IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-00644-WDM-KLM

EDWARD J. KERBER, *et al.*,

Plaintiffs,

vs.

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

Defendants.

REPLY BRIEF IN SUPPORT OF QWEST'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' SECOND CLAIM FOR RELIEF

October 16, 2008

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Defendants (collectively, "Qwest") respectfully submit this reply brief in support of Qwest's Motion for Summary Judgment on the Second Claim for Relief ("Motion") asserted by Plaintiffs Edward Kerber ("Kerber") and Nelson Phelps ("Phelps") (jointly, "Plaintiffs").

I. RESPONSE TO PLAINTIFFS' ADDITIONAL UNDISPUTED FACTS

21. Qwest admits, but affirmatively states that US West encouraged employees to read the 5+5 Packet, including a document stating that US West "reserves the right to amend or terminate any or all [Plan] provisions in the future for any reason." (*See* Ex. A-30 pp. QL100045 & QL10050.)

22. Qwest admits.

23. Qwest admits plaintiffs so contend, but denies the contention is meritorious.

24. Qwest admits the corresponding facts as set forth in Undisputed Facts ("UF") ¶¶ 12-13 of its Motion, and otherwise denies the averments in this paragraph.

25. Qwest admits that neither the 1998 Plan Document nor any SPDs issued after Plaintiffs retired in February 1990 stated that pre-1991 retirees were guaranteed Plan benefits; affirmatively states that the March 26, 1990 letter to which Plaintiffs refer (Ex. A-38), which speaks for itself, was not sent to plaintiffs, and otherwise denies the averments in this paragraph.

26. Qwest admits the first sentence in this paragraph, admits the portion of the third sentence stating that no relevant written amendment to the Group Policy was executed by both parties, and denies the remainder of this paragraph. Qwest states that it agreed with its insurer prior to January 1, 2006, and again prior to January 1, 2007, to

amendments to the Group Policy that reflected the reduction in Plan benefits to $10,000 that would become effective January 1, 2006 and January 1, 2007. *See* Ex. A-42 attached hereto ¶¶ 2-6 & Ex. A-43 attached hereto ¶¶ 4-6 (for full versions of both declarations *see* DN 108 Exs. A-9 & A-19). These agreements were effective even in the absence of a signed written document. *See Agritrack, Inc. v. DeJohn Housemoving, Inc.*, 25 P.3d 1187, 1193 (Colo. 2001); *Williams v. Colo. Springs College of Business*, 736 P.2d 419, 420 (Colo. App. 1987); *Houtchens v. United Bank of Colo. Springs, N.A.*, 797 P.2d 814, 815 (Colo. App. 1990).

II. ARGUMENT

Qwest is entitled to summary judgment on Plaintiffs' Second Claim because as a matter of law: (1) Qwest made no actionable misrepresentations or omissions; (2) Plaintiffs did not reasonably rely on any such misrepresentations or omissions; and (3) Plaintiffs are not entitled to the relief sought in their Second Claim.

A. Qwest Made No Actionable Misrepresentations or Omissions.

Plaintiffs' Response in Opposition to Qwest's Motion ("Resp.") includes what plaintiffs themselves call a "laundry list" of alleged fiduciary breaches by Qwest (Resp. at 22), ranging from alleged "favoritism" towards a handful of retirees to alleged "threats" against retirees. But Plaintiffs' Second Claim is one for "Breach of Fiduciary Duty—*Material Misrepresentations*," and the text of that claim alleges *solely* fiduciary breaches based on alleged material misrepresentations. (*See* SAC pp. 22-23.)

In support of their "Breach of Fiduciary Duty—Material Misrepresentation" claim, Plaintiffs allege that both before and after their retirement, US West, its predecessor

Mountain Bell,[1] and its successor QCII failed to disclose that Plan benefits were subject to change, and/or affirmatively misstated that Plan benefits were not subject to change. The undisputed facts reveal these allegations to be baseless.

Rather than directly admitting or denying a number of the undisputed facts set forth in Qwest's Motion, Plaintiffs state that they "deny" such facts *in toto*, even though the text accompanying these "denials" reveals that Plaintiffs admit all but a tiny component of such facts. These same Plaintiffs, in another lawsuit brought against two of the defendants in this case (QCII and the EBC), used this same technique in responding to the statement of undisputed facts supporting defendants' motion for summary judgment. *See Edward J. Kerber, Nelson B. Phelps et al. v. Qwest Pension Plan, et al.*, Case No. 1:05-cv-00478-BNB-KLM (D. Colo.) ("*Kerber I*"), Doc. No. 155 (Ex. A-44 hereto) at 3 n. 1. In granting summary judgment to defendants in that case, the Court stated: "[P]laintiffs often claim to dispute a paragraph containing factual statements, but they neither identify the specific fact in dispute nor otherwise establish the existence of a disputed material fact. *Unsupported general statements of dispute do not create a material fact dispute.*" (*Id.* (emphasis added).)

