IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,
vs.

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

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION TO (Docket 90) DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs hereby submit their response brief in opposition to (Docket 90) Defendants' motion for a summary judgment on Plaintiffs' First, Third, Fourth and Fifth Claims for Relief.

I. Plaintiffs Have Pending a Motion to Strike Defendants' Brief Because the Brief Does Not Comply with Judge Walker Miller's Pre-Trial Procedure Rules.

Plaintiffs remind the Court that on July 21, 2008, they filed Docket 93, "Plaintiffs' Motion For Order to Strike (Docket 90) Defendants' Motion for Summary Judgment. . ", and that matter has not been ruled upon. In their Rule 56 motion, Defendants did not separately set forth undisputed material facts. Instead, in order to strategically maximize space in their brief for argument, they omitted a section specifying facts, and they did not ask for leave to avoid having to comply with Rule 6.3 of Judge Miller's Pretrial Procedures for a summary judgment

motion. Again, on July 30, 2008, the undersigned conferred with Defendants' counsel requesting they withdraw the pending motion and re-file one in conformity with Judge Miller's rules. But, that request was, again, rebuked. Since Plaintiffs' must go forward in order to meet their deadline for filing their response, they hereby respond in opposition to Defendants' brief, but without prejudice to their pending motion to have Defendants' brief stricken.

II. PLAINTIFFS' STATEMENT OF ADDITIONAL UNDISPUTED FACTS WHICH SERVE TO UNDERMINE DEFENDANTS' MOTION

1. When this case was set up for the Court's ruling on Defendants' initial motion to dismiss, the Court did not see or consider Appendix 8 to the Governing Document, because that document was then disputed, not the subject of a stipulation. Subsequently, Defendants, via the Plan Administrator's declaration (Docket 91-2, p. 4 ¶ 12), have confirmed Appendix 8 is a true and accurate part of the Governing Plan Document. Appendix 8, unlike Appendix 7 which the Court ruled was specifically tied to the age reduction formula found in Section 2.6(a) of the 1998 Governing Plan Document, stands alone and is not tied to the age reduction formula. Appendix 8 reconfirms rules stating Eligible Retirees' benefits shall not be reduced below $20,000 for one group and $30,000 for the remaining group. (See Docket 91-6, p. 38 Bates QL00038).

2. Regardless of whether the disputed documents Defendants contend are Plan amendments, there remained in the Governing Plan Document coexisting more favorable terms dictating higher benefits be paid to beneficiaries, and those terms were not removed until after this lawsuit was commenced and Defendants executed and adopted Plan Amendment 2007-1 on June 7, 2007 in order to alter, remove or delete the inconsistent more favorable controlling terms for Eligible Retirees and their beneficiaries. (See Exhibit 1, filed herewith, Plan Amendment 2007-1 Bates QL06596-QL06598, authenticated by Docket 91-20, Taylor Declaration, ¶ 9).

III. ARGUMENT

A. Defendants Grossly Mischaracterize the First Claim For Relief in Order to Shoehorn in Their Inapposite Argument For Summary Judgment.

As they have done previously, Defendants grossly mischaracterize Plaintiffs' First Claim for Relief, borrow a snippet from a single paragraph of the Second Amended Complaint ("SAC") and distort that allegation. Defendants state:

> Plaintiffs First Claim alleges that the Plan violates the requirement, set forth in ERISA Section 402(b)(3), that every employee benefit plan "provide a procedure for amending such plan." Plaintiffs allege that the 1998 Plan Document lacks such a procedure, and accordingly ask this Court to declare void the 2005 Amendment and all other amendments purporting to reduce life insurance benefits. (SAC ¶ 79)."

(Docket 90, Defts' Brief, pp 2-3). That is not the essence of the First Claim. Defendants deliberately ignored the fact that the First Claim specifically incorporates all of the detailed factual and legal allegations set forth in paragraphs 1 through 75 of the SAC. Furthermore, Defendants ignore the Prayer for Relief of the SAC. In short, for their First Claim, Plaintiffs have asked for a declaration of all Eligible Retirees' (and their beneficiaries) rights to Plan benefits. In the paragraphs supporting their First Claim, Plaintiffs contend that Defendants' actions violated ERISA's provisions and the more favorable Plan terms when Defendants were paying out only $10,000 to Plan beneficiaries. In particular, Plaintiffs seek relief pursuant to ERISA Section 502(a)(1)(B) [1] and ERISA Section 502(a)(3) which statutory provisions state:

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

> Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), declare the PLAN fails to comply with the requirements of ERISA Section 402(b)(3), § 1102(b)(3), and, pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), declare Named Plaintiffs' and Eligible Retirees' rights to PLAN benefits are not governed by documents purporting to be PLAN amendments reducing their benefits. (Docket 69, SAC, Prayer ¶ B) (emphasis added);
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> Pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), declare the Named

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

29 U.S.C. § 1132(a)(1)(B) and (a)(3). *Tomlinson v. El Paso Corp.*, Slip Copy, 2008 WL 762456 (D. Colo., J. Miller, March 19, 2008).

