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.

QWEST'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' FIRST, SECOND AND SEVENTH CLAIMS FOR RELIEF

Defendants Qwest Group Life Insurance Plan (the "Plan"), Qwest Employees Benefit Committee ("EBC"), Qwest Plan Design Committee, and Qwest Communications International Inc. (collectively, "Qwest") respectfully submit this reply brief in support of their Motion To Dismiss Plaintiffs' First, Second, and Seventh Claims for Relief ("Motion").

I. ARGUMENT

A. The Complaint's First Claim Fails To State a Claim Upon Which Relief Can Be Granted.

Plaintiffs assert that Qwest has "grossly mischaracterize[d]" their First Claim. (Plaintiffs' Response in Opposition to Qwest Defendants' Motion To Dismiss ("Pl. Br.") at 4.) In particular, plaintiffs accuse Qwest of failing to mention that their First Claim seeks declaratory relief under ERISA Section 502(a)(1)(B) and injunctive and equitable relief under ERISA Section 502(a)(3). (*See* Pl. Br. at 4-5 & 8 & n. 2.) But these are the *remedies* plaintiffs seek in their First Claim—not the *wrong* alleged in that claim. Qwest's Motion

addresses whether the allegations in plaintiffs' First Claim suffice to establish a *wrong*—that is, an *ERISA violation.* And the sole ERISA violation alleged in that claim is a violation of ERISA Section 402(b)(3), which states that "*[e]very employee benefit plan shall . . . provide a procedure for amending such plan,* and for identifying the persons who have authority to amend the plan." 29 U.S.C. § 1102(b)(3) (emphasis added).

Thus, when Qwest states that "[p]laintiffs' First Claim . . . alleges that the Disputed Amendments are null and void *because the 1998 Plan Document does not specify a procedure for amending the Plan that complies with ERISA Section 402(b)(3)*" (Motion at 1 (emphasis added)), Qwest is not mischaracterizing that claim. Instead, Qwest is simply echoing plaintiffs' *own summary* of the ERISA violation alleged in their First Claim: "*Since the Governing Plan Document does not provide a procedure for amending the PLAN* and there are no Qwest corporate by-laws or corporate resolutions that provide a procedure for amending the PLAN, *there is no compliance with the requirements of ERISA Section 402(b)(3), 29 U.S.C. § 1102(b)(3).*" Second Amended Complaint ("SAC") ¶ 77 (emphasis added); *see also id.* p. 2 (same); Scheduling Order (Doc. No. 77) p. 5 (same).[1]

After falsely accusing Qwest of mischaracterizing their First Claim, plaintiffs accuse Qwest of "sorely misconstru[ing]" (Pl. Br. at 9) the Supreme Court decision dispositive of that claim—*Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995). The Supreme Court addressed two distinct issues in *Curtiss-Wright*: (1) whether the amendment procedure in that case complied with Section 402(b)(3); and (2) whether the plan sponsor complied with that amendment procedure. Qwest argues in its Motion only that its

[1] Qwest does not contend that its by-laws or resolutions specify a Plan amendment procedure.

amendment procedure complied with Section 402(b)(3), which is the *first* issue addressed in *Curtiss-Wright*, and the *sole* subject of plaintiffs' First Claim.

Plaintiffs do not challenge Qwest's characterization of the relevant holding of *Curtiss-Wright*: that an ERISA plan document containing language identical in all material respects to the amendment language in the 1998 Plan Document specifies a procedure for amending an ERISA plan that complies with Section 402(b)(3). *See* 514 U.S. at 79-80 ("[T]he reservation clause says in effect that the plan may be amended 'by the Company.' *Curtiss-Wright is correct . . . that this states an amendment procedure*.") (emphasis added). As Qwest stated in its Motion, the Supreme Court's rejection in *Curtiss-Wright* of the exact claim asserted in plaintiffs' First Claim is fatal to that claim.

Instead of discussing the holding of *Curtiss-Wright* that is dispositive of their First Claim, plaintiffs discuss the *second* holding of that case: that an employer's compliance with a plan's amendment procedure depends on "what persons or committees within [the employer] possessed plan amendment authority" and "whether those persons or committees actually approved the new plan provision." 514 U.S. at 85 (*quoted in* Pl. Br. at 9). This holding is relevant to several of plaintiffs' claims as to which Qwest is *not* seeking dismissal (but *will* seek summary judgment), which alleged that Qwest failed to comply with the Plan's amendment procedures. (*See, e.g.,* SAC ¶ 90.) But this holding is irrelevant to plaintiffs' First Claim, which alleges only that the Plan's amendment procedures failed to comply with ERISA Section 402(b)(3).

