IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

EDWARD J. KERBER, et al.,

Plaintiffs,

vs.

QWEST PENSION PLAN, et al.,

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Defendants Qwest Pension Plan ("the Plan"), Qwest Employees Benefit Committee, Qwest Pension Plan Design Committee, and Qwest Communications International, Inc. ("Qwest") respectfully move for Summary Judgment under Fed. R. Civ. P. 56 on all claims for relief, consistent with the directions set forth in this Court's Order dated September 24, 2007.

PRELIMINARY STATEMENT

This case concerns the right of an employer, as the sponsor of employee benefit plans, to make changes to its benefit offerings. The legal principles covering this area are not complicated. Retirees receive pension and welfare benefits. Pension benefits accrue (grow in size over time) during an employee's worklife and ultimately vest (become irrevocable and therefore not subject to change), according to statutory timetables and the terms of the employee's pension plan. Welfare benefits (also called ancillary benefits when, as here, they are appurtenant to a pension plan), in contrast, do not accrue (because the concept simply does not fit them) and they vest only if the particular plan clearly and expressly states the sponsor's intention to make them irrevocable.

Under this broad canopy, the Court must make key determinations, such as whether a given benefit is classified as pension or welfare, and, if it is a welfare benefit, whether the plan provides for its vesting. If the Court reaches the conclusion that a particular benefit is an unvested welfare benefit, the sponsor may change or eliminate that benefit at any time for any reason.

In 2003 Qwest changed an employee benefit that could pay, in certain circumstances, a "death benefit" to particular survivors of a retiree, if such survivors existed and met qualifying conditions at the time of the retiree's death. That change eliminated the benefit for employees who retired on or after January 1, 2004. Three of the Plaintiffs here (West, Meister and Ingemann) were affected by that change and challenge its lawfulness. Qwest also briefly considered eliminating the death benefit for all retirees, but indefinitely postponed further action on that proposal. Two of the Plaintiffs here (Kerber and Phelps) would like a declaration of their rights concerning the death benefit; their stated goal is to block Qwest from returning to that proposal in the future.

While the Second Amended Complaint states that it contains four claims for relief, in reality Plaintiffs have only three distinct claims: (1) the First Claim for Relief for Breach of Fiduciary Duty and Equitable Estoppel seeking, among other things, injunctive relief to set aside the 2003 amendment for post-2003 retirees and to forbid Qwest from changing the Pensioner Death Benefit; (2) the Second Claim for Relief[1] alleging the Pensioner Death Benefit vested when excess assets were transferred from the Plan pursuant to 26 U.S.C. § 420 and, therefore, changes to the benefit violate ERISA; and (3) the Third Claim for Relief requesting a declaratory judgment pursuant to ERISA Section 502(a)(1)(B) to clarify Plaintiffs' respective

[1] As this Court has already ruled, Plaintiffs Kerber and Phelps lack standing to prosecute the Second Claim for Relief and therefore the claim is advanced by West, Meister and Ingemann only.

rights with respect to the death benefit.[2] Defendants address the Third Claim for Relief first in the argument section below because it lays out the analytical framework within which to consider the First and Second Claims for Relief. Defendants respectfully submit that they are entitled to summary judgment on all claims. The death benefit is an unvested welfare benefit that Qwest, as plan sponsor, may change how it wants and when it wants.

UNDISPUTED MATERIAL FACTS

All claims involve the same material facts that are not in dispute. Consistent with Judge Blackburn's procedures, adopted by this Court, defendants set those facts out here, prior to stating their legal arguments.

1. Qwest is the successor-in-interest to U S WEST, Inc. ("U S WEST"), one of the original "Baby Bells," or Regional Bell Operating Companies, created in 1984 when the American Telephone & Telegraph Company ("AT&T") divested itself of local telephone service. In 2000, Qwest acquired and merged with U S WEST. (*SAC*, ¶ 16.[3]) As a result of the merger, Qwest became and remains to this day the sponsor of the Plan, which is the successor to U S WEST's pension plan(s). (*See* 2001 Plan,[4] Preamble, Ex. A-1: 4569-70.)

2. The Plan provides eligible employees and retirees with "employee pension benefits" and "employee welfare benefits." The Qwest Employee Benefit Committee ("the

[2] The Fourth Claim for Relief merely seeks a specific form of equitable relief – reformation of the Plan – and is solely derivative of the First through Third Claims for Relief.

[3] Defendants will use the following citation conventions. The Second Amended Complaint will be identified as "*SAC*" with the corresponding paragraph number (e.g., *SAC*, ¶ 13). The exhibits filed herewith will be identified by a brief description using recognized abbreviation forms (e.g., "1984 Mgmt. Plan" or "1997 SPD") and a citation to the exhibit with a pinpoint page cite for the Bates Numbered page (e.g., "2001 Plan, § 13.13, Ex. A-1: 4746"). In an effort to separate the wheat from the chaff, Defendants will file excerpts only from the various plan documents. A binder containing the corresponding full text of those documents has been prepared and will be provided to the Court upon request.

