan benefits. SPDs provided to Plan participants since at least 1977 have stated that (1) the

plan may be amended or terminated without notice, (2) the SPD is only a summary of and does not describe all of the details of the plan; and (3) the official plan document, not the SPD, governs the participants' right to benefits. *Exhibit J: Compilation of relevant SPD provisions, 1977 to present: 1977 Mountain States Telephone and Telegraph Co. Summary of Plan For Employees' Pensions, Disability Benefits and Death Benefits at Bates Stamp 1836, 1838, 1871; Summary of Plan for Employees' Pensions Disability Benefits and Death Benefits Eff. January 1, 1979 at Bates Stamp 1891-92, 1906 (Northwestern Bell version); Bell System Pension Plan SPD, Eff. Oct. 1, 1980 at Bates Stamp 1651, 1656 (identical Northwestern Bell version not included); Bell System Management Pension Plan SPD, Eff. Oct. 1, 1980 (Mountain Bell version) at Bates Stamp 1707, 1719 (identical Malheur Bell and Northwestern Bell versions not included); U S WEST Pension Plan SPD, Eff. Jan 1. 1984, Rev. Jan 1, 1985 at Bates Stamp 1523-24 (identical Pacific Northwest Bell version not included); U S WEST Management Pension Plan SPD, Eff. Jan 1. 1984, Rev. Jan 1, 1985 at Bates Stamp 1559-60 (identical Pacific Northwest Bell version not included); U S WEST Pension Plan SPD, Eff. Jan. 1, 1984, Rev. Jan. 1, 1987 at Bates Stamp 1074, 1078, 1105-06 (identical Northwest Bell version not included); U S WEST Management Pension Plan SPD, Eff. Jan. 1, 1984, Rev. Jan. 1, 1987 at Bates Stamp 5662, 5666 (identical Northwest Bell, Pacific Bell versions not included); U S WEST Management Pension Plan SPD, Eff. Jan. 1, 1989 at Bates Stamp 1145, 1157-58; U S WEST Pension Plan SPD (found in Benefits Today Handbook), Eff. Jan. 1, 1990 at Bates Stamp 1127, 1129, 1138-39; U S WEST Pension Plan SPD, Eff. Jan. 1, 1990 at Bates Stamp 747, 749, 774, 792; U S WEST Management Pension Plan SPD, Eff. Jan. 1, 1990 at Bates Stamp 712, 715, 738-40; U S WEST Pension Plan SPD, Amended Sept. 1, 1993 at Bates Stamp 515, 519, 539,*

541; U S WEST Benefits Handbook Including Pension Plan SPD, January 1996 at Bates Stamp 409, 411, 435, 494-95, 498; U S WEST Pension Plan Retiree SPD, January 1996 at Bates Stamp 352, 358, 361-62, 406; U S WEST Pension Plan Benefits Handbook Update, July 1997 at Bates Stamp 6620, 6635; U S WEST Pension Plan SPD, Amended Jan 1. 1999 at Bates Stamp 5532, 5599; U S WEST Benefits Handbook Including Pension Plan SPD, August 1999 at Bates Stamp 0001, 0009, 0067-68; Qwest Pension Plan SPD, Eff. Jan. 1, 2001 at Bates Stamp 5444, 5452, 5520.

III. Why The Motion Should Be Granted

A. Summary Judgment Standard

Summary judgment is appropriate where the evidence submitted in support of the Motion shows that there is "no genuine issue as to any material fact" and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Proc. 56(c). While "the moving party bears the initial burden of establishing that there are no genuine issues of material fact, once such a showing is made, the non-movant must set forth specific facts showing" that there is a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Zurich N. Am. v. Matrix Serv.*, 426 F.3d 1281, 1287 (10th Cir. 2005).

This case is particularly appropriate for summary judgment. The case presents only questions of law and any factual allegations do not bear on the outcome of the legal question. The Court can resolve all of Plaintiffs' claims by interpreting the statutory language and plan documents, both of which involve purely legal questions. *Proctor & Gamble Co. v. Haugen***,** 222 F.3d 1262, 1270 (10th Cir. 2000) (statutory interpretation is a question of law); *Andrews v. Blue*

Cross Blue Shield of Nebraska Employee Group Long Term 165 Fed.Appx. 650, 653 (10th Cir. 2006) (*copy attached as Exhibit K*) ("Questions involving the scope of benefits provided by a plan to its participants must be answered initially by the plan documents, applying the principles of contract interpretation.") Where there is no ambiguity within plan documents, reference to extrinsic evidence is inappropriate. *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir. 1996) ("questions involving the scope of benefits. . . must be answered initially by the plan documents, applying the principles of contract interpretation."); *Bill Gray Enterprises Inc., Employee Health and Welfare Plan v. Gourley*, 248 F.3d 206, 218 (3d Cir. 2001) ("it is inappropriate to consider extrinsic evidence when no ambiguity exists").