An example of Plaintiffs' use of this same improper technique in this case involves UF ¶ 4, which states that Mountain Bell and US West issued multiple SPDs before Plaintiffs retired that expressly reserved the companies' right to amend or terminate the Plan. Rather than dispute these facts, Plaintiffs dispute a fact not alleged in UF ¶ 4—that the SPDs were *re*-issued to employees when they retired. (See Resp. § 2 ¶ 4.) The facts actually stated

[1] Plaintiffs state that Kerber worked for Mountain Bell rather than Pacific Northwest Bell. (*See* Resp. § II ¶¶ 3-4.) Qwest withdraws its contrary assertion.

in UF ¶ 4 are indisputable, because Plaintiffs' own Amended Complaint alleges these same facts. Specifically, it alleges that:

- "Mountain Bell issued a SPD revised August 7, 1977" stating that "*[t]he company . . . reserves the right to end or amend*" the Plan. (DN 10 ¶ 41; *see* Ex. A-6 p. QL02810.)
- "Mountain Bell issued a SPD dated October 1, 1982" stating that "*[t]he Company . . . reserve the right to end or amend*" the Plan. (*Id.* ¶ 47; *see* Ex. A-11 p. K00327.)
- "U S WEST issued . . . an SPD dated March 1986" stating that "*[t]he Company . . . reserves the right to end or amend*" the Plan. (*Id.* ¶¶ 48 & 51; *see* Ex. A-12 p. K00414.)
- "U S WEST issued . . . an SPD dated June 1, 1987" (the "1987 SPD") stating that "*[t]he Company . . . reserves the right to terminate or amend*" the Plan. (*Id.* ¶¶ 48 & 52; *see* Ex. A-13 p. QL04562.)

(Emphasis added throughout.) Moreover, Plaintiffs admit that:

- In December 1989 they received and read a 5+5 Packet that included a document entitled "US West Insurance Plans" stating that "the Company *reserves the right to amend or terminate any or all [Plan] provisions in the future for any reason*." (UF ¶ 6 (emphasis added); *see also* Resp. Ex. 1 ¶¶ 7 & 9 & Ex. 2 ¶ 5.)
- In January 1990 they viewed a Video Conference in which US West's Director of Human Resources stated that this reservation of rights provision ("ROR") was "intended to give the company *the ability to modify the plans as circumstances and conditions change in the future*." (UF ¶ 8 (emphasis added); *see also* Resp. Ex. 1 ¶ 11 & Ex. 2 ¶ 10.)

In short, it is undisputed that Mountain Bell and US West advised Plaintiffs on multiple occasions over more than a dozen years preceding their February 1990 retirement, including in August 1977, October 1982, March 1986, June 1987, December 1989 and January 1990, that the Plan could be amended or terminated at any time.

Notwithstanding these undisputed facts, Plaintiffs persist in asserting that US West somehow duped them into believing the Plan could not be amended or terminated. Plaintiffs make a series of specious arguments to support this assertion.

First, Plaintiffs assert at least *six times* in their Response that US West did not give them another copy of the 1987 SPD upon their retirement. (*See* Resp. p. 2 ¶¶ 5-6 & pp. 10, 13, 14 & 18.) Plaintiffs cite no legal authority requiring Plan sponsors to give employees additional copies of the controlling SPD when they retire, and no such authority exists. To the contrary, ERISA's requirements for issuance of SPDs are both explicit and limited: 29 U.S.C. § 1024(b)(1) requires only that SPDs be issued to new participants, to existing participants within five years after an amendment, or at least every 10 years. ERISA thus does not impose the requirement that Plaintiffs suggest US West violated.