[4] For simplicity, references to the Plan will focus on the 2001 Plan, which does not differ materially from the earlier plans except as noted. If the context requires reference to a different plan, it will be so identified.

Committee") is the Plan's "named fiduciary" and is responsible for, among other things, administration of the Plan including appointment of other fiduciaries and interpretation of the Plan's provisions.[5] (*See* 2001 Plan, §§ 8.4, 8.6, 8.8, Ex. A-1: 4721-22.)

3. The Plan had several antecedent forms. U S WEST started its existence with two pension plans, effective January 1, 1984, established as successors to the Bell System's pension plans: the U S WEST Pension Plan (hereafter referred to as the 1984 Occupational Plan or "1984 Occ. Plan") and the U S WEST Management Pension Plan (hereafter referred to as the 1984 Management Plan or "1984 Mgmt. Plan"). These two plans merged into a single plan, named the U S WEST Pension Plan, effective January 1, 1993 ("1993 Plan"). Following the merger of Qwest and U S WEST, the U S WEST Plan was renamed the Qwest Pension Plan, effective January 1, 2001 ("2001 Plan"). (*See* 2001 Plan, Preamble, Ex. A-1: 4569-70.)

4. The 1984 Occupational and Management Plans included what was called the "Death Benefit Plan," which provided for death benefits that could be paid to certain survivors of employees and retirees. The Sickness Death Benefit and the Accidental Death Benefit covered active employees; the Pensioner Death Benefit could be paid upon death to certain qualified beneficiaries, if they existed, of retired employees receiving a service pension or disability pension. (1984 Mgmt. Plan, § 5, Ex. A-2: 3630-38; 1984 Occ. Plan, § 5, Ex. A-3: 3331-38). Subsequent to the 1984 Plan(s), the terms "Death Benefit Plan" and "Pensioner Death Benefit" were no longer used, but the benefits remained the same except as noted below.[6]

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[5] The Qwest Pension Plan Design Committee also is a nominal party to this case from whom relief is sought by Plaintiffs. It has been given authority by the Plan sponsor (Qwest) to make amendments to the Plan, but it is not a Plan fiduciary. (2001 Plan, § 8.5, Ex. A-1: 4720.)

[6] For a convenient point of reference, these terms will be used throughout this brief to more precisely identify the death benefit at issue (distinguishing it from the Sickness and Accidental Death Benefits) and the provision in the Plan in which all of the death benefits are set forth.

5. The amount of the Pensioner Death Benefit generally was equal to twelve months' "Wages" (a defined term), as of the date of retirement or March 1, 1993 (whichever is earlier), for the decedent. (2001 Plan, § 7.3(a), Ex. A-1: 4716)

6. The Pensioner Death Benefit can be paid to a "mandatory beneficiary," *i.e.*, either an "eligible surviving Spouse" (spouse of the retiree living with the retiree at time of death), "eligible dependent children" (dependent children up to age 23) or an "eligible dependent parent" (dependent parents living with or near the retiree), or "other beneficiaries," which could encompass a wider circle of dependent family members. (*Id.*, § 7.4(b), (c), Ex. A-1: 4717.) If no such eligible persons were living at the time of a retiree's death, then the benefit would not be paid, except for a discretionary burial expense of up to $500. (*Id.*, § 7.4(c), (d), Ex. A-1: 4717.)

7. The Pensioner Death Benefit was not paid automatically upon the death of a retiree. A claimant had to apply for the payment within one year of the retiree's death and to provide proof satisfactory to the Committee of his or her qualification to collect under the terms of the Plan. (*Id.*, § 7.7, Ex. A-1: 4718.) Additionally, if a retiree's otherwise eligible survivor filed suit against Qwest (or previous plan sponsors) in connection with the retiree's death, no benefit would be paid. (*Id.*, § 13.13, Ex. A-1: 4746.)

8. Effective February 28, 1993, the Plan limited eligibility for the Pensioner Death Benefit to individuals hired on or before March 1, 1993. (2001 Plan, § 7.11, Ex. A-1: 4719; Bd. of Dir. Min. dated Dec. 4, 1992, Ex. C.) Commencing in 1997, certain management employees became eligible to elect a lump sum pay-out of their retirement benefits; the Death Benefit Plan was amended to allow the inclusion in that lump-sum payment of a discounted version of the Petitioner Death Benefit that assumed the retiree would be survived by a beneficiary. (2001 Plan, § 7.3(c), Ex. A-1: 4716.) Effective January 1, 2004, the Plan eliminated

the Pensioner Death Benefit for employees retiring on or after that date. (Amendment 2003-5, Ex. D: 4961-4963.)

9. The Plan contains a definition of "accrued benefit" that expressly excludes the death benefit (2001 Plan, § 1.0B, Ex. A-1: 4572), and has contained one since the 1993 revision and merger of the former management and occupational plans. (*See, e.g.*, 1993 Plan, § 1.0, Ex. A-4: 4457; 1997 Plan, § 1.0, Ex. A-5: 3998.)

