IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

vs.

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

Defendants.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF (Docket 63) MOTION FOR CLASS CERTIFICATION

Named Plaintiffs, hereby submit their reply brief in support of (Docket 63) their motion for class certification and to address issues raised in Qwest Defendants' opposition (Docket 86).

A. Qwest Defendants' Primary Opposition to Class Certification Is Based Upon Defendants' Threat to Retaliate Against the Class.

In their brief opposing class certification, Defendants make no pretense about their intention to harm the entire Qwest retiree community should Plaintiffs secure requested relief including the payment of additional life insurance benefits to several thousand beneficiaries of deceased retirees. Defendants state "if plaintiffs prevail on their First, Third or Fourth Claims, Qwest would need to consider terminating the Life Plan benefits for Eligible Retirees altogether." (Docket 86, p. 15). Defendants further state that "by pursuing these claims, the

seven named plaintiffs are playing dice with the life insurance benefits of the nearly 50,000 retirees they purport to represent." (*Id.*). "If plaintiffs obtain the relief they seek in their First, Third or Fourth Claims--invalidation of the 2005 Amendment in its entirety--Qwest would need to consider. . . eliminating all life insurance benefits for such retirees. . ." (*Id.* pp. 16-17). Essentially, because Plaintiffs are exercising their legal rights under ERISA, including their right to have the "Prior Loss Proviso" enforced, the company may choose to retaliate in violation of the letter and spirit of ERISA Section 510, which makes it "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter. . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter. . ." 29 U.S.C. § 1140.

This threat come from none other than Erik Ammidown, one of the members of the Qwest Employee Benefits Committee, the named fiduciary for the Plan. (See Docket 86-12). Mr. Ammidown shows his tremendous conflict of interest and inability to fulfill his ERISA duty of loyalty to Plan participants and beneficiaries. As recently suggested by the United States Supreme Court in *Metropolitan Life Insurance Co. v. Glenn*, 128 S.Ct. 2343 (2008), plan sponsors should minimize any such conflicts by separating and isolating personnel that serve their benefit plan administration. Qwest should not have the same individuals who serve as employer representative in its plan sponsor capacity also serve in the capacity of plan administrator or plan fiduciary. Mr. Ammidown is the quintessential example of why employers should take "active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances. " *Id.* at 2351.

Instead of formulating a valid argument to oppose class certification, Mr. Ammidown's decision to take the bully pulpit and defense counsel's supporting arguments present ample reason why the claims in this case should proceed as a class action. Plaintiffs anticipated Qwest might stoop so low as to threaten retaliation or actually take such action and that's why Plaintiffs ask in their Prayer for Relief for this Court to "order QWEST's officers, employees and agents not to retaliate against Named Plaintiffs (and their relatives and beneficiaries) and the proposed class of Eligible Retirees and their beneficiaries on the basis of the filing or prosecution of this action." (Docket 69, Second Amended Complaint, p. 37, ¶ N).

In short, Defendants have no evidence of any real antagonism between the Named Plaintiffs and the tens of thousands of U S WEST/Qwest retirees who are actively supporting this case. Indeed, the retirees are simply appalled that Defendants would advocate they intend to punish ERISA litigants for exercising their legal rights, and the retirees refuse to be intimidated. They will not back down. Plaintiffs meet the four prong test of numerosity, commonality, typicality and adequacy required for them to proceed under Fed.R.Civ.Proc Rule 23(a).

B. <u>The Releases and Arbitration Agreements Purportedly Executed by 1,400 of the Class of 48,000 Eligible Retirees Neither Pertain to Life Insurance Benefits Nor the Clams of Beneficiaries</u>.

Defendants argue against class certification by trying to raise defenses which they argue would apply to a fraction of the larger putative class. But, that's not sufficient reason to deny class certification. Another court within the Tenth Circuit rejected a similar effort made ten years ago by Qwest's predecessor, Mountain Bell, by explaining that "[defendant's] ability to raise a potentially valid defense" as to "some or all of [the class members] is not an obstacle to class certification." *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 426 (D.

NM. 1988) (finding plaintiffs typical and certifying class). In any event, the defenses Defendants try to raise are fully invalid.

