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,
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' MOTION TO STRIKE THE REPORT OF PLAINTIFFS' PUTATIVE EXPERT

Defendants Qwest Pension Plan, Qwest Employees Benefit Committee, Qwest Pension Plan Design Committee and Qwest Communications International, Inc. (collectively "Qwest" or "Defendants") hereby submit the following Motion to Strike the Report of Plaintiffs' Putative Expert (Exhibit 1 within Docket Entry #87) pursuant to Rule 56(e) of the Federal Rules of Civil Procedure.

1. As more fully demonstrated in the supporting memorandum accompanying this Motion, the report filed by Plaintiffs' putative expert witness expresses solely legal opinions, and therefore an improper subject for expert testimony under Fed.R.Evid. 702. Further, any facts Plaintiffs offer on summary judgment must be admissible into evidence. The Report is hearsay and therefore inadmissible.

2. Defendants certify that, pursuant to D.C.COLO.L.Civ.R. 7.1(A), counsel contacted Plaintiffs' attorney by email and also left a voicemail concerning the grounds for this

motion and the relief requested on November 2, 2006. Defendants' attorney has not heard back from Plaintiffs' attorney, but believes that Plaintiffs and their attorney would oppose this motion.

WHEREFORE, for the reasons identified in this Motion and the supporting Memorandum, Defendants respectfully request that the court strike Plaintiffs' Expert Witness Report as inadmissible pursuant to Fed.R.Evid. 702.

Respectfully submitted this 2nd day of November, 2006.

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Attorneys for Defendants

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 2nd day of November, 2006, I electronically filed the foregoing **MOTION TO STRIKE THE REPORT OF PLAINTIFFS' PUTATIVE EXPERT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

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

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s/ Carla A. Chiles
Carla A. Chiles, Paralegal
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Defendants.

MEMORANDUM BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE THE REPORT OF PLAINTIFFS' PUTATIVE EXPERT

Defendants Qwest Pension Plan, Qwest Employees Benefit Committee, Qwest Pension Plan Design Committee and Qwest Communications International, Inc. (collectively "Qwest" or "Defendants") submit this Memorandum in support of their Motion to Strike the Expert Report of Plaintiffs' Putative Expert, Leonard Garofolo. Mr. Garofolo's report is attached as Exhibit 1 to Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, a copy of which is attached herein as Exhibit A for the Court's convenience.

INTRODUCTION

This lawsuit concerns the elimination of a "death benefit" from the Qwest Pension Plan ("the Plan"), which Plaintiffs challenge as a violation of several provisions of the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code ("the Code"). As described in Defendants' Opening and Reply Briefs in Support of Motion for Summary Judgment, the central legal issues to be decided in this case concern whether death benefits

available to certain eligible Qwest employees and retirees had "vested" as a matter of law or as a contractual matter, and if so whether Qwest was collaterally estopped from eliminating the benefit for future retirees. To help them make their case, Plaintiffs engaged Leonard L. Garofolo as an "expert witness" to render an opinion as to whether "eligible participants and/or retirees of the Qwest Plan or predecessor plans are entitled to" the death benefits under the Plan. See Expert Report of Leonard L. Garofolo, Qwest Pension Plan, July 3, 2006 at 5 ("Garofolo Report"). Far from clarifying complex factual questions, or expressing an opinion on technical facts regarding benefit plans in general or the Plan in particular, as is required for expert testimony to be admissible pursuant to Fed.R.Evid.702, the Garofolo Report engages in a broad discourse on the state of the law, applies what Mr. Garofolo deems controlling law to the facts of the case, and generally expresses Mr. Garofolo's legal opinion. Accordingly, the Court should rule that the Report is inadmissible, pursuant to Fed.R.Evid.702. In addition, any facts a party offers on summary judgment must be admissible as evidence. *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995); *Apodaca v. Discover Financial Services*, 417 F. Supp.2d 1220, 1226 (D. N.M. 2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). As the Report is hearsay and therefore inadmissible, the Court should not consider the Report in adjudicating the motion for summary judgment. *Gross*, 53 F.3d at 1541.

