CASE NO. 10-1349

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD J. KERBER,
NELSON B. PHELPS,
JOANNE WEST,
NANCY A. MEISTER,
THOMAS J. INGEMANN, JR.,
MARTHA A. LENSINK,
SAMUEL G. STRIZICH,
Individually, and as Representative of plan participants and plan beneficiaries of the Qwest Group Life Insurance Plan,

Plaintiffs-Appellants,

vs.

QWEST GROUP LIFE INSURANCE PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado
Civil Action No. 07-cv-00644-WDM-KLM
The Honorable Senior Judge Walker D. Miller, Presiding

PLAINTIFFS – APPELLANTS' REPLY BRIEF

Curtis L. Kennedy
8405 E. Princeton Ave.
Denver, Colorado 80237-1741
(303) 770-0440
Attorney for Plaintiffs-Appellants

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A. The District Court's Ruling Dismissing Claim 1 of the Amended Complaint Should Be Reversed.

1. The District Court Erred in Ruling Qwest May Reduce Eligible Retirees' Basic Life Coverage to Any Level Because the Plan's Rules Forbid Qwest From Reducing Such Coverage Below Stated Minimums.

In the "Response Brief of Defendants-Appellees" (hereinafter "Response Brief"), Qwest continues with the same effort made in the District Court to distort the actual claims asserted within Claim 1of the Amended Complaint ("AC"). It is misleading for Qwest to argue that the retirees contend the Basic Life Coverage is a "contractually vested" benefit that can neither be adversely affected nor terminated. (Response Brief pp. 24-33). In Claim 1 of the AC, the Appellants never assert any allegation that the Master Plan Document creates unforfeitable vested rights. Indeed, the retirees concede that, generally, Qwest possesses the right to terminate the Plan. But, the retirees contend that, so long as the Plan is not terminated and remains operational, Qwest must abide by the rules which limit Qwest's right to reduce the retirees' amount of Basic Life Coverage.

In Claim 1 of the AC, Appellants contend that prior Plan sponsor U S WEST deliberately chose two specific situations in which to circumscribe its power and rights to reduce benefits under any reservation of rights ("ROR")

language set forth in the Master Plan Document. (1 App. 36 ¶ 23, 45-46 ¶¶ 57-61, 49 ¶68). Appellants sought an order declaring Qwest's reduction of Plan benefits to only $10,000 violated Plan document rules and constituted a violation of ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). (1 App. 59 ¶ 108). The District Court considered this a claim that Appellees were "contractually barred" from reducing retirees' minimum life insurance benefit. (4 App. 840; 13 App. 2594).[1]

Thus, in the Response Brief, Qwest incorrectly analogizes the retirees' position with the stand taken by the plaintiffs in the case of *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir.1996). (Response Brief at pp. 24-28). Herein, the retirees do not advocate a reading of the Plan that serves to render the Plan sponsor powerless to terminate the Plan. Appellants are not attempting to assert a claim that Qwest is committed contractually to an open-ended promise. The retirees advocate a reasonable reading of the Plan. A reasonable person in the position of a retiree classified Plan participant could read the rules as allowing Qwest to modify or terminate the Plan when it deems necessary, but if the chosen form of Plan modification is to reduce benefits, Qwest may not reduce retirees' Basic Life

[1] The District Court recognized that Plaintiffs-Appellants' Claim 1 of the AC was not a "contractual vesting" claim as Appellees mis-characterize the matter. The District Court ruled in its "Amended Order on Motion to Dismiss" that "Plaintiffs have failed to state claim a upon which relief can be granted for their contractual bar claim. . ." (emphasis added) (4 App. 847).

Coverage below the amounts stated in Appendix 7 of the Master Plan Document. *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1202 (10th Cir. 1992) (court gives words their common and ordinary meaning, as a reasonable person in the position of the plan participant would have understood them). In other words, the rules forbidding Qwest's reduction of retirees' Basic Life Coverage tie Qwest's hands only for so long as the Plan continues to exist. By reducing retirees' Basic Life Coverage to only $10,000, Qwest violated the specific rules of the plan. Perhaps, it would have been safer for Qwest to have terminated the entire Plan and started anew with a different plan.

In the District Court, Appellants argued in opposition to the motion to dismiss, that the Plan's "rules circumscribed Qwest's discretionary rights under the 'reservation of rights' provision in the Plan'". (4 App. 754). Appellants argued that, although the sponsor may generally reduce other Plan participants' benefits and even terminate the Plan, the sponsor is barred from reducing certain Eligible Retirees' Basic Life Coverage below stated minimum amounts. (4 App. 759). The District Court arrived at an erroneous decision. This Court should reverse and rule that Qwest's reserved right to reduce Plan benefits is subject to the reduction exception rules set forth in Appendix 7 of the Master Plan Document.