10. The Plan's documents, from inception to present, expressly authorize the Plan Sponsor (or its designee) to modify or terminate the benefits provided by the Plan, subject only to specifically stated limitations. When the first U S WEST pension plans were established in 1984 each contained a clause (called the reservation of rights clause) reserving the power and authority to change benefits to the sponsor. The clause stated:

> **The Committee, with the consent of the Chairman of the Board . . . may from time to time make changes in the Plan as set forth in this document**, and the Company may terminate said Plan, but such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder.

(1984 Mgmt. Plan, Ex. A-2, § 9 (emphasis added); *see also* 1984 Occ. Plan, Ex. A-3, § 10.)

11. Beginning in 1993, Qwest changed the Plan's reservation of rights clause, pursuant to its right to make changes, using language that clearly delineated that future changes could be made in any benefits, as long as those benefits had not previously "accrued" under the law. The 2001 Plan provision uses the following language:

> The Company expects this Plan to be permanent, but as future conditions cannot be foreseen **it reserves the right to amend the Plan at any time, without prior notice to anyone**. * * * Amendments may modify the rights and interests of Employees who are Participants in the Plan at the time thereof as well as future Participants but **amendments may not diminish the accrued benefit (as defined in Section 411(d)(6) of the Code) of any Participant as of the effective date of such amendment.**

(2001 Plan, § 11.4, Ex. A-1: 4730 (emphasis added).) Earlier versions are quite similar and do not materially differ. (1993 Plan, § 11.4, Ex. A-4,: 4508; 1997 Plan, § 11.4, Ex. A-5: 4128-29.)

12. Plan participants regularly were provided with Summary Plan Descriptions ("SPDs") that summarized Plan benefits. SPDs provided to participants throughout the life of the Plan have stated that (1) the plan may be amended or terminated without notice; (2) the SPD is only a summary of and does not describe all of the details of the plan; and (3) the official plan document, not the SPD, governs the participants' right to benefits. (Compilation of selected SPD pages, 1984 to present, Ex. B.) The SPDs also disclose all conditions that fulfilled before the Pensioner Death Benefit can be paid to a qualified beneficiary, if one exists at the time of a retiree's death. (*See id.*)

13. Plaintiffs Kerber and Phelps both retired effective February 28, 1990 from U S WEST and receive "service pension annuities" from the Plan. (*SAC*, ¶¶ 5, 7.) All of the remaining Plaintiffs retired from Qwest after January 1, 2004. West and Meister each received lump sum payments that did not include a death benefit payment. (*Id.*, ¶¶ 9, 11.) Ingemann currently receives a service pension annuity. (*Id.*, ¶ 13.)

14. Between 1984 and 1993, no Plaintiff died. (*See SAC*, ¶¶ 5-14.)

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO A DECLARATION PROHIBITING QWEST FROM CHANGING OR ELIMINATING THE PENSIONER DEATH BENEFIT, THEREFORE QWEST IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' THIRD CLAIM FOR RELIEF

Plaintiffs' Third Claim for Relief seeks a declaration pursuant to Section 502(a)(1)(b) of ERISA (29 U.S.C. Section 1132(a)(1)) that Qwest may not change or eliminate the Pension Death Benefit because to do so would violate ERISA's anti-cutback rule set forth in Section 204(g), 29 U.S.C. § 1054(g). To obtain such a declaration Plaintiffs must establish either (1) the Pensioner Death Benefit is an accrued and vested pension benefit or (2) the Pensioner

Death Benefit is a welfare benefit that contractually vested by virtue of clear and express language in the Plan. Plaintiff cannot establish either theory. Therefore, Qwest is entitled to summary judgment on the Third Claim for Relief.

A. The Pensioner Death Benefit Is A Welfare Benefit, Not A Pension Benefit

Plaintiffs contend the Pensioner Death Benefit is an accrued pension benefit protected by the anti-cutback provision. To prevail on this theory, they first must carry their burden to prove that the death benefit is a pension benefit, for the statute does not apply to welfare benefits.[7] *See* 29 U.S.C. § 1051(1); *Rombach v. Nestle USA, Inc.*, 211 F.3d 190, 192-93 (2d Cir. 2000); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 934 (5th Cir. 1993). The Pensioner Death Benefit, however, is not a pension benefit.

"The Court's role in classifying the death benefit is to look at the nature of the benefit as defined by the Plan terms." *Foss v. Lucent Tech. Inc. (In re Lucent Death Benefits ERISA Litig.)*, 2006 WL 3437586, at *7 (D.N.J. Nov. 27, 2006) (attached as Ex. E-1), *appeal docketed*, Nos. 06-5008, 5009 (3d Cir.). ERISA divides all employee benefits into two groups: pension benefits and welfare benefits.