Plaintiffs try to salvage their First Claim by arguing, not that the Plan's amendment procedure violates Section 402(b)(3) (an argument foreclosed by *Curtiss-Wright*), but that other, less obviously-defective allegations in their Complaint have been

incorporated into the First Claim. For example, plaintiffs argue that their First Claim is based in part on an allegation that "the October 2005 dated recommendation document was never adopted and made part of the Governing Plan Document." (Pl. Br. at 9.) But this is the subject of plaintiffs' *Third* Claim. That claim is entitled "Declaration that October 14, 2005 Minutes Are Ineffective" (SAC p. 23), and alleges that the October 2005 Minutes were ineffective because they were "not duly adopted and incorporated into the Governing PLAN Document" (*id.* ¶ 90).

Plaintiffs also argue that their First Claim is based in part on an allegation that "since Defendants retroactively applied Plan Amendment 2006-1 adopted by the Qwest Plan Design Committee on December 13, 2006, Defendants violated the Prior Loss Proviso and short changed hundreds of Plan beneficiaries." (Pl. Br. at 9.) But this is the subject of the Complaint's *Fifth* Claim. That claim is entitled "Violation of Prior Loss Proviso" (SAC p. 25), and alleges that Plan Amendment 2006-1 was "executed and adopted by QWEST PLAN DESIGN COMMITTEE members on December 13, 2006 in violation of the Prior Loss Proviso" (*id.* ¶ 95).

Like their First Claim, plaintiffs' Third and Fifth Claims are without merit as a matter of law. Although Qwest's Motion does not seek dismissal of those claims (because documents not cited in plaintiffs' Complaint are needed to demonstrate their lack of merit), this hardly means plaintiffs' First Claim is immune from dismissal. If plaintiffs could avoid dismissal of a baseless claim by asserting that other, separately-pled claims are incorporated by reference into the baseless claim, *any* claim could survive a motion to dismiss so long as some other claim in the complaint can survive such a motion. This would render toothless Fed. R. Civ. P. 12(b)(6), which authorizes courts to dismiss claims that fail to state a claim

upon which relief can be granted, and whose purpose is to ensure that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955, 1966 (2007) (quotation marks, citation and ellipsis omitted).

In summary, Qwest has accurately characterized plaintiffs' First Claim, and that claim must stand on its own allegations rather than those supporting other claims. Because the allegations supporting the First Claim do not state a claim upon which relief can be granted, that claim must be dismissed.

B. The Complaint's Second Claim Fails To State a Claim Upon Which Relief Can Be Granted.

The Complaint's Second Claim is asserted solely by Plaintiffs Edward Kerber and Nelson Phelps, and solely on behalf of a putative subclass consisting of "Eligible Retirees to whom Qwest sent the Confirmation Notices concerning the rights of Pre-1991 Retirees." (SAC ¶ 88; *see also id.* ¶ 114(A).) These facts conclusively show that the Second Claim is not, as plaintiffs now pretend, based on all of the Complaint's allegations. It is instead based solely on the allegations referred to in Qwest's Motion, which are insufficient to state a claim upon which relief can be granted.

As with their First Claim, plaintiffs try to buttress their Second Claim by arguing that other, less obviously-defective claims have been incorporated into that claim. For example, plaintiffs argue that the Second Claim is based in part on plaintiffs' allegation that Qwest breached its fiduciary duties by "[v]iolating the Prior Loss Proviso and short changing hundreds of beneficiaries." (Pl. Br. at 11.) But this is the subject of the Complaint's

Fifth and *Sixth* Claims, which are entitled "Violation of Prior Loss Proviso" and "Additional Violation of Prior Loss Proviso," respectively. (SAC pp. 25-26.) The Fifth Claim seeks a declaration that Plan Amendment 2006-1 is "in violation of the Prior Loss Proviso and, therefore, null and void as applied to the estates and beneficiaries of any Post-1990 Occupational Retirees who died during January 1, 2006 through December 12, 2006." (SAC ¶ 95.) The Sixth Claim likewise seeks a declaration that "any purported PLAN amendment . . . applied retroactively [is] in violation of the Prior Loss Proviso and, therefore, null and void." (*Id.* ¶ 98.)

Plaintiffs assert that Qwest's discussion of the Second Claim improperly "focus[es] only on the alleged misrepresentations set forth in paragraphs 84 through 86" of the Complaint, to the exclusion of the allegations on which plaintiffs' Fifth and Sixth Claims are based. (Pl. Br. at 11.) But plaintiffs' assertion that the Second Claim also covers the allegations comprising these additional claims ignores who is asserting the claims in question, and on whose behalf those claims are being asserted.