Appellants' do not contend within Claim 1 of the AC that the plan sponsor

promised lifetime benefits and, thus, had no right to *terminate* the plan. Appellants recognize that the promise made to retirees was a qualified one: the promise was that Basic Life Coverage for retirees would not be reduced below certain levels provided the Plan sponsor chose not to terminate the Plan. Hence, the seven circuit cases Appellees rely upon in their Response Brief at pp. 28-30 are inapposite. Each of the cited circuit cases involved resolving the tension between a plan's lifetime benefits clause and the plan's clause reserving the plan sponsor's right to terminate benefits.[2] In contrast to each of Appellees' cited circuit cases, this litigation does not involve a challenge to the termination of Plan benefits. None of the cases relied upon by Appellees involved tension between the reserved right to reduce and rules limiting the right to reduce the benefits for a particular group of plan participants.

Appellants cannot be faulted for not being able to "cite a single case holding that a plan sponsor is contractually barred from reducing a welfare benefit where the plan document contains a reservation of rights provision." (Response

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[2] *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 98 (2nd Cir. 2001); *In re Unisys Corp. Retiree Medical Benefit ERISA Litig.*, 58 F.3d 896, 903-04 (3rd Cir. 1995); *Gable v. Sweetheart Cup. Co.*, 35 F.3d 851, 856 (4th Cir. 1994); *Spacek v. Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998) (*en banc*); *Barnett v. Ameren Corp.*, 436 F.3d 830, 833 (7th Cir. 2006); *Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 501 F.3d 912, 918 (8th Cir. 2007).

Brief at p. 32). There is no reported federal court case decision analyzing a welfare benefit plan with rules similar to the rules in the subject Plan. The rules of the Master Plan Document established in 1998 are rather unique, reflecting U S WEST's special commitment to maintaining benefits for its retirees. In conformity with its relationship with retirees, former Plan sponsor U S WEST reserved the right to reduce Plan benefits, but specifically chose to place a limitation on its right pertaining to reducing retirees' benefits. This Court should take judicial notice of its ruling made in April 1998 discussing U S WEST's commitment to retirees' welfare benefits. See, *Phelps v. U.S. West, Inc*., 141 F.3d 1185 (Table), 1998 WL 165117, (10th Cir. April 03, 1998) (unpublished opinion being cited under the terms and conditions of 10th Cir. R. 32.1) (case concerning U S WEST's commitment regarding health care benefits).[3]

Appellees do not dispute Appellants' contention that a plan sponsor may choose to limit its right to reduce welfare benefits. And this Court has seen by virtue of the *Phelps* case that very type of action taken by U S WEST. See also *International Union, U.A.W. v. Skinner Engine Co.,* 188 F.3d 130, 138 (3rd Cir. 1999) (citing *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe*

[3] Plaintiff-Appellant Nelson B. Phelps herein was the single named plaintiff in the *Phelps* case and he was represented by the undersigned counsel.

Ry. Co., 520 U.S. 510, 515, 117 S.Ct. 1513, 1516 (1997) (noting that employer may "contractually cede its freedom"). While not mentioned in the Response Brief, in the District Court proceedings Appellees conceded that all of the circuit cases recognize that "a plan sponsor can contractually limit its ability to change or eliminate plan benefits." (4 App. 787).

In a final salvo, Appellees speciously argues that the District Court properly dismissed Claim 1 of the AC because the CWA (a collective bargaining agreement representative for active workers only) was willing to allow Qwest to reduce currently employed workers' life insurance benefits in an alleged *quid pro quo* arrangement so as to preserve a certain level of health care benefits for current workers. (Response Brief at p. 33, referencing a July 14, 2008 dated affidavit set forth in 6 App. 1217-18 at ¶¶ 4-9). But, the alleged irrelevant facts contained in Qwest's self-serving affidavit, generated months after the District Court's February 27, 2008 Rule 12(b)(6) ruling, were not pled anywhere within Claim 1 of the AC. No doubt, the disputed evidence now relied upon by Appellees would have been most inappropriate for the District Court to consider for purposes of making a Rule 12(b)(6) order to dismiss Claim 1 of the AC.

2. The District Court Erred By Dismissing the ERISA Equitable Estoppel Component of Claim 1 of the Amended Complaint.

In the Response Brief, Appellees agree with Appellants' contention that this Court has neither adopted nor rejected an ERISA equitable estoppel claim. Several panels of this Court have outlined differing frameworks of rules and elements to be followed when analyzing an ERISA equitable estoppel claim. See, e.g., *Averhart v. U S WEST Management Pension Plan*, 46 F.3d 1480, 1486 (10th Cir. 1994); *Cannon v. Group Health Serv.* 77 F.3d 1270, 1275-77 (10th Cir. 1996), *cert. denied*, 519 U.S. 816, 117 S.Ct. 66 (1996). Both frameworks are discussed in Appellants' Opening Brief at pp. 25-26. Notably, Appellees choose to point out the framework discussed in *Averhart*, but not the different framework discussed in the latter case of *Cannon.* (Response Brief p. 34).

In *Cannon*, the Tenth Circuit considered whether the plaintiff had stated an equitable estoppel claim applying the Eleventh Circuit's test for equitable estoppel in ERISA cases, to-wit: (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted upon or had reason to believe that the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation.

Cannon, 77 F.3d at 1276-77 (citing *National Companies Health Benefit Plan v. St. Joseph's Hosp. of Atlanta*, 929 F.2d 1558, 1572 (11th Cir.1991).