B. Plaintiffs' Claims

The point of Plaintiffs' lengthy complaint—weighing in at 51 pages, with 214 numbered allegations, and six footnotes—is a simple one: Defendants had no right to eliminate the death benefit, either because of their conduct (estoppel and misrepresentation) or because of the nature of the benefit (accrued rather than ancillary). This claim is articulated in four different counts:

1. Count I of the Complaint is styled (in part) "Breach of Fiduciary Duty and Equitable Estoppel." In this Count, Plaintiffs seek an "Order" "forbidding Defendants and [their] successors from ever altering, modifying, eliminating or terminating Named Plaintiffs' and the proposed class of PLAN participants' expected Pension Death Benefits in the absence of a PLAN termination." *Second Am. Compl. at ¶ 165*. Plaintiffs allege that this Order is warranted because they were "systematically tricked into believing the Pension Death Benefit was a funded protected benefit under the plan." *Second Am. Compl. at ¶ 156*. In essence,

Plaintiffs claim that they were told that the death benefit would never be modified, and they relied on this claim to their detriment. *Second Am. Compl. at ¶¶ 152-160*.

2. Count II of the Complaint is styled "Violations Due to Illegal Elimination of Pension Death Benefit." This count alleges that eliminating the death benefit (a) violates ERISA's anti-cutback provisions in 29 U.S.C. § 1054(g) and (b) that the amendment "constituted an unlawful inurement of PLAN assets to the PLAN sponsor," contrary to 29 U.S.C. § 1104(a). *Second Am. Compl. at ¶¶ 180, 182*.

3. Count III of the Complaint asks for declaratory relief regarding the rights of retired employees "and their mandatory beneficiaries" to receive the death benefit. *Second Am. Compl. at ¶ 191*.

4. Count IV of the Complaint asks the Court to Order defendants to amend the Plan to declare that "the Pension Death Benefit is a vested, protected or accrued defined pension benefit" that cannot be reduced or terminated absent the Plan's termination or that language be inserted into Plan documents "memorializing the Pension Death Benefit [as] an entitlement." *Second Am. Compl. at ¶¶ 197-198*.

At bottom, all of Plaintiffs' claims rest on the incorrect legal premise that the death benefit is an accrued benefit that cannot be reduced once earned rather than an ancillary benefit that is not earned and may be reduced at any time.

C. The Death Benefit Is An Ancillary Benefit Not Subject To ERISA's "Anti-Cutback" Rule.

In Counts II, III and IV of the Complaint, Plaintiffs claim that the death benefit was an "accrued benefit" not subject to elimination from the Plan, regardless of the Plan's amendment

procedures or definitions, and protected by ERISA's "anti-cutback statute." 29 U.S.C. § 1054(g). ERISA, the tax code and its regulations[6] all define "accrued benefit" in substantially similar terms. Under both statutory schemes, "a qualified pension plan is exempt from taxation, and to remain qualified for tax-exempt status, a plan may not violate the anti-cutback rule which prohibits a plan's elimination or reduction of an accrued benefit." *Board of Trustees of the Sheet Metal Workers' National Pension Fund v. The Commissioner of Internal Revenue*, 318 F.3d 599, 602 (4th Cir. 2003). An "accrued benefit" is "in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age, or the actuarial equivalent of the benefit." 29 U.S.C. § 1002(23)(A); *and see* I.R.C. § 411(a)(7)(A)(i). In lay terms, an accrued benefit is a stream of replacement income from retirement until death or until paid out in a lump sum at the time of retirement.

The anti-cutback statute prohibits amendment of qualified pension plans[7] to eliminate a plan participant's "accrued" benefits:

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . .
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of—

[6] In order to receive favorable tax treatment as a "tax qualified plan" plans must comply with certain provisions of the IRC and applicable regulations. Thus, although ERISA is the operative statute at issue in this case, certain provisions of the IRC parallel ERISA and can help shed light on the meaning of certain ERISA provisions. ERISA's anti-cutback rule is duplicated in IRC § 411(d)(6), which also provides that a participant's accrued benefit in a tax-qualified plan may not be decreased by plan amendment.