In making their First Claim for Relief - for a declaration of all Eligible Retirees' rights to Plan benefits -, Plaintiffs specifically contend that when former Plan sponsor U S WEST made a special early retirement offering in 1990 to Plaintiff Kerber, Plaintiff Phelps and 3,850 others, the Plan administrator sent a confirmation statement stating that the U S WEST Employees Benefit Committee had granted the retirees a special early retirement pension and confirmed that, "You are **entitled** to the benefits paid under the Group Life Insurance Program." (SAC ¶ 32) (emphasis added). Notably, the March 26, 1990 confirmation statement sent to all "5 + 5" recipients does not include any disclaimer suggesting that a Plan document controlled over the confirmation statement. (See Exhibit 2 filed herewith bearing Bates K00419). Furthermore, when persons retired before January 1991, they weren't even provided a SPD for the insurance

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> Plaintiffs' and Eligible Retirees' rights to PLAN benefits and, applying principles of *contra proferentum* to conflicting terms of the Governing PLAN Document and the terms of any document (including the October 14, 2005 dated minutes and PLAN Amendment 2006-1) Defendants contend served as a PLAN amendment reducing Eligible Retirees' PLAN benefits, declare that the more favorable terms of the Governing PLAN Document govern the rights of Eligible Retirees and their beneficiaries. (SAC, Prayer ¶ C) (emphasis added); and
>
> Grant Plaintiffs and the proposed class members such other and further class-wide and plan-wide relief under ERISA § 502(a)(1)(B) as more specifically pled and requested within their Claims for Relief. . ." (SAC, Prayer ¶ L) (emphasis added).

plan. Instead, persons retiring from U S WEST companies were habitually provided brochures promising the retiree that after he or she turned age 70 their earned basic life insurance benefit would no longer be reduced, but remain at that set level for the rest of his or her life. (Exhibit 3 filed herewith, Phelps' Affidavit, ¶¶ 6-8; Exhibit 4, filed herewith). The SPD for the 5+5, Exhibit 5 does not contain any disclaimer or reservation of rights for the group life benefit. [2]

Eight years later, U S WEST memorialized Plan terms in a document the parties to this case refer to as the "1998 Governing Plan Document," or "Governing Plan Document" a document executed in June 1998. The 1998 Governing Plan Document includes rules providing Eligible Retirees minimum life insurance benefits, what the Court refers to as the "Minimum Benefit Promise." (Docket 47, Amended Order p. 3, n. 4). The Governing Plan Document contains what the Court refers to as the "Prior Loss Proviso," which is a restraint on Qwest's right to amend the Plan and protects Plan participants' benefits from being reduced before a Plan amendment is "adopted." (*Id.* p. 12). While the Governing Plan Document identifies the Company as having amendment authority, it does not state any procedure for amendment of the Plan and there is no procedure for 'adoption' of a Plan amendment.

In October 2005, the Qwest Plan Design Committee documented a recommendation to reduce life insurance benefits for a certain group of retirees. (Docket 91-5, Bates QL02122). Fourteen months later in December 2006, the Committee members adopted to the 1998 Governing Plan Document a document entitled "Plan Amendment 2006-1" which states "Effective January 1, 2006, with respect to Post-1990 Occupational Retirees, the Basic Life

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[2] No doubt, that's the reason Qwest continued sending confirmation notices to thousands of Pre-1991 Retirees stating, "The Company intends to continue these plans indefinitely; however, it reserves the right to amend, suspend, or discontinue them at any time, except for those who retired before 1991 and where prohibited by collective bargaining agreements. (emphasis added). (Docket 16-27 through 16-30, discussed in Docket 47, Amd. Order pp. 14-15).

Coverage is a flat $10,000 Benefit." (Exhibit 6, filed herewith at Bates QL07005).

Despite the October 2005 dated recommendation document and the December 2006 Plan Amendment 2006-1, there continued to exist terms in the 1998 Governing Plan Document more favorable for all Eligible Retirees, including the terms set forth in Section 2.2, Section 2.6(a), Appendix 2, Appendix 7 and Appendix 8. [3] Neither the October 2005 recommendation nor the December 13, 2006 Plan amendment contain language stating "any inconsistent provision of the Plan shall be read consistent with this Amendment," language the Qwest Plan Design Committee members included in amendments to other employee benefit plans when that was their specific intent. (See Exhibit 7 at ¶ 28 filed herewith, December 14, 2005 amendment to Qwest Pension Plan executed by same Committee members).