ARGUMENT

The Opinions Expressed In Garofolo's Report Are An Attempt To Define The Legal Parameters For A Decision In This Case, And As Such Are An Invasion Of The Court's Authority To Define The Law.

An analysis of whether the opinion of a purported "expert witness" is admissible begins "with a careful look at the contents and purpose of Fed.R.Evid.702." *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988). Rule 702 permits an expert opinion to be admitted to evidence only if, among other things, it expresses "scientific, technical, or other specialized knowledge" and "will

assist the trier of fact to *understand the evidence or to determine a fact in issue*…." Fed.R.Evid.702 (emphasis added). Whether an opinion is helpful in clarifying complex facts – as distinct from legal issues – "was seen then as an essential condition of admissibility" by the drafters of the Federal Rules of Evidence. *Specht,* 853 F.2d at 807, *quoting* 3 *Weinstein's Evidence,* ¶ 701[01] (1985).

For expert testimony to be admissible, courts must determine that the opinion is, indeed, limited to an opinion based on the facts, "for it is axiomatic that the judge is the sole arbiter of the law and its applicability" *Specht,* 853 F.2d at 807. While it is permissible for an expert to refer to the law in expressing an opinion, it is not permissible for the expert to "invade the court's authority by discoursing broadly over the entire range of applicable law." *Specht,* 853 F.2d at 809. *See also United States v. Buchanan,* 787 F.2d 477, 484 (10th Cir. 1986) ("unadorned legal conclusions are impermissible," *citing* *Frase v. Henry*, 444 F.2d 1228, 1231 (10th Cir. 1971)). [1]

The Garofolo Report is precisely the kind of broad discourse over the entire range of applicable law presenting the types of "unadorned legal conclusions" that the 10th Circuit has consistently held to be inadmissible. Apart from a mere recitation of selected Plan provisions needing no technical explanation or expert elucidation, the Garofolo Report consists entirely of legal opinions. From beginning to end, the Garofolo Report repeatedly invades the Court's authority to define the controlling law of the case by applying ERISA, the Code, regulations promulgated thereunder, and case law to the facts as provided by Plaintiffs' counsel. In doing so, the Garofolo Report draws myriad legal conclusions pertaining to the ultimate questions of law in this case, and should this Court should strike the entire report as not admissible.

[1] Numerous other circuits have held likewise. *U.S. v. Feliciano,* 223 F.3d 102 (2d Cir. 2000); *Adalman v. Baker, Watts & Co.,* 807 F.2d 359 (4th Cir. 1986); *Owen v. Kerr-McGee Corp.,* 698 F.2d 236 (5th Cir. 1983); *U.S. v. Zipkin,* (6th Cir. 1984); *Hogan v. American Tel. & Tel. Co.,* 812 F.2d 409 (8th Cir. 1987); *U.S. v. Oliveros,* 275 F.3d 1299 (11th Cir. 2001).

After a recitation of his qualifications and experience,[2] and a description of the information he considered to render his opinions, Mr. Garofolo begins the Report by indicating that he will provide an opinion on "whether eligible participants and/or retirees of the Qwest Plan or predecessor plans are entitled to" the death benefits under the Plan.[3] Garofolo Report at 5. To render that opinion, Mr. Garofolo indicates that he considered: (A) whether the death benefits are "ancillary" or "welfare" benefits; (B) whether the plan fiduciary had breached its fiduciary obligations in the way it wrote the Plan's summary plan descriptions ("SPDs"); (C) how transfers of excess plan assets to pay for retiree health benefits pursuant to Code section 420 may have affected the death benefit; and (D) whether the Plan amendment that gave rise to plaintiff's lawsuit is "ineffective" and therefore amounts to a "breach of fiduciary duty under ERISA." *Id.* Not only do each of those considerations involve the key legal issues presented in this case, they all necessarily involved the application of law to the facts developed in this case, and as such are "legal opinions." *A.E. v. Independent School Dist.*, 936 F.2d 472, 476 (10th Cir. 1991).