[7] A "qualified pension plan" is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to employees over a period of years, usually for life, after retirement. Retirement benefits are generally measured by, and based on such factors as years of service and compensation received by the employees. Treas. Reg. § 1.401-1(b)(1)(i) further provides that a qualified pension plan may also offer certain other benefits, which are not retirement-type benefits, i.e., ancillary benefits.

> (A) eliminating or reducing an early retirement benefit or retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy.

29 U.S.C. § 1054(g). *See also* I.R.C. § 411(d)(6) (the companion provision in the IRC).

The Secretary of Treasury has the ultimate authority to interpret the overlapping anti-cutback provisions in the tax code and ERISA. *See Central Laborers' Pension Fund v. Heinz*, 124 S.Ct. 2230 (2004); *and see* Reorganization Plan No. 4 of 1978, § 101, 43 Fed. Reg. 47713 (1978). Pursuant to this authority, the Secretary has issued regulations stating that incidental death benefits are not "accrued benefits" for purpose of the anti-cutback statute:

> In general, the term "accrued benefits" refers only to pension or retirement benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits such as payment of medical expenses (or insurance premiums for such expenses), disability benefits not in excess of the qualified disability benefit (see section 411(a)(9) and paragraph (c)(3) of this section), life insurance benefits payable as a lump sum, *incidental death benefits*, current life insurance protection, or medical benefits described in section 401(h).

Treas. Reg. § 1.411(a)-7(a)(1)(emphasis added). In addition, recent changes to the regulations confirm that a death benefit is an ancillary benefit, not an accrued benefit and can be amended by the plan sponsor. *See* Treas. Reg. 1.411(d)-3(g)(2)(v).

The Treasury regulations are consistent with the anti-cutback statute's legislative history as a component of the ERISA statute. *See* H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 273 (1974) ("[u]nder the conference substitute, the term 'accrued benefit' refers to pension or

retirement benefits. The term does not apply to ancillary benefits . . .") (*reprinted in* 1974 U.S.C.C.A.N. 5-38, 5054).[8] The Tenth Circuit adopted the Treasury regulation's definition of "accrued benefit" holding that an accrued benefit is "only based on two characteristics – it must be in the form of (1) an annual benefit that (2) commences at a normal retirement age." *American Stores v. American Stores Co. Ret. Plan*, 928 F.2d 986, 990 (10th Cir. 1991). The death benefit previously provided by QCI neither takes the form of an annual benefit nor commences at normal retirement age. It therefore fails to fulfill the characteristics of an accrued benefit and is not subject to the anti-cutback provision.

Unlike the death benefit, a pension benefit provides retirement income which is based, in part, on years of service with an employer. When an employee changes employment, the new employer will give no credit for service with the previous employer and, therefore, a pension benefit is not considered to be transferable from one employer to another. *See, e.g.*, *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1991); *Shaw v. Int'l Assoc. of Machinists and Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir.

[8] The House Conference report explains that "In the case of a defined benefit plan the bill provides that the accrued benefit is to be determined under the plan, subject to certain requirements. The term 'accrued benefit' refers to pension or retirement benefits and is not intended to apply to certain ancillary benefits, such as medical insurance or life insurance, which are sometimes provided for employees in conjunction with a pension plan, and are sometimes provided separately. To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income. Also, where the employee moves from one employer to another, the ancillary benefits (which are usually on a contingency basis) would often be provided by the new employer, whereas the new employer normally would not provide pension benefits based on service with the old employer. Also, the accrued benefit to which the vesting rules apply is not to include such items as the value of the right to receive benefits commencing at an age before normal retirement age, or so-called social security supplements which are commonly paid in the case of early retirement but then cease when the retiree attains the age at which he becomes entitled to receive current social security benefits, or any value in a plan's joint and survivor annuity provisions to the extent that exceeds the value of what the participant would be entitled to receive under a single life annuity." H.R.Rep. No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4670, 4726, *cited in American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986 (10th Cir. 1991).