Plaintiffs contend that, as between the harsh unfavorable terms of Plan Amendment 2006-1 and the more favorable coexisting terms left in the 1998 Governing Plan Document, Plan administrators should have acted in the best interests of Plan beneficiaries, as required by ERISA Section 404(a)(1), and they should have applied principles of *contra proferentum* [4] and carried out the more favorable terms when making life insurance payments to beneficiaries of deceased

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[3] When ruling on Qwest's first motion to dismiss, the Court concluded that the rules set forth in Appendix 7 were especially tied to the age reduction formula set forth in the 1998 Governing Plan Document at Section 2.6(a). (Docket 47, Amended Order p.3 n. 4). At that time, the Court did not see or consider "Appendix 8", which document was then disputed by the parties and the subject of ongoing formal discovery. Subsequently, Defendants conceded that Appendix 8 was, indeed, part of the official Governing Plan Document. Furthermore, the undisputed fact is Appendix 8 was not removed or deleted from the Governing Plan Document until June 7, 2007 when Plan Amendment 2007-1 was executed and adopted. (See Plaintiffs' Statement of Additional Undisputed Facts ¶2). Notably, the rules set forth in Appendix 8 are not tied to the age reduction formula. The rules stand by themselves.

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

Eligible Retirees. (SAC ¶ 66). More specifically, Plaintiffs Lensink and Strizich (both beneficiaries of deceased Plan participants) contend the Prior Loss Proviso was violated and they are entitled to a declaration of their right to receive additional Plan benefits (SAC ¶¶ 69 and 73). The remaining Plaintiffs and the proposed class of Eligible Retirees contend they are entitled to have this Court enforce their rights under the terms of the Governing Plan Document, or to clarify their rights to future benefits under the terms of the Plan. (SAC ¶ 75).

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

Also, Plaintiffs ask the Court to declare that the Plan fails to comply with the requirements of ERISA Section 402(b)(3), 29 U.S.C. § 1102(b)(3).[5] (SAC ¶ 77-78). Article 10.1 of the 1998 Governing Plan Document states "the Company reserves the right to, in its sole discretion, to amend the plan at any time." Defendants have produced a resolution by the Qwest

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

Board of Directors designating the Qwest Plan Design Committee as the entity with responsibility for making plan amendments and changes. (See Docket 91, p. 5 ¶ 20). Plaintiffs agree that particular document suffices for "identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3). It is the company that has amendment authority, not the Union and not a third party administrator. *Curtiss-Wright Corporation v. Schnoonejongen.*, 514 U.S. 73, 115 S.Ct. 1223, (1995). But, neither Article 10.1 nor any Qwest corporate by-laws nor any corporate resolution sheds any light on what the "procedure" is for amending the Plan.

Unlike in *Curtis-Wright*, which case was remanded for a fact intensive inquiry into whether or not the procedure set forth in the corporate by-laws was complied with, there is no procedure set forth in any corporate document. Defendants have no written Plan amendment procedure for anyone to refer to and comply with.

In *Cirulis v. Unum*, 321 F.3d 1010, 1014 (10th Cir. 2003), the appellate court ruled that the right to amend requires compliance with amendment procedures (citing *Krumme v. WestPoint Stevens, Inc*., 143 F.3d 71, 84 (2d Cir.1998)) . Therefore, when an alleged Plan amendment is being challenged, the Court should first look and determine whether the challenged document complies with the Plan's stated amendment "procedure." Alas, the Plan in this case has no specified amendment procedure. Since the Plan, to this date, does not meet the requirements of ERISA Section 402(b)(3), and it does not provide a procedure set forth in any corporate by-law or corporate resolution for amending the Plan and for adopting plan amendments, Plaintiffs request the Court grant them equitable relief and declare <u>*all*</u> Eligible Retirees' benefit rights continue to be governed by the more favorable terms of the 1998 Governing Plan Document.

Defendants contend that violation of ERISA Section 402(b)(3) is a technical violation and Plaintiffs must show either detrimental reliance, evidence of bad faith or active concealment

with respect to Defendants' purported Plan amendments. Plaintiffs can show both evidence of bad faith and active concealment all surrounding Defendants' actions with respect to the October 14, 2005 Recommendation and the December 13, 2006 dated Plan Amendment 2006-1.

