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' REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Defendants respectfully submit this reply brief in further support of their motion for summary judgment on all claims asserted by the Second Amended Complaint.[1]

PRELIMINARY REPLY STATEMENT

Plaintiffs reveal much about their approach to the issues in this case when they tell the Court that this case concerns the "Pension Death Benefit." No such thing exists. See Defendants' Motion for Summary Judgment and Brief in Support ("Def. Br.") at p. 4, ¶4. The U S WEST pension plan contained a "Death Benefits Plan" and that plan-within-a-plan contained, among its forms of benefits, a "Pensioner Death Benefit" (later simply called the Death Benefit in the Plan section "Death After Retirement"). Like its counterparts in the Death Benefit Plan, the Sickness Death Benefit and the Accidental Death Benefit, the Pensioner Death Benefit is a welfare benefit. It essentially carries the coverage of the Sickness Death Benefit from active employment into retirement. *Id*. at p.4-5 ¶¶ 4-7. Like other welfare benefits that

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[1] Plaintiffs' final point of argument in their brief purports to seek partial summary judgment in their favor. This unstated cross-motion violates Local Civil Rule 7.2(C), which states "[a] motion shall not be included in a response or reply to the original motion." It accordingly must be denied.

begin in active employment and continue into retirement, the nature of the Pensioner Death Benefit is not transformed into a pension benefit at the time of retirement. It continues to be a welfare benefit that may be changed or eliminated by Defendants absent clear and express language limiting their right to make any change – a situation not present here.

REPLY CONCERNING UNDISPUTED FACTS

While Plaintiffs claim they dispute certain of Defendants' statement of undisputed facts, in reality they merely dispute the way the facts should be used. Defendants rely entirely on Plan documents and allegations in the Second Amended Complaint. The Plan documents are key here and say what they say. Plaintiffs do not raise any genuine dispute over an issue of material fact by their stated disagreement with Defendants' reading of those documents.[2]

Similarly, Plaintiffs' "additional undisputed material facts" do not raise any dispute. Indeed, suggesting that certain other facts are not in dispute only moves the Court closer to summary judgment, since the law may be applied to such facts as well as those offered by Defendants. (Defendants do not agree that all of Plaintiffs' "additional undisputed material facts" fit that description, but Defendants have no obligation to dispute them at this stage.)

REPLY ARGUMENT

Plaintiffs pose one overarching proposition that should be addressed at the outset: retiree benefits are fixed at the moment of retirement. Plts.' Br. at pp. 7-8. And they are correct as to the *vested pension benefit* – the income replacing benefit. Plaintiffs state, accurately, that the calculation of the *pension* benefit will be determined by the Plan in effect when they retire. The pension benefit does not continue to accrue after retirement and monthly annuity payments

[2] For example, Plaintiffs repeat the very same reservation of rights language set forth by Defendants. Plaintiffs' attempt to impose their interpretation of those provisions on the Court does not create a fact dispute. See Def. Br. at p.6, ¶¶ 10-11, Plts.' Br. at p. 5, ¶11.

are not automatically enhanced. The pension benefit also may not be cutback. However, *unvested benefits* are not fixed at the time of retirement; Defendants are free to make changes to them. The reservation of rights clause exists precisely to guarantee the right to make changes to the unvested benefits. The clause would be superfluous if that right did not exist. *Cf. Howe v. Varity Corp.*, 896 F.2d 1107, 1110 (8th Cir. 1990).

I. PLAINTIFFS DO NOT QUALIFY FOR A DECLARATION OF RIGHTS (THIRD CLAIM FOR RELIEF) BECAUSE THEY HAVE FAILED TO RAISE ANY GENUINELY DISPUTED ISSUE OF MATERIAL FACT CONCERNING THE STATUS OF THE PENSIONER DEATH BENEFIT

Plaintiffs bounce back and forth between treating the Pensioner Death Benefit as a pension benefit and apparently arguing that it should be considered contractually vested as a welfare benefit. We urge the Court to cut through Plaintiffs' thicket of arguments with the following analysis.