1984). *Shaw* held that a pension amendment that tied the amount of pension benefits to the current salary of the job from which the pensioners retired was an accrued benefit (or a stream of income replacement for life) because the pension feature primarily provided retirement income based on years of service and such past service credit was not generally transferable from one employer to another. 750 F.2d at 1463-64. Similarly, the Seventh Circuit in *Hickey* held that a cost of living adjustment (COLA) was part of the plan's accrued benefit because the COLA was an essential element of the normal retirement benefit which provided additional retirement income each month that was necessary to maintain the value of the retirement benefits. 980 F.2d at 468-69. Plaintiffs do not complain that they are being deprived of their stream of retirement income but, rather, that they are being deprived of a benefit that was payable for the benefit of their surviving beneficiaries. This differs markedly from the accrued benefits in the cases discussed above.

The death benefit at issue in this case does not come close to satisfying the statutory, regulatory, or judge-made definition of "accrued benefit" for purposes of the anti-cutback statute. It is a *death* benefit, either paid at death or, during certain periods, as a lump sum payment included in the lump sums paid to those Plan participants who elected to receive their pension benefit as a lump sum payment. It is not a recurring annuity payment— it was paid once at death (or in contemplation of death for a retiree who chose to 'close out his account' with the Plan) and falls outside the scope of an "accrued benefit". *See American Stores*, 928 F.2d at 986; *Laurenzano v. Blue* Cross, 134 F.Supp.2d 189, 200 (D. Mass. 2001) ("ERISA allows only *one* definition of 'accrued benefit,' and that one definition depends on the 'annual benefit commencing at normal retirement age.")

Plaintiffs may argue that because the death benefit was paid from the assets of a pension plan, it is *sui generis* an accrued benefit that cannot be eliminated, under the anti-cutback rule of ERISA § 204(g). This argument fails. Welfare benefits and ancillary pension benefits are often found in pension plans, are exempt from the participation and vesting requirements of Part 2 of ERISA, and can be reduced or eliminated at any time. It is the nature of the benefit, not where it is placed or how it is funded that determines whether it is a pension benefit subject to mandatory vesting or whether it is an ancillary pension benefit or welfare benefit. If, for example, a pension plan contains welfare benefits, those welfare benefits still constitute a welfare benefit plan. *See, e.g.*, *Rombach v. Nestle USA, Inc.*, 211 F.3d 190 (2nd Cir. 2000) (Where a pension plan provides benefits that are triggered by disability, that portion of the plan is a welfare plan under ERISA: "it does not matter that [the company] called the disability retirement pension of its plan a 'pension benefit' and made it part of its master 'pension plan.' Its meaning and function remained clear; it was a benefit triggered by disability."). Simply stated—the label the employer places on a benefit does not control. *Id.* In the present case, the benefit at issue is a death benefit, not a disability benefit. But the principle is exactly the same. The death benefit is an ancillary pension benefit – akin to a welfare benefit – despite the fact that it was also funded out of the Plan.

D. The Plan Was Properly Amended To Eliminate The Death Benefit

ERISA does not require employers to offer employee benefit plans. As a general rule, a plan sponsor has the authority to modify, amend or terminate benefits offered by the plan without implicating fiduciary duties. *See Lockheed v. Spink*, 517 U.S. 882, 890 (1996). As long as the

plan does not violate certain anti-cutback rules, the plan sponsor may eliminate or modify benefits as permitted by plan documents.

QCI's elimination of the death benefit was expressly authorized by section 11.4 of the Plan:

> The Company expects this Plan to be permanent, but as future conditions cannot be foreseen it reserves the right to amend the Plan at any time, without prior notice to anyone. The Plan may be amended by a writing approved by the Company's Board of Directors and signed on behalf of the Company by an officer of the Company duly authorized by the Board of Directors. The Plan may also be amended in writing by the Plan Design Committee or other person(s) to the extent authority to amend the Plan has been delegated to the Plan Design Committee or such person(s) by the Board of directors. Each amendment shall be effective on such date as the Company or its delegee may determine. No amendment or modification that affects the rights, power, privileges, immunities or obligations of the Trustee may be made without the consent of the Trustee. Amendments may modify the rights and interests of Employees who are Participants in the Plan at the time thereof as well as future Participants but amendments may not diminish the accrued benefit (as defined in Section 411(d)(6) of the Code) of any Participant as of the effective date of such amendment.