Second, Plaintiffs assert that the ROR language in the 1987 SPD is "exactly the ROR language which the courts have found to be ambiguous." (Resp. at 10-11.) To support this claim, Plaintiffs cite a single case—*Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3rd Cir. 1992). *Alexander* found ambiguous an ROR stating that the company "reserves the right to amend, modify, or discontinue the Plan in the future *in conformity with applicable legislation.*" *Id.* at 93 (emphasis added). As the Tenth Circuit noted in *Chiles v. Ceridian Corporation*, 95 F.3d 1505, 1513-14 (10th Cir. 1996), the court in *Alexander* found the italicized phrase to be ambiguous because a statement that a company could amend the plan "in conformity with" applicable legislation "could reasonably be read to limit plan modifications to those necessary to comply with changes in the law."

The ROR in the 1987 SPD did *not* include the "in conformity with" language deemed ambiguous in *Alexander*. Instead, it provided that US West "reserves the right to terminate or amend [the Plan] at any time, *subject to* applicable limitations of the law or any applicable collective bargaining agreements." Ex. A-13, p. QL04562 (emphasis added). Under this ROR, US West *could* amend the Plan unless barred from doing so by applicable

law/agreements, whereas under the ROR in *Alexander*, the plan sponsor arguably *could not* amend the plan unless required to do so by applicable law.

In *Kerber I*, Plaintiffs themselves argued that an ROR containing "subject to" language was "explicit," *i.e.*, clear: "In *Balestracci v. NSTAR Electric and Gas Corp.*, 449 F.3d 224, 232 (1st Cir. 2006), the court noted an ***explicit*** 'reservation of rights,' stating, '[T]he company reserves the right, subject to the provisions of any collective bargaining agreement, to amend, modify or terminate the [dental benefits] Plan at any time.'" *Kerber I*, Doc. No. 146 (Ex. A-45 hereto) at 9 (emphasis in original). *Balestracci* does in fact hold that an ROR including "subject to" language is unambiguous, *see* 449 F.3d at 232, and it is not alone in so holding. *See, e.g, Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 501 F.3d 912, 918 (8th Cir. 2007) (ROR that "reserves the right to change or terminate [health plans] in the future, *subject* naturally, *to* any outstanding contractual agreements" is "a clear reservation of rights to do what [defendant] has done—modify the retiree health plans") (emphasis added). In short, contrary to Plaintiffs' contention, the ROR in the 1987 SPD is unambiguous.

Third, even though Plaintiffs admit US West's spokesman stated in the Video Conference that the Plan's ROR was intended "to give the company the ability to modify the plans as circumstances and conditions change in the future," Plaintiffs allege they were confused and/or deceived by the spokesman's additional statement that the ROR was intended "to make the plans more meaningful and more affordable not only for the employee but for the company." (Resp. at 3.) Plaintiffs contend this statement evinced US West's "intent to confuse or deceive" and was "completely disarming of the ROR." (*Id.* at 12 & 18.) These contentions are impossible to square with the statement's language. For example,

although Plaintiffs are correct that the reduction of the Plan benefit to $10,000 did not "make the Plan more . . . affordable for retirees" (*id.* at 12), that reduction *did* "make the Plan more . . . affordable . . . for the Company," which was the second point made in this statement. The clear import of the statement was that the ROR gave US West the right *either* to enhance Plan benefits (as occurred in 1997) *or* to reduce Plan benefits (as occurred in 2005-06). The statement is neither confusing nor deceptive.

Fourth, Plaintiffs continue to assert that a sentence in Confirmation Statements they received in 2000-2003 misled them into thinking Qwest did not reserve the right to amend the Plan as to pre-1991 retirees. (Resp. at 14.) Plaintiffs make this assertion even though they do not dispute that this Court's Dismissal Order considered and rejected this very argument in the context of Plaintiffs' estoppel claim. (*See* DN 47 at 14-16.) It is unfortunate that Plaintiffs view the Dismissal Order as something to be ignored. Moreover, even more compelling reasons exist to reject this assertion at the summary judgment rather than dismissal stage, because Plaintiffs have now admitted that the 1996 SPD, which was issued to Plaintiffs and other retirees before they received the 2000-2003 Confirmation Statements (and to which those statements referred), included an ROR stating that the Company "reserves the right to terminate or amend [the Plan] at any time." (*See* UF ¶ 14.)