A. Plaintiffs Have Not Shown That The Pensioner Death Benefit Satisfies The Statutory Definition For Accrued Pension Benefits

The threshold issue is classification of the Pensioner Death Benefit as a welfare benefit or a pension benefit. ERISA defines those terms. See Def. Br. at pp. 9-10. Plaintiffs simply ignore the statutory definitions and other analysis set forth in Defendants' opening brief, apparently conceding that any attempt to classify the benefit as a pension benefit in the face of the statutory definitions simply cannot succeed. Their approach does not work for three reasons.

First, the determination whether the Pensioner Death Benefit is a pension or welfare benefit is an issue of law, to be determined by this Court. Consistent with this precept, the purported expert opinion of Leonard Garofolo may and should be rejected out of hand because "[i]n no instance can a witness be permitted to define the law of the case." *Specht v. Jensen*, 853, 805, 810 (10th Cir. 1988) (en banc); *Gray v. Briggs*, 45 F. Supp. 2d 316, 324 (S.D.N.Y. 1999) (precluding expert's opinion on ERISA obligations because it would "constitute

an attempt to substitute the expert's judgment for the Court's") (internal quotation marks omitted). His opinion merely expresses his answer to the legal determination left to the Court; it does not provide any useful analysis of any facts, customs or usages that would enlighten the Court in its task. Likewise, the self-interested, conclusory testimony of former Employee Benefit Committee ("EBC") members (who are now retirees and prospective members of the putative class in this case) does not alter or assist in this Court's task.

Second, the legal determination does not depend upon (a) the statement in the SPD identifying the Pensioner Death Benefit as part of the pension plan,[3] Plts.' Br. at pp. 10-11, or (b) entries in tax documents such as a Form 5500 Annual Report for the Plan, Id. at pp. 11-12. Defendants set forth legal authorities establishing the irrelevance of these sources and Plaintiffs have offered no contrary authority.[4] Def. Br. at pp. 10-12.

Third, Qwest's creation in 1997 of a lump-sum option for retirees to collect their accrued pension benefits, which also paid a lump sum substitute for the death benefit then available to retirees who elected a regular service pension, did not change the fundamental nature

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[3] That statement merely conveys the fact that some of the death benefits are paid from the funds set aside for defined pension benefits. That is why this particular welfare benefit also carries the label "ancillary benefit." A welfare benefit funded independently of a pension plan is simply a welfare benefit; a welfare benefit funded out of pension monies is an ancillary benefit, a distinction that carries significance when the IRS determines whether a plan "qualifies" for preferential tax treatments. Precisely because an ancillary benefit is not a pension benefit, the government monitors the extent to which pension monies are spent on such benefits to ensure that a pension plan does not deviate too far from its core mission.

[4] Plaintiffs offer two cases for the proposition that employer treatment of a plan should be "a significant factor" to be considered. This assertion is misleading. Plaintiffs' cases decide whether a plan is governed by ERISA (an issue exclusively concerned with welfare plans), not whether a benefit is "pension" or "welfare". Moreover, in *Stern v. IBM Corp.*, 326 F.3d 1367, 1374 (11th Cir. 2003), the Eleventh Circuit found that the employer's filing of a Form 5500 for its plan had very little weight and was not enough to conclude that ERISA covered a plan. *Accord Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1137 n.5 (1st Cir. 1995). *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 492-93 (9th Cir. 1988), Plaintiffs' other case, looked to a benefits booklet to decide whether an employer had "endorsed" a policy of group insurance offered to the employees, *see Baxter v. Life Ins. Co. of N.A.*, 982 F. Supp. 1453, 1456 (D. Wyo. 1997) (discussing *Kanne*), an issue that obviously has no application here.

of the Pensioner Death Benefit. Notably, the lump sum substitute for a death benefit is stated as separate and distinct from the pension benefit. Moreover, calculation of the amount of the death benefit contains an actuarial assumption that reflects the contingent nature of the benefit for regular service pension retirees – survival by a qualified beneficiary. The lump sum death benefit substitute payment is, without question, an incentive to lump-sum retirees to sever their relationship with the Plan. It is not part of the accrued benefit itself.[5]