The framework discussed in *Cannon* is consistent with the views of other circuits. See *In Re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 58 F.3d 896, 907 (3rd Cir.1995) (holding "an ERISA beneficiary may recover benefits under an equitable estoppel theory upon establishing a material misrepresentation, reasonable and detrimental reliance upon the representation and extraordinary circumstances."). Appellants' discuss each of these elements in Appellants' Opening Brief at pp. 26-28).

Within Claim 1 of the AC, Appellants contend that Qwest should be equitably estopped, by virtue of the Plan's rules combined with official confirmation notices sent to Appellants and Eligible Retirees, from reducing their Basic Life Coverage. Appellants alleged that Qwest Defendants and their predecessors previously interpreted or explained that the rules of the Master Plan Document prevented the company from reducing Eligible Retirees' coverage below the stated minimum thresholds. (1 App. 51). Appellants alleged the Plan administrator's past promises of minimum life insurance coverage were made with the intent that Appellants and Plan Participants act on the basis of that information when deciding survivor's pension benefits and whether or not to purchase

additional life insurance on the market. (1 App. 58 ¶ 102). Appellants alleged they had been systematically tricked into believing their minimum life insurance coverage was a protected and irrevocable Plan benefit. Appellants Kerber and Phelps contend that the repeated misrepresentations and assurance about Plan benefits misled them into making an inadequately informed decision about whether to accept the 5+5 Option and how best to provide for survivor's benefits. (1 App. 49-50). Appellants alleged that U S WEST senior leadership and former Plan fiduciaries have acknowledged that representations and commitments about Plan benefits were made to retirees with the intent that retirees act upon that information when deciding upon the right level of survivor's pension benefits and whether or not to purchase additional life insurance on the market. (1 App. 50 ¶ 74 and 58 ¶ 102). Appellants further alleged that they reasonably and detrimentally relied upon the written representations made by Plan administrators that there was a commitment to provide the promised Plan benefits to their estate or beneficiaries, including surviving spouse, and Appellants did not obtain the equivalent in life insurance coverage from other sources. (1 App. 58 ¶ 104).

When ruling on the Rule 12(b)(6) motion to dismiss Claim 1 of the AC, the District Court failed to accept all of the above listed allegations as true and construe all reasonable allegations in the light most favorable to the Plaintiff.

United States v. Colorado Supreme Court, 87 F.3d 1161, 1164 (10th Cir. 1996). Appellants' cumulative allegations in Claim 1 of the AC about the repeated misrepresentations and resulting consequences for the retirees surpass the "extraordinary circumstances" threshold. *Pell v. E.I. DuPont de Nemours & Co. Inc.*, 539 F.3d 292, 303-04 (3rd Cir. 2008) (appellate panel reiterating that, "[e]xtraordinary circumstances can arise where there are 'affirmative acts of fraud,' where there is a 'network of misrepresentations ... over an extended course of dealing,' or where particular plaintiffs are especially vulnerable.'").

In the Response Brief, Appellees contend that "plaintiffs' attorney previously admitted that 'we don't have evidence of a deliberate intent to deceive the retirees'. . . " (Response Brief at p. 35, referring to 9 App. 1762). Appellees deviously refer to a news article published in a retiree newspaper after the District Court's order dismissing Claim 1 of the AC and before there had been any formal discovery in the case. Thus, it is inappropriate for Appellees to suggest there had been some sort of in-court legal admission made by Plaintiffs' counsel.

In the Response Brief, Appellees contend that "Plaintiffs had in hand multiple Plan and other documents unambiguously reserving Qwest's right to reduce the life insurance benefit." (Response Brief at p. 38 referring to ROR passages found in two documents in the Appendix: 3 App. 495 and 9 App. 1797).

Those two documents do not "unambiguously" reserve the plan sponsor's rights, for all of the reasons discussed in Appellants' Opening Brief at pp. 48-51. Moreover, the Plan sponsor chose to give an interpretation and explanation of the ROR which painted a rather rosy picture and misled Appellants Kerber and Phelps, as more thoroughly discussed in Appellants' Opening Brief at pp. 51-55.

Within Claim 1 of the AC, Appellants allege all of the necessary elements of an ERISA equitable estoppel claim, including the nebulous element of "extraordinary circumstances", inasmuch as they allege that misrepresentations were made to them and thousands other long term workers when they chose to take an early retirement – the 5+5 Option – and made irrevocable decisions about whether to accept a lump sum option or an annuity and, if an annuity, whether to select survivor's benefits. (1 App. 49-50 ¶¶ 71-74).

In a Third Circuit decision published a few weeks before the Response Brief was filed, the appellate panel reiterated and clarified some prior decisions concerning a claim of breach of ERISA fiduciary duty based upon misleading information given to an employee. In *Shook v. Avaya Inc.*, --- F.3d ----, 2010 WL 4292065 *5 (3rd Cir. November 2, 2002), the appellate court explained that for a showing of detrimental reliance, "the common thread has been that the alleged misrepresentation caused an employee participant or beneficiary to make a

decision regarding benefits or retirement that is related to the employee's plan."

This case gives this Court reason to clarify and expand upon *Cannon* and *Averhart* and firmly adopt ERISA equitable estoppel as a viable claim. Appellants urge this Court to adopt the Third Circuit's reasoning in *Pell* and *Shook* and, accordingly, reverse the District Court's order dismissing the ERISA equitable estoppel component of Claim 1 of the AC, and remand for further proceedings.