The statute defines "employee welfare plan" as including plans "maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . benefits in the event of . . . death . . . ." ERISA § 3(1), 29 U.S.C. § 1002(1); *see Oatway v. American Int'l Group, Inc.*, 325 F.3d 184, 188-89 (3d Cir. 1993) (noting that the definition of employee welfare benefit plan includes one "designed specifically to provide

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[7] The remaining elements of an claim based on the anti-cutback rules require Plaintiffs to show that the pension benefit accrued before Qwest changed the Plan, that is, they must show that the Plan was amended in a manner that eliminated or reduced a benefit that had been earned before the amendment. *See, e.g., Lindsay v. Thiokol Corp.*, 112 F.3d 1068, 1071-72 (10th Cir. 1997); *Adams v. Bowater Inc.*, 292 F. Supp. 2d 191, 197 (D. Me. 2003). Because the threshold issue of whether the Pensioner Death Benefit is a pension benefit is decisive, Defendants will not address these remaining elements.

employees with . . . death . . . or other specified benefits"). The Pensioner Death Benefit meets the statutory definition of a welfare benefit. Indeed, the fact that the Pensioner Death Benefit existed as an integrated part of the Death Benefits Plan confirms its status as one plan, with one purpose, that falls squarely within the statutory definition. *Cf. In re Unisys Corp. Ret. Med. Benefit "ERISA" Litig.*, 58 F.3d 896, 901 (3d Cir. 1995) (medical benefits plan that started for active employees and continued into retirement was a welfare plan).

In contrast, the definition of "employee pension plan" turns on whether a plan "was created for the purpose of providing retirement income . . . ." *Oatway*, 325 F.3d at 189. The Death Benefit Plan, as a whole, did not have that purpose; it served the potential survivors of both active and retired employees. Moreover, it does not reflect any retirement income that would be due to a participant because (by definition) he or she can never receive any of the proceeds of a benefit that is paid, if at all, only after his or her death.[8] As the terms of the benefit suggest, it exists as a compassionate payment to certain dependents, if such dependents are living when a retiree dies.

This distinction gains further clarity by examining the process by which pension benefits mature, by law, into vested, accrued benefits.[9] The statutory definition of "accrued benefits," for purposes of a defined benefit plan, "is based upon two characteristics – [the benefit] must be in the form of (1) an annual benefit that (2) commences at normal retirement age." *American Stores Co. v. American Stores Co. Ret. Plan*, 928 F.2d 986, 990 (10th Cir. 1991)

[8] The Pensioner Death Benefit also cannot be described as deferred retirement income. It is not created by reducing or setting aside a defined amount of an employee's earnings during some period of active employment to generate an income stream that will be realized only after retirement. The IRS does not view it as such, either. *See* Rev. Rul. 86-109, 1986-2 C.B. 196 (wage taxes not applied to lump-sum death benefit because "[d]eath benefits paid from a qualified plan are amounts paid solely by reason of the employee's death for which the employee did not possess a nonforfeitable right while living").

[9] "The concepts of accrued on the one hand, and vested or "nonforfeitable", on the other, are related, but not the same. A participant becomes fully vested when he gains a nonforfeitable right to receive his entire accrued benefit. Vesting provisions do not affect the amount of accrued benefit, but rather govern whether all or a portion of the accrued benefit is nonforfeitable." *Hoover v. Cumberland, Md. Area Teamsters Pension Fund,* 756 F.2d 977, 983 (3d Cir. 1985).

(refusing to find a benefit that did not possess one of these two characteristics was "accrued"); *Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Ret. Income Trust*, 134 F. Supp. 2d 189, 200 (D. Mass. 2001) ("ERISA allows only *one* definition of 'accrued benefit,' and that one definition depends on the 'annual benefit commencing at normal retirement age.'") (emphasis in original). Further, ERISA sets forth a statutory schedule governing the timetable for the accrual of protected benefits, ERISA § 204(b), 29 U.S.C. § 1054(b). Its "statutory definition of 'accrued benefits' imparts a specific meaning to the word accrued, connoting a set periodic increase or accumulation." *Hoover*, 756 F.2d at 981.[10]

The Pensioner Death Benefit bears no resemblance to such "accrued benefits." It does not pay annually. It does not commence at normal retirement age. And a retiree did not accumulate its value through growth over time. Rather, the Pensioner Death Benefit is designed to pay once, at the death of a retiree, and only if an eligible qualified beneficiary then existed to collect it. It plainly did not comply with ERISA vesting or accrual rules for pension benefits. *See* 29 U.S.C. §§ 1053, 1054. This last distinction demonstrates that Qwest has not considered it to be, and it did not qualify as, an accrued pension benefit. *See Ashenbaugh v. Crucible Inc., 1975 Salaried Ret. Plan*, 854 F.2d 1516, 1524 & n.10 (3d Cir. 1988).

Moreover, the conditional nature of the benefit distinguishes it from accrued pension benefits. It is not paid merely upon the death of a retiree, which concededly will come to pass for all retirees one day. Rather, the payment of the Pensioner Death Benefit turns on a larger set of conditions, calling for particular survivors at the time of death manifesting the defined conditions of dependency and agreeing not to assert certain rights. Pension benefits do not turn on such

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[10] *Accord LaBrosse v. Trustees of Asbestos Workers Loc. 47 Ret. Trust Plan*, 186 F. Supp. 2d 791, 795 (W.D. Mich. 2001) ("Under normal English usage, an accrued benefit is a benefit that accumulated by growth."); *Berard v. Royal Elec., Inc.*, 795 F. Supp. 519, 527 (D.R.I. 1992) ("An accrued benefit is the benefit a participant earns annually as calculated according to the formula specified in the plan.").

contingencies. *See, e.g., Dhayer v. Weirton Steel*, 571 F. Supp. 316, 324 (N.D. W.Va.) (observing that "conditional benefits" do not qualify as "accrued benefits"), *aff'd, sub nom. Sutton v. Weirton Steel*, 724 F.2d 406 (4th Cir. 1983).