B. The October 14, 2005 *Recommendation* and Resolutions Document Was Not "Adopted" as a Plan Amendment.

Defendants don't know what to call the October 14, 2005 dated document, which they submitted as Docket 91-5, an exhibit to the Declaration of Plan Administrator Erik Ammidown. Mr. Ammidown reveals how very confused he is about this document which bears Bates QL02122. Mr. Ammidown begins in paragraph No. 7 of his sworn statement by calling the document the "Oct. 2005 Resolutions." Then, he immediately starts calling the same document the "2005 Amendment." In paragraph No. 12 he goes back to calling the document the "Oct. 2005 Resolutions." Again, in paragraph No. 16, he calls the document the "Oct. 2005 Resolutions." (Docket 91-2, Ammidown Decl. at ¶¶ 7, 12 and 16). When Mr. Ammidown responded to Plaintiffs' pre-litigation ERISA document disclosure request, he called the document the "Plan Design Committee Resolutions, October 14, 2005." He did not call it the "2005 Amendment" a phrase coined after litigation ensued. (Docket 91-9, p. 3, Bates QL07410).

Which is it? the "Oct. 2005 Resolutions"? or the "2005 Amendment"? A careful reading of Docket 91-5, proves the document is merely a **recommendation** for Mr. Ammidown, acting as a director level management employee, to take certain action. [6] And, it was unfinished business, as explained by Mr. Ammidown who states he thought about drafting a new restated Plan document in its entirety, one that would incorporate the terms of the October 2005

[6] The October 14, 2005 document states: **"Recommendation:** That the Director, Employee Benefits, Health Life & Disability, Human Resources, or his delegate, be authorized to take all actions appropriate to implement for the 2006 plan year:" (Docket 91-5 Bates QL02122).

Resolutions, but that job was never carried out. (Docket 91-2, ¶ 12).

Unlike the December 13, 2006 dated Plan Amendment 2006-1, the October 14, 2005 dated document wasn't "adopted" and formally incorporated into the 1998 Governing Plan Document. Knowing the date a Plan amendment is adopted is very important for purposes of the Prior Loss Proviso. In their opening brief (Docket 90), Defendants use their best effort to avoid using the term "adopt" when explaining what transpired 14 months after the October 2005 Recommendation when, in December 2006, the Committee did, indeed, *adopt* to the Governing Plan Document a document entitled "Plan Amendment 2006-1" which states "Effective January 1, 2006, with respect to Post-1990 Occupational Retirees, the Basic Life Coverage is a flat $10,000 Benefit." See Exhibit 6 filed herewith which states: "To reflect its approval and **adoption** of the proposed changes, the Committee approved and **adopted** the resolutions that are attached hereto and made a part hereof as Exhibit A; the attached amendment which is effective January 1, 2006 is **adopted** in substantially the form attached hereto; RESOLVED, that the Amendment 2006-1 to the Qwest Group Life Insurance Plan be and hereby is **adopted** effective January 1, 2006, in substantially the form as the attached document;") (emphasis added) (Exhibit 6 at Bates QL07001, QL07003-QL07004).

Mr. Ammidown states that "in lieu of creating" a restated Governing Plan Document, Plan Design Committee members "reviewed, approved and executed" the December 13, 2006 dated Plan Amendment 2006-1. (Docket 91-2, ¶ 13). Defendants describe the purpose of this event occurring in December 2006 was to "restate the 2005 Amendment." But, nowhere does the December 13, 2006 dated paper refer to the October 14, 2005 dated paper. Bottom line: The October 2005 dated recommendation document was never adopted and made part of the 1998 Governing Plan Document. It is bad faith for Defendants to not acknowledge the October 2005

Recommendation was not 'adopted. Certainly, Plan Amendment 2006-1 was adopted, but it was wrongfully applied - retroactively - again, in bad faith.

C. The Retroactive Application of Plan Amendment 2006-1 Violated the Rights of Plan Beneficiaries Whose Benefits Vested Before that Amendment Was *Adopted*. Violation of the Prior Loss Proviso is Evidence of Bad Faith.

Curiously, not once in their opening brief do Defendants refer to the Prior Loss Proviso. Defendants' retroactive application of Plan Amendment 2006-1 adopted on December 13, 2006 violated the Prior Loss Proviso. Plan Amendment 2006-1 was adopted nearly a year after Plan administrators had already reduced Plan benefits paid to numerous beneficiaries of Post-1990 Occupational Retirees, including Plaintiff Lensink. Defendants admit that reduced payments were sent to the beneficiaries of deceased retirees starting on January 1, 2006. (Docket 91, p. 2, admitting ¶ 11). Action taken in violation of the Prior Loss Proviso is the quintessential proof of Defendants acting in bad faith. It is no excuse for Defendants to have not first adopted a Plan Amendment mandating a reduction of life insurance benefits and removing all other inconsistent more favorable terms before sending beneficiaries reduced benefit payments. [7]

Although after the October 14, 2005 recommendation was made, Defendants intended for there to be a new restated Plan document created, that task was not completed. Defendants decided to adopt a Plan amendment, but that didn't happen for another 14 months on December 13, 2006. Hence, Defendants acted in bad faith when they allowed Plan administrators and claims handlers to shortchange numerous beneficiaries, including Plaintiff Lensink whose husband died on January 6, 2006, months before the adoption of Plan Amendment 2006-1.