This language is identical to provisions in the US WEST pension plans dating back to at least 1993. *See Facts ¶ 14*. Plan documents dating back until at least 1997 also explicitly state that "**Accrued benefits shall not include any benefits under Article VII [i.e., the death benefit]** . . . or any benefit that is not an accrued benefit under Section 411(d)(6) of the code." (emphasis added). *See Facts ¶ 11*. The Plan documents plainly authorized Defendants to modify the Plan, as they saw fit, "without prior notice to anyone." This is consistent with SPDs regularly provided to Plan participants. *See Facts ¶ 15*.

Moreover, it cannot be disputed by the Plaintiffs that the death benefit was modified numerous times in the past, including several times during Plaintiffs' terms of employment. Specifically, the amount of the benefit was frozen based upon 1993 salary levels; the benefit

itself was limited to employees whose employment began prior to 1993; and the right to receive a lump sum payment was limited. *See Facts ¶ 10*. No one disputes that each of these modifications was made known to the Plaintiffs, thus contradicting their assertion that they did not know that the death benefit could be modified or eliminated. Only if the benefit was accrued would Defendants be barred from eliminating it and, as discussed above, this is simply not the case.

Any argument that Plaintiffs were permanently entitled to the death benefit fails. Each iteration of the Plan specifically reserved to the Company the right to change any benefit at any time. *See Facts ¶ 14;*[9] *See Chiles*, 95 F.3d at 1513 (finding that reservation of rights language allowed plan sponsor to change terms of the plan). Because this is an ancillary pension benefit that does not vest, the employer is free to amend the terms or terminate the plan at will. *See, e.g., Member Serv. Life Ins. Co. v. American Nat'l Bank and Trust Co.*, 130 F.3d 950, 954 (10th Cir. 1997). In fact, "the strong weight of authority throughout the circuits indicates that, in the area of welfare benefits, which are not subject to ERISA's minimum vesting and accrual requirements, a general amendment provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually, and thus become unalterable, after the employee retires." *Spacek v. Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998), *rev'd on other grounds, Heinz,* 541 U.S. at 743. The general amendment provision in the Qwest and predecessor plans serves just such a purpose.

[9] Although the reservation of rights language changed slightly in 1994 (with a plan amendment effective January 1, 1993), in *Jarvis v. U S WEST Inc.*, Case No. 97 N 2189 (D.Colo. March 30, 1999) the Court, referring specifically to the language that had changed, held that "While the language is somewhat different, the meaning is the same. . ." *Slip Op. at 12*. The *Jarvis* Court referred specifically to the change in language between the 1984 plan and the 1993 plan. *See Exhibit L: Jarvis v. US WEST, Inc. at 2-3 and 12***.** Pursuant to 10th Cir. R. 36.3, an unpublished decision may be cited if: (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and (2) it could assist the court in its disposition.

E. Plaintiffs' reference to IRC sections 401(h) and 420 bear absolutely no relevance to this case.

In the Second Claim for Relief, Plaintiffs allege that on several occasions between 1998 and 2000, the Plan, or its predecesors, used the opportunity provided by IRC sections 420 and 401(h) to provide retiree medical benefits with pension plan assets. This does not constitute a violation of the IRC. If the conditions of IRC section 420(c) are satisfied, IRC section 420 permits the transfer of "excess pension assets," as defined in IRC section 420(e)(2), to a "health benefits account", within the meaning of IRC sections 420(e)(3) and 401(h). A health benefits account is a separate account, within the same pension plan, used to provide retiree health benefits.

One of the conditions that a plan must satisfy to complete a section 420 transfer is that all participants must be fully vested in all accrued pension benefits. I.R.C. § 420(c)(2)(A).

Plaintiffs incorrectly interpret that section to require full vesting of all plan benefits, not just accrued pension benefits. As demonstrated above, the death benefit is not an accrued benefit and is not subject to any vesting requirement, including the vesting requirement of IRC section 420(c)(2)(A). IRC section 420 does not mention or refer to any plan benefits other than accrued pension benefits, and specifically does not require full vesting of ancillary death benefits.

Plaintiffs also try to link section 420 transfers to Plan Section 11.2, which addresses the allocation of Plan assets upon termination or partial termination of the Plan. That Plan section is totally irrelevant. A transfer in accordance with IRC section 420 is not a termination or partial termination of the Plan, Plaintiffs have not alleged any facts supporting a termination or partial termination of the Plan, and there is nothing that supports any link whatsoever between a section 420 transfer and a termination or partial termination of the Plan.