B. Plaintiffs Have Not Shown That The Pensioner Death Benefit Vested As A Welfare Benefit

The Court might end its consideration at this point. Plaintiffs do not press the argument that the Pensioner Death Benefit is a welfare benefit that has become vested. Given their failure to meaningfully distinguish *Foss v. Lucent Tech. Inc.*, 2006 WL 3437586 (D.N.J. Nov. 27, 2006), this may be the wisest course. Indeed, a second District Court has considered and rejected the argument that the Pensioner Death Benefit is a vested benefit under an AT&T successor plan, adopting wholesale the reasoning in *Foss*. *See Chastain v. AT&T*, 2007 WL 3357516, at **10-11 (W.D. Okla. Nov. 8, 2007). The plans at issue in *Foss* and *Chastain* contain language that is similar and sometimes identical to the Qwest Plan.

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[5] Plaintiffs try to shoehorn this lump-sum incentive into the category of a "retirement-type subsidy" protected under ERISA Section 204(g)(2)(A), 29 U.S.C. § 1054(g)(2)(A). Subsection 2(A) was added by Congress in the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (1984), a law passed in response to a split among courts over early retirement benefits. The REA legislative history explains that death benefits are excluded from protection under the provision. Contemplating Treasury regulations that were to be drafted to further define the term "retirement-type subsidy," the Senate Committee expressed its expectation that "a death benefit (including life insurance) . . . will not be considered a retirement-type subsidy." S. Rep. No. 575, 98th Cong., 2d Sess. 1, 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576. This passage of legislative history "clearly expresses" congressional intent about the meaning of the then-newly added subsection in Section 204(g). *See Bellas v. CBS, Inc.*, 221 F.3d 517, 526 (3d Cir. 2000). Indeed, as Plaintiffs' brief notes (p. 19 n.11), the Treasury regulations effective August 12, 2005, implemented this intent. While Plaintiffs argue that these regulations do not apply to the 2003 amendment at issue here, they confirm for this Court how to apply the REA to past changes and plainly the regulations control (and defeat) Plaintiffs' request for a declaration concerning future changes, even under their own analysis.

Nonetheless, Defendants will address the vesting arguments scattered throughout Plaintiffs' brief. They appear to fall into four groups: (1) Plan and SPD language describing how the benefit is paid (assuming the various contingencies have been met), Plts.' Br. at pp. 14-16; (2) Plan language on the priority of payment of benefits in the event of the Plan's termination, *id*. at pp. 16-17; (3) various documents extrinsic to the Plan and SPDs, *id*. at pp. 10-11, 13; and (4) unilateral contract theory, *id*. at p. 24. The first and third arguments have been fully disposed of in Defendants' opening brief and Plaintiffs have not challenged Defendants' analysis. Def. Br. at pp. 10-16. The fourth argument "cannot be squared with the congressional intent not to bind employers in the area of welfare benefits," *Chastain*, 2007 WL 3357516, at *11, and essentially attempts to restate equitable estoppel as a vesting doctrine, *see id*.

The remaining argument concerning Plan termination also fails. The termination clause prioritizes the payout for benefits as required by ERISA Section 4044, 29 U.S.C. § 1344(a). "Such prioritization of benefits pursuant to Section 4044 does not create vesting rights; but rather 'insurance' upon termination of a plan." *Foss*, 2006 WL 3437586, at *9.[6] Because the Plan has not terminated, the potential effects on benefits arising out of a termination simply have no relevance. Further, Plaintiffs' argument *infers* vesting from the structure of the Plan termination provision. "Language which vests welfare benefits, however, must be clear and express. An inference, by definition, is not express." *Chastain*, 2007 WL 3357516, at *14.

In the end, Plaintiffs fail to prove that the Pensioner Death Benefit vested. Contractual vesting demands "precise language denying the right to withdraw benefits . . . " and "is a narrow doctrine. To prevail, plaintiffs must assert strong prohibitory or granting language;

[6] This follows logically from the fact that Section 4044 itself creates no rights. *See Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("4044(a) is a distribution mechanism and not a source of new entitlements").

mere silence is not of itself abrogation." *Wise v. El Paso Nat'l Gas Co.*, 986 F.2d 929, 938 (5th Cir. 1993). No such language exists here. Thus, Plaintiffs rely on language they claim is "*consistent* with vesting" (Plts.' Br. at p. 15 [emphasis added]),[7] rather than identify prohibitory language expressly denying Qwest's right to change the benefit.. This is simply insufficient.