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[7] Presumably, Defendants were caught off guard with their unfinished business when they received the November 15, 2006 ERISA document demand letter from the undersigned counsel for retirees. The demand letter required disclosure of the controlling Plan document and all Plan amendments. Curiously, Plan Amendment 2006-1 was drafted, executed and adopted on December 13, 2006, a few days before the 30 day deadline for making the required ERISA Section 104(b) document disclosure response. (See Docket Nos. 91-8 and 91-9)

Defendants' failure to abide by existing Plan terms cannot be excused by efforts by the company, the Union and the Retirees' organization to inform retirees that the company intended to reduce benefits. Moreover, the so-called 'notice' Defendants contend was sent to Mr. Lensink while he was terminally ill is woefully illegible and insufficient. (See Docket 91-28). In any event, Plaintiff Martha Lensink's testimony is she never knew about the reduction in Plan benefits until after she asked for the expected full payment. (Docket 91-14, p. 2, response to 1 & 2; and pp. 7-8, response to 23).

Tenth Circuit authority holds that a *post hoc* amendment cannot alter a plan provision in effect at the time performance under the plan became due. *Gorman v. Carpenters' & Millwrights' Health Benefit Trust Fund*, 410 F.3d 1194, 1198 (10th Cir. 2005); *Bartlett v. Martin Marietta Oper. Supp., Inc. Life Ins. Plan*, 38 F.3d 514, 517 (10th Cir.1994) (subsequent modifications to the plan do not affect the terms of the plan in existence when insured died).

All of Defendants' arguments about 'ratification' are most irrelevant and must be rejected. The Prior Loss Proviso uses as the distinct triggering date the date an amendment is ***adopted***, not the date of 'ratification.' Article 10.1 in the 1998 Governing Plan Document states no amendment "shall reduce the benefits of any Participant with respect to a loss incurred prior to the date such amendment is adopted" (emphasis added), and that is an express limitation on Qwest's rights under the ROR clause. (Docket 47, Amended Order at pp. 10-11). Defendants' arguments concerning ratification severely stray from the express terms of the Plan – the common and ordinary meaning of the Prior Loss Proviso. The Tenth Circuit proclaims "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) (citations omitted) (commenting "[r]esort to a plan's terms in the event of a dispute should not require the prescience of a clairvoyant as to whether an amendment has occurred." *Id*.).

D. Defendants Never Disclosed When A Plan Amendment to Reduce Benefits Was "Adopted" and They Concealed Material Changes to the Plan.

Despite all the rhetoric in Defendants' brief about Qwest's efforts to announce they intended to reduce Plan benefits for retirees, there was no compliance with the letter and spirit of ERISA Section 104(b)(1)(B), 29 U.S.C. § 1104(b)(1)(B) which requires a fiduciary to notify **each** plan participant of a material change in a plan within "210 days after the end of the plan year in which the change is adopted." ERISA Section 104(b)(1)(B), 29 U.S.C. § 1104(b)(1)(B).

First, assuming the October 2005 recommendation was intended to be an adopted Plan amendment, which it wasn't, Defendants concealed that fact and they failed to say anything about material changes to the Plan when they mailed out the Summary Annual Report and Summary of Material Modifications (SMM), pursuant to ERISA Section 104(b)(1)(B), in December 2005, two months later. (See Exhibit 8 filed herewith, Bates QL07906-QL07921). That December 2005 SMM sent to each Plan participant says nothing about there being any material changes to the Qwest Group Life Insurance Plan for the upcoming 2006 Plan year. Why? Because no changes had been made to the Plan as of the December 2005 distribution date of that SMM!

Second, Defendants admit they never sent retirees and beneficiaries the required formal notice due 210 days after adoption of Plan Amendment 2006-1. Defendants' witness Erik Ammidown confirms in his declaration that "Qwest did not send Life Plan participants or beneficiaries SMMs or other notices following execution of the Dec. 2006 Resolutions." (Docket 91-2, ¶ 14). By not making the ERISA required SMM disclosure to each participant about material Plan changes, Defendants engaged in active concealment of the actual date of adoption (December 13, 2006) of Plan Amendment 2006-1. This was a deliberate concealment, so that the many beneficiaries (mostly elderly survivors) who unexpectedly received reduced

benefits upon the deaths of retirees occurring during January 1, 2006 through December 12, 2006 would not know that their rights under the Prior Loss Proviso had been violated.

Plaintiffs do challenge the adequacy and propriety of the SMM's issued in late 2005. And, just as Defendants failed to comply with ERISA's requirement to send each Participant a SMM revealing material changes to the Plan, Defendants have never sent retirees a "Certificate of Insurance Coverage", as required by the Group Policy. (Exhibit 3, Phelps Aff. ¶ 13).