B. The District Court Erred By Granting Appellees a Summary Judgment on Claims 3-6 of the Second Amended Complaint.

In the Response Brief, Appellees lump together the separately well-pled Claims 3-6 of the Second Amended Complaint ("SAC") and refer to them as "the Ineffective Plan Amendment Claims." (Response Brief at pp. 40-50). As they did throughout the trial court proceedings, Appellees continue to direct attention to Qwest's efforts to "manifest its intention to amend the Plan" and conduct that Appellees allege served as a "ratification" of Qwest's intent to amend the Plan. In so doing, Appellees do not address Appellants' key contentions with respect to Claims 3-6 which are:

1) the document dated October 14, 2005 was not formally adopted to the Master Plan Document;

2) the document dated September 16, 2006 was not formally adopted to the Master Plan Document;

3) neither the October 14, 2005 document nor the September 16, 2006 document changed any of the existing terms of the Master Plan Document (i.e., the term "Basic Life Coverage" was not altered by either of those documents);

4) Qwest wrongfully applied retroactive to January 1, 2006 a December 13, 2006 executed and formally adopted Plan amendment so as to defeat Plan beneficiary Appellant Lensink's rights to receive payment of unreduced benefits vis-a-vis the Prior Loss Proviso;

5) Qwest wrongfully applied retroactive to January 1, 2007 a June 7, 2007 executed and formally adopted Plan amendment so as to defeat Plan beneficiary Appellant Strizich's rights to receive payment of unreduced benefits vis-a-vis the Prior Loss Proviso; and

6) It was not until January 21, 2009 that Qwest completed the necessary task of changing the terms of both controlling Plan documents (i.e., the Master Plan Document and the Group Contract).

Nowhere in the Response Brief do Appellees pay homage to the Prior Loss Proviso found within the ROR set forth in Section 10.1 of the Master Plan Document. The Prior Loss Proviso states that "no amendment shall reduce the benefits of any Participant with respect to a loss incurred prior to the date such amendment is adopted." (8 App. 1620). The Prior Loss Proviso bars retroactive application of a Plan amendment and protects the rights of each beneficiary of a retiree who dies before the actual calendar date of adoption of a Plan amendment that serves to reduce Plan benefits.

Plain and simple, the Prior Loss Proviso suggests a Plan beneficiary can

know whether his or her benefit payment rights are affected by a Plan amendment by looking to see the "date such amendment is adopted." That should be an easy task. One should only have to look at the face of an amendment instrument for the noted date of execution and formal adoption. The Prior Loss Proviso uses as the distinct triggering date the date an amendment is 'adopted', not the date of 'ratification', not the date of 'substantial compliance', and not the date of 'manifestation of intent.' Appellants arguments, all of which are dismissive of the 'date such amendment is adopted', severely stray from the express terms of the Plan – the common and ordinary meaning of the Prior Loss Proviso. While this Court has acknowledged that "ex post events might ratify a company's intended amendment to a plan," this Court has also proclaimed that "we have repeatedly rejected efforts to stray from the express terms of a plan, regardless of whom those express terms may benefit." *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002) (citing *Pratt v. Petroleum Production Management Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 662 (10th Cir. 1990) (" we are without license to alter an express, unambiguous provision"). For any court to accept Appellees' position would be the same as altering the express terms of the ROR's Prior Loss Proviso. The Prior Loss Proviso does not state "*no amendment shall reduce the benefits of any Participant with respect to a loss incurred prior to the Company's*

manifestation of intent to make the amendment." Likewise, the Prior Loss Proviso does not state "*no amendment shall reduce the benefits of any Participant with respect to a loss incurred prior to the Company's ratification of the amendment*." The Prior Loss Proviso requires an objective determination of the specific calendar "date such amendment is adopted", not a subjective analysis of whether there has been substantial compliance. In order to make a determination of the date such amendment is adopted, no Plan beneficiary should have to do go through a complicated fact finding process of cobbling-together multiple pieces of extraneous evidence, including affidavits.

In the Response Brief, Appellees devote significant effort to their argument that Qwest should be given a break because there was "substantial compliance" (Response Brief at pp. 44-45). That argument is easily dismissed because this Court holds that the law of 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*, 289 F.3d at 1237. The fact that Qwest made some effort still begs the key question, to-wit: For purposes of determining a Plan beneficiary's rights vis-a-vis the Prior Loss Proviso, what is the "date of adoption of the amendment"?

With respect to Claims 3, 4 and 5 of the SAC, Appellants repeatedly argued

to the District Court that no effective amendment to the terms of the Master Plan Document had been formally adopted prior to December 13, 2006, the date of adoption of Amendment 2006-1. When rejecting Appellants' position, the District Court erroneously accepted Appellees' position and engaged in a convoluted analysis so as to make summary judgment findings favorable to Qwest that there had been either sufficient "manifestation of intent" or "ratification" of an intended change to retirees' Plan benefits.