The Garofolo Report next proceeds to explain how the private pension and welfare system works by providing a broad legal discourse on ERISA and relevant provisions of the tax

[2] While not a basis for this Motion, Defendants note that Mr. Garofolo is not qualified to render many of the opinions expressed in his report. As was discussed at length during the his deposition testimony, Mr. Garofolo served as a Regional Director for the San Francisco Regional Office of the Pension and Welfare Benefits Administration of the Department of Labor. As Mr. Garofolo acknowledged during the deposition, sole interpretative and regulatory authority over provisions contained in both Title I and Title II of ERISA regarding minimum standards for funding and benefit accrual under pension plans was transferred to the Department of Treasury in 1978. Reorganization Plan Number 4 of 1978. In addition, Mr. Garofolo testified during sworn deposition testimony that he could not recall any specific instances in which the Regional Office that he headed ever alleged violations, initiated civil litigation, or issued any voluntary compliance letters with respect to the funding and benefit accrual rules under Parts 2 and 3 of Title I of ERISA. Garofolo Deposition at 18:10 – 21:19. By filing this motion, Defendants do not waive, and expressly reserve the right to object to the relevance and reliability of the Garofolo Report under Fed.R.Evid. 702, and the standards articulated by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny, should the Court deny the present motion.

[3] Mr. Garofolo also includes an appendix at the end of his report entitled "Information Considered" which includes lengthy lists of legal documents, cases, statutes, regulations, and legal treatises. *See Appendix B, Garofolo Report , Exhibit A.* These are clearly the tools one uses in issuing a legal opinion, not an expert opinion in accordance with Rule 702.

code. Garofolo Report pp. 6-20. The 14-page discussion of controlling authority reads like a summary judgment brief, basing its conclusions on analyses of ERISA's legislative history, key statutory definitions and concepts, Department of Labor and Internal Revenue Service regulations, and relevant case law. *Id.* This "overview" section is much more than a mere reference to the law that helps explain relevant facts. *Specht* 853 F.2d at 809. Rather, it is an attempt to define the legal issues before the Court and to provide an alternative vehicle for advancing the same legal arguments Plaintiffs have made in the pleadings.

Even Plaintiffs' counsel implicitly concedes that opinions expressed in the Garofolo Report were nothing more than legal conclusions. During Mr. Garofolo's deposition held on August 18, 2006 ("Garofolo Deposition"), Plaintiffs' counsel objected to several questions asked of Mr. Garofolo because in his view they required the witness to draw a legal conclusion. In fact, in at least two parts of the Garofolo Deposition, questions to which Plaintiffs' counsel objected were simply restatements of conclusions made in the Garofolo Report itself.

For instance, Plaintiffs' counsel objected to a question that asked Mr. Garofolo if an "ancillary" benefit is subject to the protections of Code section 411(d)(6) and ERISA section 204(g), otherwise known as the "anti-cutback rule." According to Plaintiffs' counsel, such a question would call for Mr. Garofolo to render a "legal conclusion." *See Exhibit B* Garofolo Deposition, 135:6-9.[4] Yet, Mr. Garofolo was not so restrained when he authored his report. After reciting Department of Treasury regulations that describe several types of benefits – one of which is an "ancillary benefit" – that are not protected by the "anti-cutback rule," Mr. Garofolo concluded that those types of benefits "were not treated as 411(d)(6) protected benefits as of December 31, 2003." Garofolo Report at 15-16. Plaintiffs' counsel subsequently objected to a

[4] Q: Okay. And if a benefit provided for in a defined benefit pension plan is an ancillary benefit, that benefit is not subject to the anti-cutback rule?
MR. KENNEDY: Objection. Legal conclusion.

question that asked Mr. Garofolo to explain the difference, if any, between an "accrued benefit" and a benefit protected under the anti-cutback rule. *Ex. B* Garofolo Deposition at 168:23-169:3.[5] Again, Mr. Garofolo did not hesitate to express his opinion that an "accrued benefit" of a participant is the same thing as a benefit protected under the anti-cutback rule of ERISA and the Code. Garofolo Report at 14, footnote 4 and accompanying text.