Defendants cannot rely upon either Union or Retiree organization communications to carry out Defendants' required duties under ERISA. The October 20, 2005 dated letter EVP Teresa Taylor sent to the Minnesota PUC and Mimi Hull, a Retiree organization leader, does not meet the requirements of ERISA Section 104(b)(1)(B). (See Docket 91-22, p. 2, Bates 8194). Likewise, the "CWA News" report sent to Union members is woefully incomplete, as it simply states without further explanation that there will be "some offsetting changes to the company-paid life insurance coverage for those who retired after 1990." (Docket 91-11, p. 2, Bates QL08238)). Similarly, the single statement barely noticeable on page 88 of the SEC annual report is insufficient, as it reads, ". . . (ii) retirees will receive a reduced life insurance benefit starting January 2006;" (Docket 91-12, Bates QL08767). Thousands of retirees never receive or read the complicated and arcane reports Qwest files with the SEC.

The single page letter dated October 14, 2005 bearing EVP Teresa Taylor's signature and sent via contractor mailers does not disclose all proposed material changes to the terms of the Plan and it does not even state the Plan was amended. (Docket 91-21 and Docket 91-24, Bates QL07405). The letter says nothing about the planned material change to add a statute of limitations, as recommended by the Plan Design Commitee on October 14, 2005. [8] Furthermore,

[8] The October 14, 2005 dated recommendation by the Qwest Plan Design Committee included two proposals for material changes to the Plan: 1) to reduce basic life insurance to a

the letter, like the health care SMM, was not sent to *each* Plan participant, but sent to only a targeted group of participants. Thus, the letter does not meet the strict requirements of ERISA Section 104(b)(1)(B), 29 U.S.C. § 1104(b)(1)(B). There was active concealment about the truth.

In short, by not honoring the prior Plan administrator's specific confirmation that the U S WEST Employees' Benefit Committee had declared Mr. Kerber, Mr. Phelps, Ms. Strizich and numerous other Pre-1991 Retirees fully entitled to the promised Plan benefits, there has been a breach of fiduciary duty. By not giving beneficiaries of deceased retirees the benefit of the coexisting more favorable Plan benefit terms (terms not removed until June 7, 2007), there was a further breach of fiduciary duty and violation of the rights of beneficiaries. By acting in bad faith, ignoring the specific prohibition set forth in the Prior Loss Proviso and allowing Plan administrators and claims administrators to shortchange hundreds of beneficiaries, Defendants engaged in additional violations of the rights of Plan beneficiaries. Defendants' bad faith actions, coupled with the active concealment about the actual adoption date and the material Plan changes made in Plan Amendment 2006-1 on December 13, 2006, and the lack of a stated amendment procedure set forth in either the Plan documents, corporate by-laws or corporate resolutions, makes it appropriate to grant Plaintiffs equitable relief and declare null and void the documents purporting to be Plan amendments reducing retirees' basic life insurance benefits. Accordingly, the motion for a summary judgment on Plaintiffs' First Claim should be denied.

E. The Court Should Disregard *Ad Hoc* Extrinsic Evidence When Ruling Upon Plaintiffs' Claims Related to the Prior Loss Proviso.

The Prior Loss Proviso in Article 10.1 of the Governing Plan Document states no

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flat $10,000 amount for certain groups; and 2) require that a civil lawsuit or other proceeding be filed not later than one year after the exhaustion of internal Plan remedies. (See Docket 91-5, Bates QL02122). There is no disclosure in EVP Teresa Taylor's letter about proposed change No. 2.

amendment "shall reduce the benefits of any Participant with respect to a loss incurred prior to the date such amendment is **adopted**" and the Court has ruled that is an express limitation on Qwest's rights under the "Reservation of Rights" clause. (Docket 47, Amd. Order at pp. 10-11). Plaintiffs assert in their Third, Fourth and Fifth Claims For Relief that the October 14, 2005 dated recommendation by the Qwest Plan Design Committee did not amount to an "adopted" Plan amendment and that Plan Amendment 2006-1 adopted on December 13, 2006 was retroactively applied in violation of the Prior Loss Proviso. Defendants counter by trying to explain the documents with mimicking declarations signed by Qwest witnesses Erik Ammidown, Felicity O'Herron and Teresa Taylor. Each one states that upon signing the October 14, 2005 recommendation, he or she "intended by means of the Oct. 2005 Resolutions to amend the Plan to reduce the life insurance benefits to $10,000 for Post-1990 Occupational Retirees effective January 1, 2006" (Docket 91-2, Ammidown Decl. ¶ 7; Docket 91-9, O'Herron Decl. ¶ 3; and Docket 91-20, Taylor Decl. ¶ 5). Those sworn statements lack credibility because the October 14, 2005 dated document represented unfinished business and was not adopted.