When issuing the serial rulings against Appellants on Claims 3, 4 and 5 of the SAC, the District Court never determined the actual date of formal adoption of an amendment which served to defeat Appellant Lensink's claim to receive pre-amendment benefits payable upon the January 6, 2006 death of her husband. Finally, in a subsequent ruling addressing Claim 6, the District Court made a ruling determining the date of formal adoption. The District Court belatedly ruled that "[o]n December 13, 2006, the PDC adopted 'Amendment 2006-1' which essentially formalized the reduced benefit change for post-1990 occupational

retirees." (13 App. 2701).[4] Hence, that belated ruling effectively proves Appellant Lensink's rights under the Prior Loss Proviso were unaffected as of January 6, 2006 when Mr. Lensink passed away, because no amendment to reduce her expected benefits was formally adopted until 11 months later. For that reason alone, the District Court's rulings on Claims 3, 4 and 5 should be reversed and the District Court instructed to grant summary judgment to Appellants on those Claims.

1. Neither the October 14, 2005 Document nor the September 14, 2006 Document Was Formally Adopted to the Plan and Neither Document Served to Amend Any Terms of the Master Plan Document.

In the District Court proceedings, Appellants repeatedly argued that neither the disputed October 14, 2005 document nor the disputed September 14, 2006 document was formally adopted to the Master Plan Document and neither served to change the Plan's terms. Both documents which Appellees refer to as "Resolutions" use incorrect terminology and, unlike the formally adopted Plan amendments, neither deleted nor amended any of the material specific terms of the

[4] The District Court's belated revelation and ruling concerning the December 13, 2006 formal adoption of the amendment is specifically pointed out in Appellants' Opening Brief at p. 37. Nowhere in Appellees' Response Brief is there any discussion about the matter.

Master Plan Document. Appellants repeatedly argued that the District Court should rule that the amount of beneficiaries' benefit payments continued to be dictated by more favorable terms found in the Master Plan Document which terms continued to exist at least until June 7, 2007 when Amendment 2007-1 was formally adopted. For example, Appellants pointedly explained:

> Amendment 2007-1 removed all prior language in the 1998 Governing Plan Document which up to that point in time set forth better terms for higher paying Plan benefits to beneficiaries of Eligible Retirees. In other words, the June 7, 2007 dated Plan Amendment 2007-1 *removed altered* or *deleted* the following more favorable Plan benefit terms: Section 1.1 "Basic Life Coverage"; Section 2.6 "Benefits for Eligible Retirees"; Appendix 2 "Benefits Schedule"; Appendix 7, "Minimum and Maximum Benefits for Certain Eligible Retirees; and Appendix 8, "Minimum and Maximum Benefits for Certain Eligible Retirees". . .
>
> Therefore, it is undisputed that more favorable controlling benefit terms continued to exist in the 1998 Governing Plan Document. . . during the 17 month period (January 1, 2006 through June 6, 2007) when reduced benefits were paid to beneficiaries of deceased retirees.
>
> Just as Defendants seek to benefit by the reservation of rights (ROR) clause, Plaintiffs seek to benefit by the more favorable terms which should have dictated the amount of Plan benefits paid to beneficiaries, such as Plaintiff Martha A. Lensink.

(emphasis original) (7 App. 1425).

In none of the District Court's dispositive orders is there a finding that the Resolutions actually served to change existing controlling and defined benefit terms as set forth within the Master Plan Document. Instead, the District Court made serial dispositive rulings catapulting off its finding that there is cumulative

evidence showing that either Qwest had 'manifested its intent' to change benefits or "ratified" the Resolutions. In other words, the District Court was not concerned with the actual terminology used in the disputed Resolutions and, instead, focused on Qwest's actions and the intentions of PDC members as expressed in their affidavits.

Both of the disputed Resolutions recommend changing "Basic Life Insurance Bunified," an undefined term appearing nowhere within the Master Plan Document. At least 35 times, the Master Plan Document uses a different defined term, "Basic Life Coverage." (8 App. 1593-1632). Appellees argue that Appellants are pointing out something that "exalt[s] form over substance." (Response Brief at p. 46). Yet, when formally adopting amendments on December 13, 2006 and July 7, 2007, Qwest, too, considered it necessary to use proper terminology when amending the terms of the Master Plan Document. Until such time as the defined terms of the Master Plan Document were changed by a formally adopted amendment and there was a co-signed amendment to the Group Contract, retirees' benefits were unaffected and no beneficiary of a deceased retiree should have been limited to a $10,000 payment. As this Court stated in *Allison,* "[t]his 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.'" *Allison*, 289 F.3d at 1236 (citing *Miller v. Coastal Corp.*, 978 F.2d 622, 624 (10th Cir. 1992) (quoting 29 U.S.C. § 1001(b)).

2. Prior to the January 21, 2009 Co-Signed Amendment to the Group Contract, the Amendments to the Master Plan Document Alone Were Not Enough to Effectuate a Change to Retirees' Benefits.

In the Response Brief, Appellees try to avoid the implications of the District Court's determination that there was not a co-signed amendment to the Group Contract before Qwest starting sending beneficiaries the limited $10,000 benefit payment. With respect to the Group Contract, the other controlling Plan document, The District Court noted and ruled:

> [o]n February 7, 2007, Qwest and Prudential entered into a written amendment to the Restated Group Contract, the governing contract with respect to Qwest's Life Plan, to effect the reduction in Life Benefit. Qwest did not sign the amendment.