Plaintiffs ignore these principles, preferring to parse isolated statements in the SPDs and in the minutia of the tax filings for the Plan and suggesting these statements transform the benefit into an accrued benefit when the terms of the Plan do not. In the end, their attempt must fail. The proper classification of the Pensioner Death Benefit as pension or welfare benefit is a question of law, based on the legal significance of the terms of the plan. The only cases to consider this issue have squarely rejected Plaintiffs' position. In *Rombach*, the Second Circuit refused to classify a disability plan as a pension benefit merely because the master pension plan called it one. *See* 211 F.3d at 193-94. Following and applying *Rombach*, a district court noted that the defendants before it "may have believed that the [disability] benefit was a pension benefit and not an ancillary benefit" but their belief did not change the legal conclusion that the court had to reach, that it was a welfare benefit. *Robinson v. Sheet Metal Workers' Nat'l Pension Plan, Plan A*, 441 F. Supp. 2d 405, 425 (D. Conn. 2006). Tax documents likewise do not control the terms of the Plan. In *RLJCS Enterprises, Inc. v. Professional Benefit Trust, Inc.*, 438 F. Supp. 2d 903 (N.D. Ill. 2006), *aff'd*, 487 F.3d 494 (7th Cir. 2007), the court rejected the plaintiffs' "experts' legal opinions and . . . a private letter ruling by the IRS" in favor of looking to the terms set forth in the plan documents. 438 F. Supp. 2d at 912-13. As the Seventh Circuit summarized it, in its affirmance, "the IRS's view of the tax consequences does not change the Trust's terms[.]" 487 F.3d at 496; *see also Neuma, Inc. v. AMP, Inc.*, 259 F.3d 864, 876-77 (7th Cir. 2001) (affirming district court's refusal to rely on information in Form 5500 tax form to clarify allegedly latent ambiguity in plan). Whether these documents accurately or inaccurately described the benefit thus is immaterial to the task at hand.

Plaintiffs apparently press their contention in part because the Death Benefit Plan is literally a plan within a plan, a welfare benefit set out in the text of a pension plan, paid in part from pension trust monies. This simply marks it as an "ancillary benefit" to the Plan's primary purpose of providing retirement income, distinct from the accrued benefits protected by the anti-cutback rule. The distinction between accrued and ancillary benefits possesses a long lineage, predating ERISA; the Internal Revenue Code ("IRC") uses a definition in Section 411(a)(7)(i) virtually identical to the definition of "accrued benefit" in ERISA Section 204(g). *See Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 746-47 (2004). The Treasury Department has long drawn the distinction between accrued and ancillary benefits and applied that distinction to exclude death benefits from the category of accrued benefits. *See* 26 C.F.R. § 1.411(a)-7(a); *id.* §1.411(a)-7(a)(1)(ii) (singling out "incidental death benefits" as an ancillary benefit).

In sum, the status of a benefit can be determined only by examining the terms of the plan that creates it. The *Foss* court, looking at plan documents that shared much of the same language as the 1984 Management Plan, but did not have the subsequent changes that so clearly mark the benefit here as not accrued, still concluded:

> This classification should not be made by evaluating how the plan is funded or how Plaintiffs subjectively perceived the benefit. Looking at the Plan documents and the purpose served by the death benefit, it is apparent that it is not protected by the anti-cutback rule.

Foss, 2006 WL 3437586, at *7. As the foregoing demonstrates, this Court should reach the same conclusion and enter summary judgment for Defendants with respect to Plaintiffs' theory based on the anti-cutback rule.

B. The Pensioner Death Benefit Is Not Vested By The Plan Documents

As an alternative to their argument that the Pensioner Death Benefit is a pension benefit, Plaintiffs contend it is a welfare benefit that became contractually vested under clear and express Plan language. "Plaintiffs bear the burden of proving that the ERISA plan at issue contains vested benefits." *McPeck v. Beatrice Co.*, 936 F.Supp. 618, 638 (N.D. Ia. 1996); *accord Welch v. UNUM Life Ins. Co. of Am.*, 382 F.2d 1078, 11083 (10th Cir. 2004). They cannot carry this burden and accordingly Defendants should be granted summary judgment. The *Foss* court, applying Third Circuit precedent, concluded a like benefit was not vested and could be eliminated. Tenth Circuit law utilizes the same principles as the Third Circuit; hence, this Court should reach the same result.