The October 14, 2005 dated document "must be examined and construed in harmony with the plain and generally accepted meaning of the words used." *East Ridge of Fort Collins, LLC v. Larimer & Weld Irrigation Co.*, 109 P.3d 969, 974 (Colo. 2005). That document does not state what recommendations were then approved. The document is missing language such as "RESOLVED, that the Plan Design Committee approves of the proposed plan design recommendations for the 2006 plan year," so as to make clear what, if anything, was actually approved. Moreover, the October 14, 2005 specifically contemplates that a final form of Plan amendment and restatement would be approved and executed, which is exactly what happened on December 13, 2006. Thus, the document unambiguously proves it is a recommendation and unfinished business. The Court should not consider Defendants' *ad hoc* extrinsic evidence.

Defendants' witnesses declarations should also be disregarded because a credibility issue lies at the heart of their *ad hoc* testimony. Defendants' records belie the *ad hoc* testimony. The Agenda for the October 14, 2005 meeting refers to their being "resolutions" concerning the Qwest Group Life Plan, whereas there was an "amendment" to the Qwest Savings and Investment Plan. (Exhibit 9 filed herewith, Bates QL07222). It was specifically contemplated there would be a new Plan document, a plan restatement to be prepared by Mr. Ammidown. (Exhibit 9, at Bates QL07254). Mr. Ammidown states he thought about drafting a new restated Plan document in its entirety, one that would incorporate the terms of the October 2005 Resolutions, but that job was never carried out. (Docket 91-2, ¶ 12).

F. Since There Was No Written Procedure, the Level of Specificity Qwest Ultimately Chose was that Followed With Respect to Plan Amendment 2006-1, Executed and Adopted on December 13, 2006.

"[W]hatever level of specificity a company ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level." *Curtiss-Wright*, 514 U.S. at 85, 115 S.Ct. at 1231. Since there is no prescribed method or written procedure, the Court should look at Qwest's course of conduct. Qwest's actions speak loudly. The chosen procedure for adopting a Plan amendment is that reflected in all the paperwork pertaining to the adoption of Plan Amendment 2006-1 on December 13, 2006. (See Exhibit 6 filed herewith).[9] That is the best evidence of the chosen procedure, and it is the same procedure used for adopting plan amendments to other Qwest sponsored employee benefit plans. See Exhibit 10-11, filed

[9] "To reflect its approval and **adoption** of the proposed changes, the Committee approved and **adopted** the resolutions that are attached hereto and made a part hereof as Exhibit A; the attached amendment which is effective January 1, 2006 is **adopted** in substantially the form attached hereto; RESOLVED, that the Amendment 2006-1 to the Qwest Group Life Insurance Plan be and hereby is **adopted** effective January 1, 2006, in substantially the form as the attached document;") (emphasis added) (Exhibit 6, at Bates QL07001, QL07003-QL07004).

herewith Bates QL07017-QL07027 containing similar declaration that the "Commitee hereby adopts" the plan amendments. None of that chosen procedure was applied to the October 14, 2005 dated recommendation document.

G. Neither the October 14, 2005 Recommendation Document Nor the December 13, 2006 Plan Amendment 2006-1 Served to Amend the Group Policy, and Defendants' Violate the 'Best Evidence' Rule.

Defendants contend that "by January of 2006, the Group Policy was modified to reflect this amendment." (Docket 91, p. 12 ¶ 32). Defendants rely upon the declaration of Erik Ammidown who states, "By January of 2006, the Group Policy was modified to reflect this amendment." (Docket 92-2, Ammidown declaration ¶ 10). But, that did not happen.

Group Contract No. G-93634, the contract between Qwest and Prudential, at page 8 states that "No change in the Group Contract is valid unless shown in: (1) an endorsement on it signed by an officer of Prudential; or (2) an amendment to it signed by the Contract Holder and by an officer of Prudential" (See Exhibit 12, p. 8 Bates QL08262). There is neither an endorsement signed by Prudential nor an amendment signed by both Qwest and Prudential changing the terms of the Group Policy to provide retirees with a flat $10,000 amount of basic life insurance benefits.[10] All that has been produced to Plaintiffs is a purported amendment dated February 7, 2007 signed by a Prudential employee, but, not signed by Qwest. Oops! More unfinished business. (See Exhibit 13, Bates QL08374). Mr. Ammidown's hearsay testimony violates the 'best evidence' rule. On the basis of Fed.R.Evid. Rules 801 and 1002, Plaintiffs object to his unfounded prejudicial testimony being accepted as evidence that the

[10] If there had been a properly executed amendment to Group Policy G-93634, Defendants would have been obligated to produce it in December 2006 in response to the pre-litigation November 15, 2006 ERISA Section 104(b) document disclosure request. Also, the document would have been part of Defendants required disclosures in this case under Rule 26(a)(1)(A)ii). In both situations, no such document was produced, because it doesn't exist.