(emphasis added) (13 App. 2702). Appellees admitted in the trial court proceedings that "no relevant amendment to the Group Policy was executed by both parties." (11 App. 2165 ¶ 26).

Now, Appellees desperately try to avoid the legal consequences of their lack of attention to detail and their failure to comply with the amendment provisions of the Group Contract. Appellees argue that the amendment document signed only by Prudential on February 7, 2007 wasn't really an amendment, but was an

"endorsement". (Response Brief p. 48). That argument is completely belied by the banner at the top of the document which clarifies it is to serve as an "**AMENDMENT TO GROUP CONTRACT NO. G-93634**" (emphasis original) (12 App. 2502). The document intended for there to be two signatures. (*Id.* "by their signatures below. . . "). That attribute distinguishes it from an endorsement which is operative with only a signature by a Prudential officer.

Appellees' argument that the document was an "endorsement" requiring only Prudential's signature is particularly belied and refuted by Prudential's official position about the matter. In a sworn statement, Prudential told the District Court, that there was a "2007 Amendment" to the Group Contract and "Qwest did not sign the 2007 Amendment." (10 App. 1999 ¶ 6 referring to the document appearing as Exhibit D to the affidavit - 10 App. 2016). Never does Qwest's witness, Edith Ewing, the Prudential Director of Contracts, refer to the document as an endorsement.[5] It was not considered by Prudential to be an endorsement. And, at no point in the trial court proceedings did any party present any evidence so as to portray the document as an endorsement.

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[5] Appellees cannot now try to impeach their witness Edith Ewing. Appellees twice submitted the same sworn statement by Ms. Ewing in two separate summary judgment proceedings. See: 10 App. 1996-2017, Ms. Ewing's statement submitted in support of Qwest's motion for summary judgment on Claim 6 of the SAC; and 11 App 2185-2201, Ms. Ewing's statement submitted in support of Qwest's motion for summary judgment on Count 2 of the SAC.

Appellees' current characterization of the document is contrary to the District Court's specific finding that the document is an "amendment" not signed by Qwest (13 App. 2702). Appellees never challenged nor appealed that material fact determination which is adverse to Qwest's position in defense of this appeal.

The specific terms of the Group Contract make any attempted amendment ineffective for any losses or claims occurring before the amendment is signed by both Qwest and Prudential. (See 10 App. 2144 ¶ I "an amendment will not affect a claim incurred before the date of change" and an amendment must be "signed by the Contract Holder and an officer of Prudential"). No co-signed amendment to the Group Contract arrived on the scene until January 21, 2009 when Qwest belatedly executed the amendment. (12 App. 2502-2503). That event occurred three years after Appellees started sending only $10,000 benefit payments to Plan beneficiaries, including Appellants Lensink and Strizich. Without that necessary co-signed amendment to the Group Contract, Qwest's intended reduction of retirees' benefits was ineffective. (See Appellants' Opening Brief pp. 39-41).

Therefore, in view of the Prior Loss Proviso in the Master Plan Document and the unamended terms of the Group Contract, the District Court should not have entered summary judgment against Appellant Strizich on Claim 6 of the SAC. Mr. Strizich's claim arose upon the death of his wife Sharon Strizich in March 2007.

Mr. Strizich's payment should not have been limited to $10,000, because Qwest did not have in place the necessary changes for both the Master Plan Document and the Group Contract until January 21, 2009.

This Court should reverse the District Court's summary judgment ruling favorable to Qwest on Claim 6 of the SAC. This Court should instruct the District Court to rule that Qwest's intended change to reduce retirees' benefits was ineffective for all claims arising from the deaths of retirees occurring before January 21, 2009, the date Qwest carried out the very last of the steps required by the controlling Plan documents and signed the necessary enabling amendment to the Group Contract.

3. Qwest's Collective Actions that Appellees Allege to Equate to "Ratification" Cannot Supplant the Bright-Line Rules in the Controlling Plan Documents.

As they did throughout the trial court proceedings, in this Court, Appellees continue pounding away with their argument that Qwest's actions were tantamount to a 'ratification' of the company's intent to amend the Plan so as to reduce retirees' benefits. (Response Brief pp. 49-50). What permeates throughout Appellees' argument is their desire, when paying benefits to Plan beneficiaries, not to be held accountable to the bright-line rules in the controlling Plan documents and ERISA. Appellees seek to avoid the rules set forth in Appendix 7 and the

Prior Loss Proviso of the Master Plan Documents' ROR. And, Appellees seek to avoid the plan amendment rules set forth in the Group Contract. Finally, Appellees attempt to arm an incomplete Insurance Plan Description as if it had the same legal effect as an SPD. To effectuate ERISA, employers, participants, and the lower courts need and must comply with bright-line rules. See *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, __ U.S. __, 129 S.Ct. 865, 876 (2009) (referencing "the bright-line requirements to follow plan documents in distributing benefits."); *Hicks v. Flemeng Co.*, 961 F.2d 537, 542 (5th Cir. 1992) (adopting a bright-line rule as to what constitutes an SPD because "reasonable participants's or case-by-case tests—with their inevitable hair-splitting factual distinctions and litigation encouraging ambiguities–would introduce considerable uncertainty into this area of law, to the ultimate detriment, no doubt, of all parties."); *McMillan v. Parrott*, 913 F.2d 310, 312 (6th Cir. 1990) ("rules. . . ensure that beneficiaries get what's coming to them without the folderol essential under less-certain rules."). Appellees' approach and arguments should all be rejected for running afoul of the bright-line rules in the controlling Plan documents and ERISA.