C. Plaintiffs Have Not Shown That Qwest Lacks Authority Under The Reservation of Rights Clause To Change The Pensioner Death Benefit

Plaintiffs recognize that a valid reservation of rights clause empowers Qwest to modify or eliminate the Pensioner Death Benefit as a welfare benefit. However, they dispute the validity of the clause itself. First, they argue the SPDs do not contain a sufficiently clear statement of the reservation of rights when compared to the Plan itself. Second, they contend the SPD and the Plan conflict, with the SPD controlling in such circumstances. Third, they argue the Plan's provision should be considered ambiguous and construed against Defendants under the principle of *contra proferentum*.

The first two arguments, comparing SPD language and the Plan, fail as a matter of law and fact. An SPD is not required to disclose that welfare benefits do not vest and it is not required to quote the Plan's reservation of rights clause in full. The 1989 Management Plan SPD, for example, cautions participants that it "is a summary of the U S WEST Management Pension Plan and does not attempt to cover all details. Specific details are contained in the official plan documents which regulate the operation of the Plan and govern any questions arising under the Plan." (Plts. Ex. 10, p. 12) Participants bear a responsibility to read the Plan. *See, e.g., Jenson v. Sipco, Inc.*, 38 F.3d 945, 953 (8th Cir. 1994). The 1989 SPD does not state

[7] The language in question merely describes the benefit; it does not create any protections for it from elimination or change. Moreover, the language involves description of *when* the benefit "will be paid," which is upon the death of a retiree with a surviving qualified beneficiary. If it could create any vesting rights, it would do so only at that time – the retiree's death. Such language cannot limit Qwest from making prospective changes that do not deprive any person of a benefit that might be paid in the future on behalf of any retiree who is not yet dead (such as Plaintiffs).

that the sponsor cannot not make future changes in benefits. It thus does not conflict with the Plan provision that reserves the sponsor's right to do so. *See, e.g., Charter Canyon Treatment Ctr. v. Pool Co.*, 153 F.3d 1132, 1136 (10th Cir. 1998) ("a summary plan description which is silent on a specific term or issue cannot prevail over the master plan document"); *Sprague v. General Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998) ("the failure to allude to this power [to amend or terminate the plan] in some of the booklets did not prejudice [the sponsor's] right, clearly stated in the plan itself, to change the plan's terms"). A reasonable person, reading the SPD and the Plan, would understand that Qwest (and its predecessors) reserved that right. *See id.*; *Wise*, 986 F.2d at 938.

The argument contending ambiguity pervades the reservation of rights clause simply ignores the three cases cited by Defendants in their opening brief that hold the same clause (set forth in AT&T and AT&T-successor company plans) unambiguously grants the Plan Sponsor the right to change the Pensioner Death Benefit. (Def. Br. at pp. 15-16) *Chastain* is the fourth case to reach the same conclusion. *Chastain*, 2007 WL 3357516, at *11. Plaintiffs offer no reason to interpret the identical reservation of rights clause in Qwest's Plan differently.

II. PLAINTIFFS HAVE NOT DEMONSTRATED GROUNDS UPON WHICH TO REFORM OR CHANGE THE PLAN TO UNDO THE 1993 OR 2003 AMENDMENTS AFFECTING THE PENSIONER DEATH BENEFIT (SECOND CLAIM FOR RELIEF)

Most of Plaintiffs' arguments concerning their Second Claim for Relief simply repeat and reincorporate issues addressed above.[8] Nevertheless, Plaintiffs expand the claim to challenge the 1993 Plan amendment that froze the amount of the death benefit. Plts.' Br. at pp. 2-3, ¶¶ 5,8. They contend the amendment was not approved by the EBC, as the plan amendment procedures require. This is incorrect. The EBC did timely endorse the change. (*See* Def. Ex. F.)

[8] Plaintiffs' opposition brief omits any reference to their assertion of any claim based on IRC Section 420. The Court should treat the claim as abandoned.