Welfare benefits may be changed or eliminated if they are not contractually vested. No statutory provision requires or causes welfare benefits to vest. *See Member Servs. Life Ins. Co. v. Am. Nat'l Bank & Trust Co. of Sapulpa*, 130 F.3d 950, 954 (10th Cir. 1997). "Congress intentionally exempted welfare benefit plans from ERISA vesting requirements, determining that '[t]o require the vesting of those ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income.'" *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510 (10th Cir. 1996) (quoting *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (3d Cir. 1990)).

Rather, ERISA leaves the vesting of a welfare benefit, such as the Pensioner Death Benefit, solely to the contractual terms of a plan. *Id.* Vesting, though, is not lightly inferred. A plan participant bears the burden of proving a plan sponsor's intent to provide contractually for the vesting of a welfare benefit, *id.* at 1511; that intent to vest must be found in *clear* and *express* language stating as much in the plan documents. *Id.* at 1513. Moreover, "the weight of case authority" holds that the inclusion of a "reservation of rights" clause in a benefits plan – language reserving to the sponsor the right to make changes in the benefit offerings or to terminate the plan entirely – almost always will be sufficient to demonstrate that the sponsor did not intend to vest any of the plan's benefits. *See id.* at 1512 n.2.

The Court's task here is to read and construe the plan documents. A fundamental tenet of ERISA law is that the unambiguous written provisions of a plan must control. *See, e.g., Admin. Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004); *Allison v. Bank One-Denver*, 289 F.3d 1223 1236 (10th Cir. 2002) ("We have repeatedly rejected efforts to stray from the express terms of a plan, regardless of whom those express terms may benefit."). "In doing so, [the court] give[s] 'the language its common and ordinary meaning as a reasonable person in the position of the [plan] participant, not the actual participant, would have understood the words to mean.'" *Willard*, 393 F.3d at 1123 (quoting *Blair v. Metropolitan Life Ins. Co.*, 974 F.2d 1219, 1221 (10th Cir. 1992)).

The only court to examine a plan essentially identical to the Death Benefit Plan (Lucent's plan, like Qwest's Plan here, is derived from an AT&T plan) found that it contains no language clearly and expressly vesting the Pensioner Death Benefit. *See Foss*, 2006 WL 3437586, at *8-10. In fact, as in *Foss*, the Plan contains language barring vesting by virtue of its various conditions on the collection of the benefit, such as the foreswearing of any suit against Qwest over the death of the retiree and the nonpayment of the benefit if a qualified beneficiary does not exist at the time of a retiree's death. *See id.* at *9.

Plaintiffs, however, would rely on the Plan documents that state that a death benefit "will be paid" under the described circumstances or that certain beneficiaries are "entitled" to collect the benefit when a retiree dies. This argument commits the fallacy of construing a benefit description as vesting language. *See, e.g., Unisys Ret. Med. Litig.*, 58 F.3d at 904 (language descriptive of benefits does not vest those benefits); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 857-58 (4th Cir. 1994) ("[b]enefit descriptions cannot be translated into guarantees benefits will never be altered"). Nothing in those phrases or terms promises that Qwest would not eliminate the benefit in the future; the benefit description merely communicates to the reader what to expect, assuming the benefit remained available at the time of a retiree's death. *See, e.g., Wise*, 986 F.2d at 937-38. Nothing in ERISA requires plan sponsors to insert language to the effect "if we do not change or eliminate this benefit" repeatedly into every narrative passage of a plan or SPD.

Plaintiffs also mistakenly exalt a single phrase over a construction of the whole plan. The Pensioner Death Benefit provision itself contains language noting that the Committee pays the benefit subject to many conditions (2001 Plan, § 7.3, Ex. A-1: 4716), and the benefit appears, and always has appeared, in a plan that contains a reservation of rights clause. A reasonable participant is held to the standard of reading this plan as a whole, which includes the reservation of rights clause, leading him or her inevitably to conclude that the benefit is not vested. *See, e.g., Unisys Ret. Med. Litig.*, 58 F.3d at 904; *Gable*, 35 F.3d at 856; *Alday v. Container Corp. of Am.*, 906 F.2d 660, 665 (11th Cir. 1990).

The reservation of rights clause, notably, contains no ambiguity. Three courts that have examined language essentially identical to Section 10 of the 1984 Management and Occupational Plans have agreed that it unambiguously confers the right to change or eliminate a benefit at any time prior to the point at which a participant satisfies all of the conditions necessary to collect that benefit. *See Foss*, 2006 WL 34375586, at *4 (concluding Lucent could eliminate its retiree death benefit); *Jones v. AT&T Co.*, 798 F. Supp. 1137, 1142-43 (E.D. Pa.)