Group Policy was amended.

That the Group Policy was not properly and timely amended underscores Plaintiffs' Third, Fourth and Fifth Claims for Relief that Defendants conducted themselves in violation of the Prior Loss Proviso. In harmony with the Prior Loss Proviso, Group Policy G-93634 states that "an amendment will not affect a claim incurred before the date of change." (Exhibit 12, p. 8, Bates QL08262). Without a properly executed amendment, there could be no change reducing life insurance benefits paid to beneficiaries of deceased retirees. The failure to get the necessary paperwork timely executed so as to properly change the Group Policy, coupled with other unfinished business and the failure to send out proper notice to each Plan participant, sorely undermines Defendants' argument that there was "substantial compliance" and they should be excused. Defendants cannot take refuge behind a dissenting opinion in *Allison.* The majority in *Allison* wrote, "Even were we to assume, but not decide, that a plan fiduciary could rely on *Peckham*'s substantial compliance analysis, we would conclude that the law of ERISA, applied to this record, leaves no room for a substantial compliance argument given the requirement that a fiduciary apply the terms of a written plan and the unambiguous nature of the provision before us." *Allison*, 289 F.3d at 1227. Likewise, the Tenth Circuit's opinion in *Peckham v. Gem State. Mut. Of Omaha*, 964 F. 2d 1043 (10th Cir. 1992) is not helpful to Defendants because the case concerned whether a claimant submitted a claim in substantial compliance, not whether ERISA statutory requirements fiduciary obligations were met by the plan administrators. Finally, Defendants' argument about "ratification" via subsequent acts is not in conformity with the specific requirements of the Group Policy that Qwest agreed to abide by.

H. Defendants' Argument That They Acted in Good Faith "to Accommodate the Desire of Affected Retirees" is Preposterous and Unsupported by Any Evidence in the Record.

Near the end of their legal brief, Defendants make the preposterous argument that their

actions were done in good faith "to accommodate the desire of affected retirees." (Docket 90, p. 17). There is no such supporting evidence from affected retirees, and that argument is taken as an insult by those affected. It's simply ludicrous to think that Plaintiff Lensink, whose husband was terminally ill and died a mere 5 days after Defendants started reducing life insurance payments, was being "accommodated." She was cheated out of at least $31,000 in expected life insurance benefits in exchange for what? It is undisputed that Plaintiff Lensink didn't even know her expected life insurance payment had been reduced until after she asked for the payment. (Docket 91-14, p. 2, response to 1 & 2; and pp. 7-8, response to 23).

IV. CONCLUSION and REQUEST FOR ORAL ARGUMENT

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court is to "view the evidence and make all reasonable inferences in the light most favorable to the nonmoving party." *N. Natural Gas Co. v. Nash Oil & Gas, Inc.*, 526 F.3d 626, 629 (10th Cir. 2008). Here, while relevant material facts are not disputed, the evidence does not support Defendants' position. The Court should deny in its entirety Defendants' motion for summary judgment. Due to the importance of the issues in this civil action, which case is being monitored by thousands of putative class members, the complexity of the case and the unique legal arguments posed by both sides, an oral argument hearing may be useful and is requested.

DATED this 4th day of August, 2008.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2008, a true and correct copy of the above and foregoing document, together with Exhibits 1-13 were electronically filed with the Clerk of the Court using the CM/ECF system and a courtesy copy was emailed to Defendants' counsel of record as follows:

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 Qwest Defendants*	

Also, copy of the same was delivered via email to Named Plaintiffs as follows:

Edward J. Kerber
33302 Neacoxie Lane
Warrenton, OR 97146
EJKMAK@aol.com (Edward J. Kerber)

Nelson B. Phelps
1500 So. Macon St.
Aurora, CO 80012-5141
nbphelps@woldnet.att.net (Nelson B. Phelps)

Joanne West
10172 South Miner Drive
South Jordan, UT 84095-2421
bikenbabe@qwest.net (Joanne West)

Nancy A. Meister
12400 48th Ave., N.
Plymouth, MN 55442-2008
dnmeister@comcast.net (Nancy A. Meister)

Thomas J. Ingemann, Jr.
955 Ford Road
Newport, MN 55055-1515
tingemann@comcast.net (Thomas Ingemann)

Marty A. Lensink
1309 Campbell Ave.
Prescott, AZ 86301-1503
martylensink@hotmail.com (Marty Lensink)

Samuel G. Strizich
27605 N. 61st Place
Scottsdale, AZ 85262-6741
sams4fishing@cox.net (Sam Strizich)

/s Curtis L. Kennedy
Curtis L. Kennedy