The resolution of the U S WEST Board of Directors, the Plan Sponsor, to freeze the benefit has independent significance: the change occurred in the process of merging the management and occupational pension plans and the Plan Sponsor needed to approve the change for inclusion in the merged Plan. All pertinent parties approved the change.

III. PLAINTIFFS HAVE NOT ESTABLISHED A BASIS FOR THIS COURT TO INNOVATE AND UTILIZE EQUITABLE ESTOPPEL IN THIS ERISA CASE (FIRST CLAIM FOR RELIEF)

For their First Claim for Relief, Plaintiffs' focus on equitable estoppel[9] - a theory the Tenth Circuit has declined to adopt. They ignore the Tenth Circuit's repeated and plain statement that if it were to adopt equitable estoppel, it would do so only in egregious cases involving "lies, fraud or intent to deceive" by a fiduciary. *See Callery v. U.S. Life Ins. Co. v. N.Y.*, 392 F.3d 401, 407-08 (10th Cir. 2004); *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992). Other Circuits have set a similarly high hurdle for equitable estoppel. *See, e.g.*, *Kannapien v. Quaker Oats Co.*, __ F.3d __, 2007 WL 3355718, at *5 (7th Cir. Nov. 14, 2007) ("extreme circumstances" that require "a knowing misrepresentation"); *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 571 (3d Cir. 2006) ("extraordinary circumstances" involving acts of bad faith or fraud); *Greifenberger v. Hartford Life Ins. Co.*, 131 Fed. Appx. 756, 759 (2d Cir. 2005) ("extraordinary circumstances" that "require conduct tantamount to fraud"). Here, Plaintiffs make no allegations, much less present evidence, of such egregious misconduct.[10]

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[9] Plaintiffs concede that their breach of fiduciary claim simply repackages their other allegations. The Court thus does not need to analyze further this claim separately. But, to the extent that Plaintiffs assert their claims about an improper plan amendment in 1993 in the form of a fiduciary duty breach claim, the six-year statute of repose set forth in 29 U.S.C. § 1113 bars litigation at this late date. *See, e.g.*, *Gosselink v. AT&T, Inc.*, 1999 WL 33737341, at *11-12 (S.D. Tex. Aug. 4, 1999). Moreover, the act of plan amendment is not a fiduciary responsibility; it is a settlor function outside of the fiduciary duties established by ERISA. *See, e.g., Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

[10] Indeed, Plaintiffs did not and cannot point a single case in which equitable estoppel has succeeded when the plan sponsor reserved the right to change the benefit in question – precisely because the reservation of rights clause places a participant on notice of the possibility of change and therefore renders "reliance" (an essential element of estoppel) unreasonable as a matter of law. *See, e.g., Weir v.*

Were this Court to contemplate Plaintiffs' equitable estoppel further, however, the implications are far reaching. Plaintiffs complain the use of language in a SPD such as "benefits will be paid" should preclude a plan sponsor from relying on a disclaimer in the plan itself. Plaintiffs' argument strikes at the heart of the ERISA disclosure process. SPDs are summaries of a plan; the plan itself always will and must govern. *See Sprague*, 133 F.3d at 401 ("by definition a summary will not include every detail of the thing it summarizes"). Plaintiffs would require a plan sponsor to add "unless we change this benefit" in every benefit description. This approach would force the SPDs to incorporate all of a plan's text and render the "summary" aspect moot. *See Mers v. Marriott Int'l Group Acc. Death & Dismemberment Plan*, 144 F.3d 1014, 1024 (7th Cir. 1998). That unacceptable result demonstrates why Plaintiffs' argument should be rejected.

CONCLUSION

Based upon the undisputed material facts and the arguments set forth in the initial brief and herein, Defendants respectfully submit that they are entitled to summary judgment in their favor on all claims asserted by Plaintiffs and request that the Court enter an order directing entry of judgment in defendants' favor dismissing this action with prejudice.

Respectfully submitted this 3rd day of December, 2007.

s/ John Houston Pope

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Federal Asset Deposit Ass'n, 123 F.3d 281, 290 (5th Cir. 1997); *Kolentus v. Avco Corp.*, 798 F.2d 949, 958 (7th Cir. 1986).

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to counsel for plaintiff.

/s/ John Houston Pope