The Second Claim is brought solely by Plaintiffs Edward Kerber and Nelson Phelps, while the Fifth Claim is brought solely by Plaintiff Martha Lensink and the Sixth Claim is brought solely by Plaintiff Samuel Strizich. (SAC ¶ 114.) And these three claims have been brought on behalf of different putative subclasses: the Second Claim has been brought on behalf of "Eligible Retirees to whom Qwest sent the Confirmation Notices concerning the rights of Pre-1991 Retirees," the Fifth Claim has been brought on behalf of "beneficiaries of Eligible Retirees who died between the period January 1, 2006 and December 12, 2006," and the Sixth Claim has been brought on behalf of "beneficiaries of Eligible Retirees who died after January 1, 2007 and prior to the adoption of any PLAN

amendment subsequent to 'Amendment 2006-1.'" (*Id.*)

If, as plaintiffs now contend, the Second Claim included the allegations on which the Fifth and Sixth Claims are based, the Second Claim would have been brought: (1) by Mrs. Lensink and Mr. Strizich as well as by Messrs. Kerber and Phelps; and (2) on behalf of the subclasses for whom the Fifth and Sixth Claims have been brought, as well as on behalf of the subclass for whom the Second Claim has been brought. Plaintiffs' assertion that the Second Claim embraces the allegations in the Fifth and Sixth Claims is thus disingenuous. The Second Claim instead embraces only the allegations discussed in Qwest's Motion, which do not suffice to state a claim upon which relief can be granted.

Plaintiffs Kerber and Phelps entitle their Second Claim "Breach of Fiduciary Duty—Material Misrepresentation." (SAC p. 22.) Qwest cited cases in its Motion setting forth the following elements of this claim (and plaintiffs have cited no case providing a different list of elements): "To allege and prove a breach of fiduciary duty for misrepresentations, 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." *Burstein v. Retirement Acct. Plan*, 334 F.3d 365, 387 (3rd Cir. 2003). Kerber and Phelps have failed to allege facts sufficient to establish *three* of these four elements—an actionable misrepresentation by Qwest, materiality, and detrimental reliance by plaintiffs. And although these plaintiffs argue, in effect, that they can "pick and choose" the elements of the claim they have pled, they do not cite a single case in which a court has allowed a plaintiff to assert an ERISA claim for breach of fiduciary duty based on misrepresentations without requiring the plaintiff to allege facts

supporting each element of such a claim.

Actionable Misrepresentation by Qwest. As Qwest stated in its Motion, plaintiffs based both their First Amended Complaint's estoppel claim and their Second Amended Complaint's breach of fiduciary duty claim on *the same documents*—namely, Confirmation Statements, Summary Plan Descriptions, and a March 26, 1990 letter stating that "[y]ou are entitled to the benefits paid under the Group Life Insurance Program" (*See* Motion Ex. 6)—that Qwest sent to certain Plan participants who retired before 1991. (*Cf.* First Amended Complaint ¶¶ 69 & 76 *with* SAC ¶¶ 32, 34 & 84-86.) Plaintiffs do not dispute that this Court *dismissed* plaintiffs' estoppel claim on the ground, *inter alia*, that the First Amended Complaint had "not identified any 'lies, fraud, or an intent to deceive.'" (Dismissal Order (Doc. No. 47) at 14.) The conclusion is inescapable: Because a misrepresentation is an essential element of both an estoppel claim and a breach of fiduciary duty claim based on misrepresentation, plaintiffs' failure to allege a misrepresentation adequate to support their estoppel claim means they have likewise failed to allege a misrepresentation sufficient to support their breach of fiduciary duty claim.

Materiality. Plaintiffs do not dispute Qwest's assertion that the Complaint includes no well-pled (*i.e.*, non-conclusory) allegations that the misrepresentations alleged in the Second Claim were material. The Second Claim fails to state a claim upon which relief can be granted for this additional reason.

Detrimental Reliance by Plaintiffs. Plaintiffs likewise do not challenge Qwest's assertion that the Second Claim fails to allege detrimental reliance by plaintiffs. Instead, plaintiffs challenge only the accuracy of the Sixth Circuit's statement in *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 578 (3rd Cir. 2006), that "[d]etrimental reliance on a

material misrepresentation made by the defendant is a necessary element of an ERISA breach of fiduciary duty claim." Notwithstanding the court's statement in *Hooven*, plaintiffs cite cases stating that plan participants may allege a claim for breach of fiduciary duty that seeks solely injunctive relief without alleging "individual" or "actual" harm. (*See* Pl. Br. at 12.) But plaintiffs state that they "have alleged harm to themselves and numerous other Plan participants and beneficiaries" (*id.* at 12-13), so these cases do not help them.