The District Court fully adopted Appellees' approach and wrongly concluded that Qwest was allowed to distribute reduced benefits to Plan

beneficiaries because:

> Qwest manifested its intent to amend the Plan in many ways". . . and . . . "[a]lthough the PDC may have taken further steps to formalize the benefit changes. . . it was not required to take these steps to effectuate an amendment to the Plan. Indeed, I note again that all that was required was a manifestation of intent to amend–a requirement that was satisfied by numerous actions, as discussed above.

(emphasis added) (13 App. 2720-2721). The District Court's ruling should be reversed because, clearly, it is not in harmony with the Supreme Court's instruction that, when it comes to distributing benefits, there must be compliance with the bright-line rules set forth in the controlling Plan documents.

C. The District Court Erred By Granting Appellees a Summary Judgment on Claim 2 of the Second Amended Complaint.

In Claim 2 of the SAC, Appellants Kerber and Phelps contend they should be granted appropriate equitable relief due to material misrepresentations and omissions amounting to a breach of ERISA fiduciary duty. (5 App. 979-980). The asserted breach of fiduciary claim is in connection with their acceptance of the 5+5 Option in 1990.

In the Response Brief, Appellees attack Appellants' contention that the two page Insurance Plan Description given to Mr. Kerber and Mr. Phelps did not constitute a Summary Plan Description ("SPD"). Appellees sardonically argue, "plaintiffs cite no law supporting this remarkable proposition." (Response Brief p.

51). To the contrary, the case law, statute and regulation Appellants cited are directly on point. (Appellants' Opening Brief p. 49). The Insurance Plan Description fails to contain all of the information required to be set forth in a SPD for the Plan. The documents contains a single paragraph describing Basic Coverage under the Plan. (9 App. 1798). The document does not constitute an amendment to the ROR set forth in the June 1987 SPD, the only Plan document in effect during the offering of the 5+5 Option. The Insurance Plan Description contains a hodgepodge of curt descriptions for benefits apart from the Plan. (See 9 App. 1797-1798, describing "Medical Expense Plan", "Health Maintenance Organization", "Dental Expense Plan", and "Vision Care Plan."). The document is not part of the controlling Plan documents. It is not an instrument under which the Plan is either established or operated. Therefore, the document cannot be afforded any of the legal effects of a SPD.

In any event, while the Insurance Plan Description says the "Company reserves the right to amend or terminate" it does not clarify that the right to amend includes the right to "reduce" benefits after retirement. The District Court embellished the document and said it "contained an express reservation of rights clause that informed 5+5 Retirees of Qwest's retained right to reduce" retiree benefits. (13 App. 2713). The document contains no such message and it cannot

serve in any manner to give the Plan sponsor enforceable rights.

Next, Appellees argue that the ROR set forth in the July 1987 SPD in effect during the 5+5 Option is not ambiguous, relying exclusively on the case of *Crown Cork & Seal Co., Inc. v. International Ass'n of Machinists and Aerospace*, 501 F.3d 912 (8th Cir. 2007). That decision only briefly discusses an ROR that gave the plan sponsor the right to make changes "subject to, and within the framework of, applicable federal legislation and subject to any outstanding contractual agreements." (*Id*. at 919). Without elaborating, the appellate court ruled the union could "not create an ambiguity simply by saying that it thinks the reservation-of-rights clause can be read to mean something different from Crown's interpretation of the same clause." (*Id*.). There are three major distinctions between the *Crown Cork* case and the instant case.

First, there is a major difference between the ROR discussed in the *Crown Cork* decision and the ROR set forth in U S WEST's SPD. The ROR in the 1987 SPD says it is "subject to applicable limitations in the law" which broadly encompasses more than federal legislation. When the 5+5 Option was offered almost 21 years ago, would any reasonable Plan participant or beneficiary know whether or not the ROR was subject to state common law? Since U S WEST operated in 14 states and administered the Plan nationwide, how would any Plan

participant or beneficiary know which federal circuit case law the ROR was subjected to? As pointed out in Appellants' Opening Brief at pp. 50-51, it would not be unimaginable that reasonable persons retiring in 1990 would think there existed some form of law forbidding U S WEST from reducing or taking away benefits during retirement. With full awareness that there was confusion and worry among persons considering the 5+5 Option, U S WEST deliberately chose to interpret the ROR and allay those concerns.