(construing language AT&T severance plan), *aff'd*, 981 F.2d 1247 (3d Cir. 1992); *see also Patrick v. Telis Communications Inc.*, 2005 BCCA 592, 49 B.C.L.R.4th 74, ¶14 (B.C. Ct. App. 2005) (analyzing Canadian telecom company's pension plan) (attached as Ex. E-2), *appeal denied*, [2006] S.C.A.A. No. 35 (Can. 2006). For a death benefit, that point in time is the death of the person on whose behalf the benefit is paid. *See Huber v. Casablanca Indus.*, 916 F.2d 85, 103 (3d Cir. 1990) ("[f]or lump sum death benefits, death is a condition [of entitlement]"); *DiMarco v. Michigan Conf. of Teamsters Welfare Fund*, 861 F. Supp. 599, 609 (E.D. Mich. 1994) (observing, in a different context, that death benefit beneficiaries "become entitled to benefits . . . upon the death of the participants"). The change in the reservation of rights clause in 1993 arguably strengthened Qwest's authority to make changes – clearly stating that the Plan did not consider death benefits to be accrued – and, at the very least, it left it functionally unchanged.[11] Thus, from the inception of the Plan to present, it has contained an unambiguous grant of authority to implement changes to, even to eliminate, the Pensioner Death Benefit.

The combined lack of language expressly vesting the Pensioner Death Benefit and the unambiguous reservation of the right to make changes lead inexorably to the conclusion that the Plan permits Qwest to make changes, even to eliminate, this benefit. Defendants accordingly are entitled to summary judgment on this theory as well.

II. THE PENSIONER DEATH BENEFIT DID NOT VEST UPON TRANSFER OF EXCESS PLAN ASSETS UNDER IRC SECTION 420 AND THEREFORE QWEST IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' SECOND CLAIM FOR RELIEF

Plaintiffs argue the Pensioner Death Benefit vested when transfers of excess plan assets occurred in 1998 through 2001 to assist with the funding of retiree medical benefits.

[11] In *Jarvis v. U S WEST Inc.*, Case No. 97 N 2189 (D.Colo. March 30, 1999) (attached as Ex. E-3), the Court, referring specifically to this change in language, held that "[w]hile the language is somewhat different, the meaning is the same[.]" Slip Op. at 2-3 & 12.

(*SAC*, ¶¶ 170-73.) In doing so, they seek to invalidate the 2003-5 Amendment that eliminated the Pensioner Death Benefit for post-2003 retirees and, therefore, their claim can only be characterized as arising under Section 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3)). *See Ross v. Rail Car Am. Group Disability Inc. Plan*, 285 F.3d 735, 740-41 (8th Cir. 2002). That provision authorizes an action to "enjoin any act or practice which violates any provision *of this subchapter*," 29 U.S.C. § 1132(a)(3)(A) (emphasis added), or "to obtain other appropriate equitable relief (i) to redress *such* violations or (ii) to enforce *any provisions of this subchapter* or the terms of the plan[.]" 29 U.S.C. § 1132(a)(3)(B) (emphasis added). Thus, to prevail on a claim, Plaintiffs must prove that the challenged amendment violated a provision of subchapter I of ERISA (29 U.S.C. § 1001-1053) or the terms of the Plan. Notably, Section 420 is not part of subchapter I of ERISA, so by its terms Section 502(a)(3) does not provide a vehicle for relief. Further, the Tenth Circuit has not recognized any claim based on IRC Section 420, and does not generally allow ERISA claims based solely on the IRC. *See Stamper v. Total Petroleum, Inc. Ret. Plan for Hourly Rate Employees*, 188 F.3d 1233, 1238-39 (10th Cir. 1999). There appears to be no viable statutory basis for this claim.

Insofar as Plaintiffs seek to rely on the Plan, the analysis set forth above in Section I above demonstrates that Qwest has always possessed the power under the Plan to make changes to the Pensioner Death Benefit and thereby disposes of any contention that Qwest could not enact its 2003 amendment. Plaintiffs assert that the Plan language implementing the Section 420 transfers conferred rights on them, but the Plan itself unequivocally rebuts this assertion. Section 14.4 of the 2001 Plan provides that the "Accrued Benefit" of then-working participants would become vested when the funds were transferred, but the definition of "Accrued Benefit" in the Plan expressly excludes any death benefits from its scope. Plaintiffs thus acquired no rights under that provision that would provide a basis for relief. *See Foss*, 2006 WL 3437586, at *10 (rejecting similar Section 420 argument).

III. QWEST IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' FIRST CLAIM FOR RELIEF FOR BREACH OF FIDUCIARY DUTY AND EQUITABLE ESTOPPEL BECAUSE QWEST MAY ACT PURSUANT TO ITS RESERVATION OF RIGHTS CLAUSE

As the foregoing demonstrates, simple construction of the Plan favors Defendants. Plaintiffs therefore set forth a pair of arguments in the First Claim for Relief to entice the Court to look away from the Plan itself and perform some form of rough justice to find that Qwest should not be permitted to change or eliminate the Pensioner Death Benefit. They offer that principles of either breach of fiduciary duty or equitable estoppel should bind Defendants. Equitable estoppel, in fact, is not recognized as a cognizable theory under ERISA in this Circuit, *Cannon v. Group Health Service of Oklahoma*, 77 F.3d 1270, 1277 (10th Cir. 1996); neither theory, however, is availing.