In summary, plaintiffs' failure adequately to allege facts supporting three (or indeed, any one) of the elements of their Second Claim is fatal to that claim.

C. Plaintiffs' Seventh Claim Fails To State a Claim Upon Which Relief Can Be Granted.

In their Seventh Claim, plaintiffs ask this Court to rule that the EBC breached its fiduciary duty of loyalty by failing to help Plan participants "mitigate against the reduction of PLAN benefits" (SAC ¶ 106) by "investigat[ing] or advocat[ing] a means for Plan participants to secure either conversion or continuation privileges with either Prudential, the current insurer of the group policy, or some other insurance provider." (Pl. Br. at 16, *citing* SAC ¶¶ 104-05.) The rule plaintiffs urge this Court to adopt could not possibly survive appellate scrutiny.

Absent express "vesting" language (which does not exist here), an employer has every right to reduce or eliminate benefits provided under welfare benefit plans. Reducing or eliminating such benefits is invariably detrimental to plan participants. Plaintiffs nevertheless urge this Court to rule that, whenever an employer reduces or eliminates welfare plan benefits in a manner detrimental to plan participants—which is to say, whenever a employer reduces or eliminates such benefits—the plan fiduciary has a broad obligation to

help Plan participants "mitigate against the reduction of PLAN benefits" (SAC ¶¶ 106), and a specific obligation to "investigate or advocate a means for Plan participants to secure" equivalent benefits in some other way—in this case, by "secur[ing] either conversion or continuation privileges" with Qwest's existing group life insurance provider or some other such provider. (Pl. Br. at 16; *see also* SAC ¶¶ 105-106.)

If, as plaintiffs suggest, plan fiduciaries have a duty to help plan participants "mitigate against" the effect of an employer's reduction or elimination of welfare plan benefits, then every time an employer fails to offer participants an alternative way to secure benefits being reduced or terminated, participants can bring a class action lawsuit alleging that the plan fiduciary failed to help them "mitigate against" the adverse effects of the employer's decision. Assume, for example, that a plan sponsor decides to reduce or eliminate benefits under a dental plan provided to its employees. Under plaintiffs' proposed rule, before the plan sponsor can take this step, the plan fiduciary must help plan participants "mitigate against the reduction of PLAN benefits" by "investigating" whether they can obtain replacement dental coverage, and/or "advocating" on the participants' behalf for alternative dental benefits. How diligently must the fiduciary "investigate"? How strenuously must it "advocate"? ERISA provides no answers, because it imposes no such duties. But if the rule espoused by plaintiffs were adopted, attempting to answer these unanswerable questions would be the new domain of federal courts.

In this case, plaintiffs concede that "when the purported Plan amendments were being made the characters involved were acting as the Plan sponsor, *in a non-fiduciary role*." (Pl. Br. at 16 (emphasis added).) This concession is compelled by the cases cited in Qwest's Motion adopting the "settlor function" rule, under which a plan sponsor can reduce

or eliminate non-vested welfare plan benefits as it sees fit. But under the rule espoused by plaintiffs, the "settlor function" rule would become a dead letter. No employer would be willing to create a welfare benefit plan that could be amended or terminated only if the plan fiduciary first tries to "mitigate" the adverse impact of such changes on plan participants. Moreover, few people would be would be willing to serve as plan fiduciaries if participants could (as plaintiffs have done here) bring a class action lawsuit against such fiduciaries alleging that they did not "mitigate" against the reduction of plan benefits to the participant's satisfaction. The amendment of welfare benefit plans would become a morass into which no sensible employer would venture. And if employers cannot amend welfare benefit plans, they will stop offering such plans.

Plaintiffs cite no statutory language, regulation, or case law imposing the extraordinary duties that they ask this Court to impose on the EBC. Had Congress wanted to require plan fiduciaries to "mitigate" the effect of amendments to welfare benefit plans, it would have done so expressly. The general fiduciary obligations set forth in ERISA Section 404 do not refer to any such duty to mitigate, and it would be inappropriate to infer such an obligation on the basis of general provisions that say nothing about such a duty. In summary, ERISA's fiduciary standards do not impose the duty alleged by plaintiffs, and plaintiffs' Seventh Claim should accordingly be dismissed.

II. CONCLUSION

For the reasons set forth above and in Qwest's Motion, plaintiffs' First, Second, and Seventh Claims are frivolous, and should be dismissed.

DATED: June 20, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2008, I electronically filed the foregoing **Qwest's Reply Brief in Support of Its Motion To Dismiss Plaintiffs' First, Second and Seventh Claims 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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