The Garofolo Report concludes with more expressions of the author's legal opinion regarding the ultimate issues presented in this case. For example, Mr. Garofolo opines that "Post-retirement" death benefits "accrue" when the participants retire and "vest" when the retirees die. Garofolo Report at 40. Yet, Mr. Garofolo agreed during his deposition that the concept of when a benefit "vests" under ERISA is a "legal concept." *Ex. B* Garofolo Deposition 76:22-77:5.[6]

Finally, Mr. Garofolo undertook to define the extent to which Defendants allegedly "failed to comply with their fiduciary duties and responsibilities." Garofolo Report at 45. The conclusion that a breach of ERISA's fiduciary obligations occurred is a multi-faceted one, requiring a showing that, among other things, the party in question is an ERISA fiduciary, and that the fiduciary breached an obligation defined in ERISA. Whether a fiduciary's actions were in contravention of obligations defined by statute is clearly a legal question requiring application of ERISA's definition of fiduciary obligations to the facts of a particular case. With respect to a party's fiduciary status, the 10th Circuit has held that such determination is "a mixed question of fact and law," which is primarily a legal question for the Court to decide when, as here, the

[5] Q: But that wasn't my question. My question is 411(d)(6) only protects accrued benefits. So what's the difference between saying, this is a benefit not protected by 411(d)(6) or saying this is not an accrued benefit?
MR. KENNEDY: Objection. Legal conclusion.

[6] Q: Now you just changed the rules again. You said whether participants believe they vested. You don't say that here. You said vest. Vest is a legal concept, is that correct, in ERISA?
A. Yeah, sure.

operative facts are undisputed. *Peckham v. Gem State Mutual of Utah,* 964 F.2d 1043, 1947 n. 5 (10th Cir.1992). *See also, U.S. v. McVeigh,* 118 F.Supp. 2d 1137 (D. Colo. 2000) (expert testimony on mixed question of fact and law held to be inadmissible under Fed.R.Evid. 702). Mr. Garolofo's repeated assertions regarding the duty Defendants had toward the Plan and the alleged breaches of those duties all are premised on the resolution of the primarily legal question of Defendants' fiduciary status, and as such clearly "invade(s) the court's authority" to define the law. *Specht* 853 F.2d at 807.

The Court Should Not Consider Mr. Garofolo's Report as it Constitutes Inadmissible Hearsay

"It is well settled in this circuit that we can consider only admissible evidence in reviewing an order granting summary judgment." *Wright-Simmons v. City of Oklahoma City,* 155 F.3d 1264, 1268 (10th Cir. 1998) (*citing Gross,* 53 F.3d at 1541). *See also Apodaca v. Discover Financial Services,* 417 F. Supp.2d 1220, 1226 (D. N.M. 2006) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986)) ("Factual material accompanying a motion for summary judgment must be admissible or usable at trial.") Because it would not be admissible at trial, this Court cannot consider the hearsay embodied in the Report. *Gross*, 53, F.3d at 1541.

In a recent case, the District Court in New Mexico refused to consider an expert report in ruling on a motion for summary judgment because it found the report was "in the form of unsworn statements consisting of hearsay and hearsay-within-hearsay." *Apodaca,* 417 F. Supp.2d at 1233. This Court must similarly reject the Report.

This Court has previously rejected unsworn expert reports, such as the Report. *Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459 (D. Colo. 1997). Relying on authority from the Supreme Court as well as numerous courts of appeals, the *Sofford* court explained that unsworn reports are not competent evidence, as they do not fit within the framework of Fed. R. Civ.P

56(e). Because the Report is unsworn, it does not qualify as competent evidence, and this Court may not consider it in ruling on Defendants' Motion for Summary Judgment.

CONCLUSION

For all the reasons stated above, Defendants respectfully urge the Court to grant their Motion to Strike the Report of Plaintiff's Putative Expert.

Respectfully submitted this 2nd day of November, 2006.

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