Notwithstanding the complete absence of any link between the two, Plaintiffs suggest that the failure to vest death benefits at the time of a section 420 transfer somehow constitutes a breach of fiduciary duty under ERISA section 404(a), which requires plan fiduciaries to administer a plan "in accordance with the documents and instruments governing the plan, insofar as such documents and instruments are consistent with the provisions of this title and Title IV." To the contrary, because ancillary benefits do not vest, the failure to vest ancillary death benefits is consistent with the Plan and the law and, therefore, is entirely consistent with ERISA section 404(a). All IRC section 420 requires is that accrued benefits be fully vested; it does not speak to ancillary benefits. Since the death benefit is an ancillary benefit, IRC section 420 has no application to this case.

Finally, Plaintiffs suggest, without any explanation or supporting facts, that somehow "[t]he actions by Defendants constituted an unlawful inurement of PLAN assets to the PLAN sponsor in violation of ERISA Section 403(c)(1)." *Second Am. Compl. ¶ 182*. Section 403(c)(1) prohibits the inurement of plan assets "to the benefit of any employer . . . ." The anti-inurement provision "demands only that plan assets be held for supplying benefits to plan participants." *Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 124 S.Ct. 1330, 1344 (2004). It "refers to the congressional determination that funds contributed by the employer . . . must never revert to the employer . . ." *Id.* at 1345.

Plaintiffs have not alleged any facts demonstrating that any Plan assets reverted to the employer, or, for that matter, were used for any purpose other than providing benefits. In essence, Plaintiffs are really claiming that not enough Plan benefits are being provided to them from Plan assets. That does not constitute inurement prohibited by ERISA section 403(c)(1).

F. Plaintiffs' claim that QCI breached its fiduciary duties through its communications with Plan participants must fail.

Count I of the Complaint alleges that Defendants breached fiduciary duties to the Plaintiffs in various communications or omissions about plan benefits. The basis of this claim is not anything Defendants are alleged to have said, but, rather, that Defendants should have told Plaintiffs more than the law requires. Even if a plan fiduciary had orally conveyed what turned out to be inaccurate or incomplete information, that, by itself, would not constitute a breach of fiduciary duty. *Frahm v. Equitable Life Assur. Soc. of U.S.***,** 137 F.3d 955 (7th Cir. 1998).

Plaintiffs argue, with no support whatsoever, that the various Plan documents sent to the Plaintiffs should have explained that the death benefit was not an accrued benefit, but one that could be taken away. There is no evidence that any of the Defendants was purposely trying to misinform Plan participants. Instead, like the defendant in *Frahm*, the worst that can be said is that Defendants "did not tell the . . . retirees at every possible opportunity that which it had told them many times before-namely, that the terms of the plan were subject to change." *Frahm***,** 137 F.3d at 960 (citing *Sprague v. GM*, 133 F.3d 388, 405 (6th Cir. 1998)). Without evidence of misrepresentation, much less intent to deceive, Plaintiffs' breach of fiduciary duty claim must fail. *See Vallone v. CNA Financial Corp.* 375 F.3d 623, 642 (7th Cir. 2004). Every iteration of the Plan documents included language reserving the rights of the Plan sponsor to amend the Plan at any time. *See Facts ¶¶ 14-15*. Based on this language, Plaintiffs would be hard-pressed to claim any kind of misrepresentation regarding the permanency of any benefit described in the Plan.[10]

[10] Plaintiffs' responses to interrogatories requesting the basis for their belief that they had been promised a death benefit that could not be eliminated uniformly yield no evidence of a promise. Instead, the closest

G. Plaintiffs cannot maintain an ERISA equitable estoppel claim in this Circuit.

Plaintiffs ask this Court to apply the doctrine of "equitable estoppel" to, in effect, reinstate the death benefit. The Tenth Circuit has never recognized an ERISA claim for equitable estoppel. *See Cannon v. Group Health Service of Oklahoma*, 77 F.3d 1270, 1277 (10th Cir. 1996); *Fisher v. U.S. Steel, Inc. Employee Health Plan*, 2003 WL 21488711 *6 (D. Kan. 2003) (stating with respect to a claim for equitable estoppel that because of "the extremely limited scope of remedies provided under ERISA, the court does not believe that the Tenth Circuit will ever recognize such a claim."). Based on this fact alone, the Court should grant QCI summary judgment with respect to Plaintiffs' claim of equitable estoppel.