Plaintiffs contend that Defendants allegedly failed to disclose that the Pensioner Death Benefit "was not a vested or protected benefit or that [it] could be reduced or eliminated by the sponsoring company even in the absence of a PLAN termination." (*SAC*, ¶ 152.) They further contend that this "nondisclosure" led them to make poor decisions planning for their retirements (*id.*, ¶ 154), leaving them allegedly unable to purchase replacement life insurance (*id.*, ¶ 160), and therefore, by dint of either a claim for breach of fiduciary duty or equitable estoppel, Defendants must offer the Pensioner Death Benefit in perpetuity. (*Id.*, ¶ 163.)

To establish a breach of fiduciary duty, "a plaintiff must establish each of the following elements (1) the defendant's status as an ERISA fiduciary acting as a fiduciary; (2) a misrepresentation on the part of the defendant; (3) the materiality of that misrepresentation; and (4) detrimental reliance by the plaintiff on the misrepresentation." *Romero v. Allstate Corp.*, 404 F.3d 212, 226 (3d Cir. 2005); *accord Randles v. Galichia Med. Group, P.A.*, 2006 WL 3760251, at *13 (D. Kan. 2006) (attached as Ex. E-4); *Owen v. Regence Blue Cross Blue Shield of Utah*, 388 F. Supp. 2d 1335, 1338 (D. Utah 2005). Plaintiffs fail on the second and third elements. While a misrepresentation may in some circumstances arise out of omission or nondisclosure, *see, e.g.*, *Horn v. Cendant Operations, Inc.*, 69 Fed. Appx. 421, 427-28 (10th Cir. 2003); *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1499-1501 (10th Cir. 1995), "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." *Jenson v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994); *Wise*, 986 F.2d at 936-38. Moreover, "ERISA does not require SPDs to specifically address the possibility that those terms might later be changed, as ERISA undeniably permits." *Gable*, 38 F.3d at 858; *accord Sprague v. General Motors Corp.*, 133 F.3d 388, 401-02 (6th Cir. 1998) (en banc). Plaintiffs thus are barred, as a matter of law, from claiming that they *reasonably* relied on the SPDs to provide information concerning the circumstances of potential plan amendments, particularly given the express instruction in the SPDs to consult the text of the Plan itself for further details and the fact that Plaintiffs could, in fact, obtain and examine those documents. *See, e.g., Jensen*, 38 F.3d at 953.

Regarding equitable estoppel, were the Tenth Circuit to recognize this theory, Plaintiffs cannot prove the necessary elements.[12] The key elements of an equitable estoppel

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[12] While not stated as an element *per se*, equitable estoppel only applies "'where the terms of a plan are ambiguous' and 'the employer['s] communications constituted an interpretation of that ambiguity.'" *Averhart v. U S West Mgmt. Plan*, 46 F.3d 1480, 1486 (10th Cir. 1994) (quoting *Alday*, 906 F.2d at 666). In any other circumstances, the theory would act to circumvent ERISA's specific requirement that plans must be written, which precludes judicial recognition of any oral or other informal modifications. *Straub v. Western Union Tel.*, 851 F.2d 1262, 1265 (10th Cir. 1988); *accord Perry v. New England Bus. Svc., Inc.*, 347 F.3d 343, 346 n.3 (1st Cir. 2003); *Unisys Ret. Med. Litig.*, 58 F.3d at 906 n.16 ("To the extent that the retirees relied on extrinsic evidence of 'what the company said in explaining the plans to its employees,' and 'how the plans were applied in practice,' this evidence cannot be used to contradict the unambiguous written terms of an ERISA plan."). As the analysis above shows, the Plan documents harbor no ambiguity about whether Qwest may amend or eliminate the Pensioner Death Benefit. Equitable estoppel thus cannot be used to alter the controlling terms of the Plan.

claim (where it is recognized) are "(1) a material representation, (2) reasonable and detrimental reliance, and (3) extraordinary circumstances." *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235 (3d Cir. 1994); *see Randles*, 2006 WL 3760251, at *9. Plaintiffs must fail on the second element, reasonable and detrimental reliance, for the same reason they fail on this element under a breach of fiduciary theory. For the third element, the Tenth Circuit has expressed the view that, were it to recognize equitable estoppel, it would consider doing so only for *egregious* cases, by which it referred to instances involving "lies, fraud or an intent to deceive" by a fiduciary. *See Callery v. U.S. Life Ins. Co. of N.Y.*, 392 F.3d 401, 407-08 (10th Cir. 2004). No such circumstances are alleged, or could be proved, here.

In sum, the unambiguous terms of the Plan establish that Qwest can make changes to or eliminate the Petitioner Death Benefit, an unvested welfare benefit ancillary to the pension plan. The Court should enter summary judgment against Plaintiffs on their claim pursuant to the First Claim for Relief, and otherwise, seeking a declaration prohibiting Defendants from taking such otherwise lawful actions.

CONCLUSION

Based upon the undisputed material facts, Defendants are entitled to summary judgment in their favor on all claims asserted by Plaintiffs.

Respectfully submitted this 31st day of October, 2007.

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 31st day of October, 2007, I electronically filed the foregoing **DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

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

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Counsel of record certify understanding of and compliance with REB Civ. Practice Standard V. I.

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