Defendants contend that about 1,400 Qwest workers executed releases and arbitration agreements and, therefore, those persons should be excluded from the certified class. But, none of those persons have been identified and they are not the Named Plaintiffs The agreements which are attached as Exhibits 1 and 2 to the declaration executed by Michael Ward are not expressly made binding on life insurance beneficiaries, such as surviving spouses. (See Dockets 86-10 and 86-11). Moreover, the agreements do not pertain to life insurance claims, claims that arose years after the person's employment ended and the agreements were executed. The release agreements pertain only to claims that had arisen as of the date the release agreement were executed. For instance, the typical release agreement says, ". . . *any other matter, cause, or dispute whatsoever between you and Qwest which arose prior to the effective date of this Agreement*." (See Docket 86-10, last sentence, next to last paragraph on Bates QL08593). The only claims that are subject to arbitration are those four type of claims specified in subparts 1-4 in the Arbitration clause, to-wit: "*claims regarding (1) your application and hiring at Qwest prior to the date this Agreement was signed, (2) your employment with Qwest prior to the date this Agreement is signed, (3) your termination of employment with Qwest prior to the date this Agreement is signed, an/or (4) the terms and conditions of and/or the obligations imposed by the [Qwest Management Separation] Plan and this Agreement.*" (See Docket 86-10, "Arbitration of Disputes" on Bates QL08594). Finally, the releases confirm that "*You do not waive your rights to make claims for damages and/or money which arise after the date this Agreement is signed.*" (See Docket 86-10, ¶ 14, second sentence appearing on Bates QL08598); Docket 86-11, ¶ 12,

second sentence appearing on Bates QL08607). Therefore, as Defendants have clearly misread and misinterpreted the agreements, their arguments are inapplicable and serve as no defense to class certification.

As set forth above, and in their opening brief (Docket 64), Plaintiffs have established that they meet the threshold requirements of Rule 23(a), and they have shown that the proposed class may be certified under at least one of the provisions of Rule 23(b). In the instant case, Plaintiffs argue that class certification is proper under Rule 23(b)(1), or, in the alternative, under Rule 23(b)(2). Plaintiffs' claims are particularly well suited for Rule 23(b)(1) certification by virtue of the substantive law of ERISA. The Court should agree that, given the nature of an ERISA claim which authorizes plan-wide relief, there is a risk that failure to certify the class would leave future plaintiffs without relief. . . . There is also risk of inconsistent dispositions that would prejudice the defendants: contradictory rulings as to whether the purported plan amendments are valid and whether defendants violated the Prior Loss Proviso and did not administer benefits in accordance with more favorable terms which existed at least until June 6, 2007. The Court should find that due to ERISA's distinctive "representative capacity" and remedial provisions, class treatment under Rule 23(b)(1)(B) is appropriate in this case. Moreover, certification would also be proper under Rule 23(b)(1)(A). As the Court noted in *Bunnion*:

> We find that the ERISA [claims for breach of fiduciary duties, among others] are appropriate for certification under both [23(b)(1)(A) and (b)(1)(B)]. All of these claims relate to the interpretation and application of ERISA plans. [Defendant] treated the proposed class and subclass identically and any equitable relief granted will affect the entire class and subclass. Failure to certify a class would leave future plaintiffs without adequate representation. Moreover, we see a high likelihood of similar lawsuits against defendants should this class be denied. . . . Inconsistent judgments concerning how the Plans should have been interpreted or applied would result in prejudice.

Bunnion v. Consolidated Rail Corp., 1998 WL 372644 at *13 (E.D. Pa. May 14, 1998). *See also* *Thomas v. SmithKline Beecham Corp.*, 201 F.R.D. 386, 397 (E.D. Pa. 2001) (granting class certification under subsection (b)(1)(A); "the plaintiffs seek broad declaratory and injunctive relief related to defendants' conduct and the terms of the plan. If this relief were granted in some actions but denied in others, the conflicting declaratory and injunctive relief could make compliance impossible for defendants").

C. The Class of 48,000 Eligible Retirees and the Several Subclasses of Retirees and Beneficiaries Are Sufficiently Defined.

A class is sufficiently defined if it is "administratively feasible for the court to determine whether a particular individual is a member." *Colorado Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 357 (D. Colo. 1999) (Babcock, J.) (concluding that class, as modified by Court, was sufficiently defined so as to allow determination of whether a particular individual is a member). So long as the definition is "specific and sets an objective standard by which potential class members can be readily identified," the class definition is administratively feasible. *Joseph v. General Motors Corp.*, 109 F.R.D. 635, 639 (D. Colo. 1986). As Plaintiffs seek certification of the Plan claims against Qwest Defendants under Rule 23(b)(1) and (b)(2), Defendants' criticisms of the class definition as including thousands who have not yet been harmed is unavailing. Surely, tens of thousands of Eligible Retirees and their beneficiaries will be harmed if Defendants are allowed to carry out their announced threat to punish everyone in retaliation for Named Plaintiffs' success with this case. Qwest's most shocking revelation that it plans to engage in conduct that would constitute a clear violation of ERISA Section 510 is the

best reason to grant Plaintiffs their requested class-wide injunctive relief preventing Qwest from engaging in such retaliation.