Even if the Tenth Circuit accepted equitable estoppel in the ERISA context, Plaintiffs cannot prove all necessary elements of such a claim. Although it has never recognized a claim for equitable estoppel, the Tenth Circuit has set forth various elements of such a claim. Equitable estoppel only applies "where the *terms of a plan* are ambiguous and the Employer[s] communications constituted an interpretation of that ambiguity." *Averhart v. U.S. West Management Plan*, 46 F.3d 1480, 1486 (10th Circuit 1994) (citing *Alday v. Container Corp. of America*, 906 F.2d 660, 666 (11th Cir. 1990)); *Novak v. Irwin Yacht and Marine Corp.*, 986 F.2d 468, 472 (11th Cir. 1990)). The Plan documents contain no ambiguity about whether QCI may amend or eliminate the death benefit.

Plaintiffs cannot point to an ambiguity within the Plan or any communication by QCI that constitutes an interpretation of an ambiguity. In fact, the Plan could not be less ambiguous: its

---

that Plaintiffs come is referring to statements in letters that say that "your earned pension benefit will never be decreased." *See West Resp. to Interrog. 1 at* ¶ *6.* Because the death benefit is an ancillary pension benefit, not part of the accrued pension benefit, this statement is accurate, but inapplicable to the death benefit.

description of the death benefit clearly puts that benefit in the category of an ancillary, non-vested benefit and plainly states that the death benefit is not an accrued benefit, and has stated as much since at least 1998, *before* QCI became the Plan sponsor.[11] Without an ambiguity to point to, Plaintiffs' claim must fail even if the Tenth Circuit recognized claims for equitable estoppel in an ERISA context, which it clearly doesn't.

Even allegations that the SPD omitted certain information bear no weight since ERISA does not require an SPD to contain every piece of information about a plan, lest the SPD "mushroom in size and complexity until [it] mirrored the plan." *Mers v. Marriot Int'l*, 144 F.3d 1014, 1024 (7th Cir. 1998). Instead, where, as here the Plan speaks to an issue on which the SPD remains silent, the Plan language controls and no further inquiry is necessary. *Id.* Silence in an SPD simply does not constitute an ambiguity sufficient to create the basis for an estoppel claim. Even if the Tenth Circuit recognized an ERISA claim for equitable estoppel, Plaintiffs' claim would fail as Plaintiffs can demonstrate no ambiguity in the Plan documents.

Furthermore, to the extent that Plaintiffs may allege that QCI modified the Plan orally and should therefore be estopped from reneging on any oral communications, the Tenth Circuit has rejected this as well. The law in this Circuit clearly states that ERISA's specific requirement that plans be in writing precludes judicial recognition of any oral modifications. *Straub v. Western Union Telegraph*, 851 F.2d 1262, 1265 (10th Cir. 1988). Plaintiffs' claim that they were misled and that QCI should be equitably estopped must fail.

[11] Plan documents dating back to at least 1997 explicitly state that "accrued benefits shall not include any benefits under Article VII…." The death benefit is located in Article VII. *See Facts ¶ 11*. Prior to that the Plan documents stated that the accrued benefit included only those benefits in Article V. *See Facts ¶ 11*.

CONCLUSION

Based upon the undisputed material facts, Defendants are entitled to summary judgment in their favor.

Respectfully submitted this 30th day of August, 2006.

s/ Elizabeth Kiovsky
Elizabeth I. Kiovsky
Baird & Kiovsky, LLC
2036 East 17th Avenue
Denver, CO 80206
Telephone: (303) 813-4500
Facsimile: (303) 813-4501
e-mail: bdq@bairdkiovsky.com

Sherwin Kaplan
Thelen Reid & Priest, LLP
701 Eighth Street NW
(Eight & G)
Washington D.C. 20001-3721
Telephone: (202) 508-4218
Facsimile: (202) 654-1845
email: skaplan@thelenreid.com

Attorneys for Defendants

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 30th day of August, 2006, I electronically filed the foregoing **DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

Curtis L. Kennedy, Esq. at CurtisLKennedy@aol.com
Sherwin Kaplan, Esq. at skaplan@thelenreid.com
Sara Pikofsky, Esq. at spikofsky@thelenreid.com

and, I also certify that I have served a copy of the document upon the following non-CM/ECF participants:

Cynthia Delaney
Qwest Communications, Corp.
1801 California Street, Suite 900
Denver, CO 80202

s/ Carla A. Chiles
Carla A. Chiles, Paralegal
Baird & Kiovsky, LLC