Fifth, Plaintiffs allege that US West breached its fiduciary duties by "represent[ing] that the 5+5 retirees were 'entitled' to" a specified Plan benefit. (Resp. at 15.) In *Kerber I*, Plaintiffs likewise argued that language stating participants were "entitled" to a benefit meant the benefit could not be reduced or eliminated. (Ex. A-45 at 14-16.) The Court rejected this argument as a matter of law, stating: "The language cited by the plaintiffs is not a clear and express commitment to vest the Pensioner Death Benefit. Rather, the language

merely describes the benefit assuming it remains available at the time of the retiree's death." (Ex. A-44 at 25.) Plaintiffs' argument is even weaker in this case, because the alleged "entitlement" statements here were flatly contradicted by US West's contemporaneous statements that the Plan could be amended or terminated at any time. (*See* UF ¶¶ 6 & 8.)[2]

Sixth, Plaintiffs argue that US West *intentionally* misled 5+5 retirees into believing their Plan benefits could not be reduced. (*See* Resp. § 2 ¶ 19.) But Plaintiffs cannot dispute their own counsel's admission that "we don't have evidence of a deliberate intent to deceive the retirees and we can't honestly claim there was a deliberate intent to act fraudulently." (UF ¶ 19.) This admission is compelled by the facts. If US West had intended to deceive employees who received the 5+5 offer into believing their Plan benefits could not be changed, it would not have included in the 5+5 Packet a document that opened with bolded language stating that the company "**reserves the right to amend or terminate any or all provisions in the future for any reason.**" Nor would US West have told these employees in the Video Conference that this ROR meant the company retained "the ability to modify the plans as circumstances and conditions change in the future." Indeed, US West would not have breached its fiduciary duties even if the 5+5 Packet and Video Conference made no mention of the ROR. *See Jenson v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994) ("the failure to disclose that a welfare plan's benefits are not vested is neither a material misrepresentation nor a breach of the plan administrator's fiduciary duties"). Because US

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[2] Plaintiffs attempt to bolster their "entitlement" argument with an Affidavit of John G. Shea (Resp. Ex. 4). At no time before the September 2, 2008 fact discovery cutoff date did Plaintiffs identify Mr. Shea as an individual likely to have discoverable information that Plaintiffs might use to support their claims, as required under Fed. R. Civ. P. 26(a)(1). Qwest therefore had no opportunity to depose Mr. Shea. Qwest reserves the right to seek to depose Mr. Shea if its Motion is denied.

West affirmatively disclosed that the Plan could be amended or terminated, it could not possibly have breached its fiduciary duties.

Plaintiffs' attempts to distinguish the cases cited by Qwest are unavailing. For example, Plaintiffs assert that in those cases, "document[s] given to the departing employees accurately told the plaintiffs that the plan sponsor retained the right to change or even discontinue the benefit plan." (Resp. at 15.) This fact hardly distinguishes Qwest's cited cases from this one, because here too, documents given to the departing employees accurately told them that US West retained the right to change or even discontinue the benefit plan. Although Plaintiffs try to further distinguish Qwest's cases by asserting the documents given to departing employees in those cases were SPDs (*id.*), for the most part this is either untrue (*see, e.g.*, *Richmond v. NCR Corp.*, 227 F. Supp. 2d 802, 814 (S.D. Ohio 2002)) or cannot be discerned from the court's opinion (*see, e.g.*, *Frahm v. Equitable Life Assur. Soc. of U.S.*, 137 F.3d 955 (7th Cir. 1998); *Robinson v. Sheet Metal Workers' Nat. Pension Fund, Plan A*, 441 F. Supp. 2d 405 (D. Conn. 2006), *aff'd in part, appeal dismissed in part*, 515 F.3d 93 (2d Cir. 2008)). This alleged fact is irrelevant in any event, because (as discussed above) ERISA does not require employers to re-issue SPDs to departing employees.

Plaintiffs seek to distinguish *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998), on the ground that in that case, "[o]ther than the plan documents, GM made no representations to the general retirees." (Resp. at 14, *quoting Sprague*, 133 F.3d at 405 n. 14.) But the holding of *Sprague* cited by Qwest concerns, not GM's *general* retirees, but (as here) its "*early*" retirees, *i.e.*, those who retired under an early retirement program. *See id.* at 395 n. 3. As to early retirees, plaintiffs' fiduciary breach claim "encompassed all of GM's

oral and written representations to them in connection with the special early retirement programs" (*id.* at 404), including representations that the retirees' "health insurance would be paid by GM for life" (*id.* at 395). The relevant holding of *Sprague*, which directly applies here, is that such representations by GM were not misleading because they accurately described GM's then-existing plan and because GM had informed early retirees that the terms of the plan were subject to change. (*Id.* at 405.)