In the January 1990 Video Conference, U S WEST's Director of Benefits interpreted and explained the ROR. Appellees' quote only a snippet of the official interpretation. The full text of the spoken interpretation is set forth in Appellants' Opening Brief at p. 51, and a DVD recording is part of the trial court record. (See 10 App. 2090). In the end, U S WEST emphasized that the ROR is "really intended to make the plan more meaningful and more affordable not only for the employee but for the company." That is a very misleading explanation given during a special early retirement offer to a targeted audience particularly vulnerable to exploitation and manipulation. In no way does the official interpretation give notice that either U S WEST or any successor can take action detrimental to retirees' interests such as reducing expected benefits after retirement. It is a very incomplete explanation, one not disclosing the potential for

future adverse consequences to the retirees' 5+5 Option benefits.

When employees being solicited to take an early retirement do not receive accurate information to permit them to determine their rights and obligations under the employee benefit plans, it is impossible for them to determine what, if any, actions they must take to protect their rights, or to make informed decisions about selecting the best form of retirement benefits, whether to secure supplements to their retirement benefits and whether to make completely alternative choices, such as continued employment.

Appellees mis-characterize the Video Conference as an "informal communication". (Response Brief pp. 56-57). But, it was far from an informal communication made to one or two persons. John G. Shea, the former U S WEST Executor Director of Employee Benefits, confirmed in his unopposed sworn affidavit that the intent of the Video Conference was to convey the company's official position and "to guide persons considering the 5+5 early retirement offering." (10 App. 2139 ¶¶ 3 and 7). In contrast to the loose lips type of informal communications involved in the cases that Appellees point out, the Video Conference was officially sanctioned by the company and widely disseminated with the intent to entice employees to take early retirement under the 5+5 Option.

Second, unlike U S WEST's conduct, there is no evidence in the *Crown*

Cork case that the company broadcast either an incomplete or misleading explanation about Crown Cork's ROR.

Third, the *Crown Cork* case did not include an asserted claim that the company engaged in an ERISA fiduciary breach of duty by misleading its workers or retirees.

Therefore, it was error for the District Court to apply the ruling in the *Crown Cork* case and arrive at the conclusion that the ROR in the June 1987 SPD was unambiguous. The interpretation and inadequate explanation U S WEST chose to give Appellants Kerber and Phelps and other Pre-1991 Retirees about the ROR affecting their 5+5 Option benefits should be deemed to be a misrepresentation or omission. As explained in Appellants' Opening Brief, since Appellants proved all necessary elements for their breach of ERISA fiduciary duty claim, summary judgment should not have been entered for Appellees on Claim 2 of the SAC.

CONCLUSION

For the reasons stated in Appellants' Opening Brief and herein, this Court should vacate the judgment and reverse the District Court's orders and remand with instructions, including an instruction to revisit the issue of class certification.

Dated: December 2, 2010 Respectfully submitted,

s/ Curtis L. Kennedy
Curtis L. Kennedy
8405 East Princeton Avenue
Denver, CO 80237-1741
Telephone: 303-770-0440
Facsimile: 303-843-0360
E-mail CurtisLKennedy@aol.com
Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 6,982 words in text and footnotes, excluding (table of contents, table of citations, and certificates of counsel) the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Times New Roman 14-point font and word counted in WordPerfect 12, the word processing software system used to prepare this brief.

Dated: December 2, 2010

s/ Curtis L. Kennedy
Curtis L. Kennedy
8405 East Princeton Avenue
Denver, CO 80237-1741
Telephone: 303-770-0440
E-mail CurtisLKennedy@aol.com
Attorney for Plaintiffs-Appellants

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Pursuant to the Federal Rules of Appellate Procedure and the Local Rules of the United States Court of Appeals for the Tenth Circuit, I hereby certify:

1. The text of the electronic PDF version of the foregoing Plaintiffs-Appellants' Reply Brief that was electronically filed with the Court is identical to the text of the hard copies of the brief that were filed with the Court and served on Counsel;

2. Plaintiffs-Appellants' Reply Brief complies with the privacy policy of the Judicial Conference of the United States; and

3. A virus check was performed on the electronic brief using Symantec/Norton Internet Security and Anti-Virus software (v.18.1.0.37, current as of 12-01-10) and, according to the software application, the PDF file was found to be virus free.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: December 2, 2010

s/ Curtis L. Kennedy
Curtis L. Kennedy
8405 East Princeton Avenue
Denver, CO 80237-1741
Telephone: 303-770-0440
E-mail: CurtisLKennedy@aol.com
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 2ND day of December 2010, a true and correct copy of the above and foregoing **PLAINTIFFS --APPELLANTS' REPLY BRIEF** was emailed to all Attorneys for Defendants-Appellees and a copy was hand delivered to the offices of:

Christopher J. Koenigs, Esq.
Michael B. Carroll, Esq.
SHERMAN & HOWARD, L.L.C.
633 17th Street, Suite 3000
Denver, CO 80202
Tele: 303-299-8458
Fax: 303-298-0940
ckoenigs@sah.com (Chris Koenigs, Esq.)
mcarroll@sah.com (Michael Carroll, Esq.)
Counsel for Defendants-Appellees

and a copy of the same was sent by email to Plaintiffs-Appellants.

s/ Curtis L. Kennedy
Curtis L. Kennedy
8405 East Princeton Avenue
Denver, CO 80237-1741
Telephone: 303-770-0440
E-mail CurtisLKennedy@aol.com
Attorney for Plaintiffs-Appellants