In rejecting plaintiffs' fiduciary breach claim in *Sprague* as a matter of law, the Sixth Circuit noted that "GM's failure, if it may properly be called such, amounted to this: the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." (*Id.*) Unlike GM, US West in this case *did* tell Plaintiffs and other 5+5 retirees at virtually "every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." If GM was entitled to judgment as a matter of law on plaintiffs' fiduciary breach claim in *Sprague*, Qwest is emphatically entitled to summary judgment on that claim here.

Tellingly, Plaintiffs do not even mention, much less attempt to distinguish, a series of the Tenth Circuit cases cited in Qwest's Motion (at 15) holding that "[w]here the written language of the plan is clear, as here, any representation that is contrary to the written language of an ERISA plan can be viewed only as a purported modification of the plan and, hence, preempted by ERISA." *Averhart v. US West Mgmt. Pension Plan*, 46 F.3d 1480, 1485 (10th Cir. 1994) (citation and brackets omitted); *accord Straub v. Western Union Telegraph*, 851 F.2d 1262, 1265 (10th Cir. 1988); *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir.

1992). The holding Plaintiffs urge the Court to adopt in this case would flaunt the holdings of these cases.

In *Kerber I*, the Court granted Defendants' Motion for Summary Judgment on Plaintiffs' Claim for "Breach of Fiduciary Duty and Equitable Estoppel Due to Failure to Disclose Material Information," stating that "the terms of the plans are not ambiguous, and the plaintiffs could not reasonably rely on their own interpretation of those terms." (Ex. A-44 at 30-31.) So too here, the terms of the Plan, and of the statements US West made to Plaintiffs concerning that Plan at the time of the 5+5 offer, were not ambiguous. Under these circumstances, Qwest is entitled to summary judgment on Plaintiffs Claim for "Breach of Fiduciary Duty—Material Misrepresentation."

B. Plaintiffs Did Not Reasonably Rely on the Alleged Misrepresentations and Omissions.

Plaintiffs argue in their Response that they relied on US West's alleged misrepresentations and omissions by making "choices about the form of pension payment and survivor's options" and by giving up "an opportunity to accommodate their estate planning and insurance needs through an independent insurance carrier." (Resp. at 16-17.) Even assuming *arguendo* this alleged conduct constituted adequate "reliance," the issue raised by Qwest's Motion is whether any such reliance was "reasonable." As Qwest pointed out in its Motion—and as Plaintiffs have failed to rebut—numerous courts have held that any such reliance is *un*reasonable as a matter of law under the facts presented here.

Plaintiffs themselves concede that Qwest's Motion "cite[s] four appellate cases for the proposition that a person cannot rely upon oral statements *when the person has a SPD* disclosing the truth." (Resp. at 17 (emphasis in original).) That is the case here, since

Plaintiffs do not dispute their receipt in 1987 of an SPD disclosing that Plan benefits could be amended or terminated at any time. Except for making the (counterproductive) point set forth above, Plaintiffs do not dispute the holdings of the numerous cases cited in Qwest's Motion (at 16-17) that a plaintiff's reliance on alleged misrepresentations that plan benefits cannot be reduced is unreasonable as a matter of law when plaintiffs have been issued plan documents that unambiguously reserve the right to amend or terminate those benefits.[3]

Finally, even if, as Plaintiffs contend (*see* Resp. at 18-19), reliance is not an element of a claim for fiduciary breaches *not* involving material misrepresentations, Plaintiffs' Second Claim is one for "Breach of Fiduciary Duty—Material Misrepresentations," and reliance *is* a required element of such a claim.

C. Plaintiffs Are Not Entitled to the Relief Sought in the Second Claim.

Neither of the remedies Plaintiffs seek for Qwest's alleged breach of fiduciary duty is an appropriate remedy. First, an order requiring Qwest to pay life insurance benefits to Plaintiffs' beneficiaries at pre-reduction levels is not appropriate. Plaintiffs are so bereft of legal authority supporting such a remedy that they rely principally on *Cirulis v. Unum Corp.*, 321 F.3d 1010 (10th Cir. 2003), which simply held that a Plan sponsor could not enforce a provision that appeared nowhere in the Plan documents and as to which plaintiff had no notice. *See id.* at 1011 & 1014. Here, by contrast, the Plan provision Qwest seeks to

[3] Plaintiffs' Response makes clear that Plaintiff Phelps claims to have relied on alleged oral statements made to him alone to support his fiduciary breach claim. Such "individual reliance" issues preclude classwide treatment of Plaintiffs' Second Claim. *See, e.g.*, *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996) (affirming denial of class certification because reliance element of ERISA claims was "not susceptible to class-wide proof"); *Tootle v. ARINC, Inc.* 222 F.R.D. 88, 97 (D. Md. 2004) (refusing to certify class for ERISA breach of fiduciary duty claim due to individual reliance issues).

enforce—an ROR authorizing it to amend the Plan—appears in countless SPDs and other documents that Plaintiffs indisputably received. The cases cited in Qwest's Motion make clear that Plaintiffs are not entitled to an order requiring Qwest to pay life insurance benefits to their beneficiaries at pre-reduction levels.

Nor is removal of the Plan's fiduciaries an appropriate remedy. Plaintiffs concede that such removal is appropriate only if the fiduciaries have engaged in "repeated or substantial violations" of their fiduciary duties. (Resp. at 20 & 23.) Plaintiffs' claim that the fiduciaries have engaged in such violations is based principally on their allegations regarding material misrepresentations—allegations that are baseless for the reasons set forth above.

To salvage their "Breach of Fiduciary Duty—Material Misrepresentations" claim, Plaintiffs now seek to shove into that claim all kinds of alleged misconduct having nothing to do with misrepresentations. For example:

- Plaintiffs assert that Qwest breached its fiduciary duties by violating the Plan's "Prior Loss Proviso" and by failing "to administer the Plan in accordance with the most favorable terms." (Resp. at 20.) This is simply a reprise of Plaintiffs' Third, Fourth, Fifth and Sixth Claims for Relief. Qwest is entitled to judgment as a matter of law on those claims for the reasons set forth in its other summary judgment motions. (*See* DN 90 & 108.)

- Plaintiffs assert that Qwest breached its fiduciary duties by reducing Plan benefits without amending the Group Policy to reflect such reduced benefits. (Resp. at 20.) This argument is factually and legally baseless for the reasons set forth *supra*, pp. 1-2 ¶ 26.

- Plaintiffs assert that Qwest breached its fiduciary duties by interpreting the Plan's provisions to allow it to provide within the Plan terms enhanced "Grandfathered Benefits" to 17 out of nearly 50,000 Plan participants. (Resp. at 20-21.) But Plaintiffs do not (and cannot) provide any evidence that this alleged misinterpretation of the Plan has had any negative financial impact on other Plan participants. Absent such evidence, it cannot possibly support a request to replace the Plan fiduciaries.

- Plaintiffs assert that Qwest has breached its fiduciary duties because *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008), "suggests" that the same company

> personnel should not serve on both a plan sponsor committee (*e.g.*, the PDC) and a plan administration committee (*e.g.*, the EBC). (Resp. at 21-22.) *Metropolitan Life* suggests no such thing. It simply holds that a reviewing court should consider an insurance company's role as both plan administrator and payer of plan benefits in determining whether it abused its discretion in deciding a benefits claim. *Id.* at 2346. Moreover, Plaintiffs' own proposed expert witness, law professor Donald Bogan, admits that (1) ERISA has traditionally been interpreted to allow company personnel to perform the dual functions described above, (2) *Metropolitan Life* does not hold otherwise, and (3) personnel at companies throughout the nation perform these dual functions. (Ex. A-46 at 110-14.) *See also Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986) ("[T]he ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer.").

The import of Plaintiffs' new "laundry list" approach to their fiduciary breach claim is clear. If Qwest's Motion is denied, this Court will subject itself to an interminable trial in which every Plan-related grievance that Plaintiffs and other Plan participants have had over the past two decades, no matter now trite, will become fodder for Plaintiffs' Second Claim. And because Qwest could not allow the alleged grievances to go unanswered, this Court will be subjected to a series of "mini-trials" about countless events that are both temporally and substantively unrelated.

Ironically, such a trial could not possibly benefit Plaintiffs or other Plan participants. Regardless of who serves as the Plan's fiduciaries, the Plan sponsor will remain QCII, and (as this Court has already ruled) QCII has the right to reduce or eliminate Plan benefits. Fortunately, such a trial is unwarranted. As a matter of law, Plaintiffs have not even remotely shown "repeated or substantial" fiduciary breaches sufficient to warrant the extraordinary remedy of removal of the Plan's fiduciaries.

III. CONCLUSION

For the reasons set forth above, Qwest respectfully requests that this Court enter summary judgment in its favor on Plaintiffs' Second Claim.

DATED: October 16, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2008, I electronically filed the foregoing **Reply Brief in Support of Qwest's Motion for Summary Judgment on Plaintiffs' Second Claim for Relief** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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s/Patricia Eckman
Patricia Eckman