Lastly, it is ludicrous for Defendants to waste time arguing that since beneficiaries of some of the retirees who died after January 1, 2006 and before December 12, 2006 received full Plan benefits, they cannot further benefit from this case. All Defendants need to do is identify those persons and they can be excluded. The order for class certification can state that all persons who received full Plan benefits in excess of $10,000 are excluded. It is quite simple.

D. There Should Be Class Certification Because the Court Has Already Made a Dispositive Ruling.

During the "Status Hearing" held on March 20, 2008 (See Docket 60, Transcript of Hearing, 8:25-9:9), Defendants argued emphatically that the Court should first address the class certification issue before moving forward to address Plaintiff's Motion for a Summary Judgment. In their 'status report' replete with legal argument, Defendants lamented that there should not be dispositive rulings without their first being a class action ruling. (Docket 57, p. 8 "Generally speaking, courts should address motions for class certification before ruling on dispositive motions."). Since this Court has already made one dispositive ruling and declared the Plan's reservation of rights provision is not restrained by the reduction limitation rules set forth in Appendix 7 (what the Court refers to as the "Minimum Benefits Promise"), it only seems appropriate to grant class certification. Otherwise, might there be the risk other Eligible Retirees or their beneficiaries seek an alternative judicial determination in another forum? The Tenth Circuit has expressly approved of the certification of classes "where the relief sought is

injunctive and declaratory." *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275-76 (10th Cir. 1977).

E. There Should Be Class Certification of the Remaining ERISA Claims Under Fed.R.Civ.Proc., Rule 23(b)(2).

Rule 23(b)(2) states that a class may be certified if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.] Fed. R. Civ. Proc. Rule 23(b)(2). In *Shook v. El Paso County*, 386 F.3d 963 (10th Cir. 2004), *cert. denied*, 125 S.Ct. 1869 (2005), the Tenth Circuit held that in determining whether to certify a 23(b)(2) class, courts "need to look to whether the class is amenable to uniform group remedies," i.e., remedies that apply "equally to all cases pending within the class." 386 F.3d at 973 & 971 (quotations and citation omitted). Similarly, in *Neiberger v. Hawkins*, 208 F.R.D. 301, 317-18 (D. Colo. 2002), this District Court held that a class could be certified under Rule 23(b)(2) where "[p]laintiffs' claims seek application of a common policy by way injunctive and declaratory relief which do not depend on the individual facts of each case, but apply equally to all cases pending within the class." As these cases suggest, and as the leading class action commentator has stated, Rule 23(b)(2) certification is proper if the remedies sought by plaintiff are "uniform group remedies"—if, for example, those remedies do not require "a specific or time-consuming inquiry into the varying circumstances and merits of each class member's individual case." 2 Newberg § 4:17. For the reasons set forth above, that is the case here.

F. There Should Be Class Certification of the ERISA Claims Under Fed.R.Civ.Proc., Rule 23(b)(3).

Plaintiffs seek to certify a class with respect to their ERISA benefit claims under Rule 23(b)(3). That rule requires a plaintiff to demonstrate that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Plaintiffs can do so here. Since the claims in this case are going to be determined largely by examination of Plan documents, consideration of purported plan amendments and reference to ERISA's statutory provisions, Plaintiffs have demonstrated that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 136 (2nd Cir. 2001) (quotation marks and citation omitted). For example, the undisputed facts are that the Prior Loss Proviso prohibits retroactive reduction of Plan benefits to beneficiaries of Eligible Retirees who die before a plan amendment reducing benefits is adopted. Plan Amendment 2006-1 was adopted on December 13, 2006 and applied retroactively to January 1, 2006. There is no need for individual beneficiaries to come forward and repeat this evidence. Likewise, there is no dispute that more favorable Plan terms continued to exist in the Governing Plan Document at least until June 6, 2007 when those terms were deleted or removed by virtue of Plan Amendment 2007-1 executed and adopted on June 6, 2007.[1] Again, there is no need for

[1] The June 6, 2007 Plan Amendment 2007-1 either removed, deleted or altered then existing more favorable benefits terms set forth in the 1998 Governing Plan Document at Section 1.1 "Basic

a thousand individual beneficiaries to parade into this Court to reiterate that during the 18 month period (January 1, 2006 through June 6, 2007) they were paid lesser benefits not in conformity with then existing more favorable benefit payment terms and, thus, they are victims of a clear violation of ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Under these circumstances, class certification under Rule 23(b)(3) is most appropriate.

CONCLUSION

This ERISA case, like the numerous ERISA cases cited by Plaintiffs, is ideally suited for class certification under the law of the Tenth Circuit. The decision whether or not to certify this case as a class action rests soundly in the Court's discretion. *Shook v. El Paso County*, 386 F.3d 963, 967-68 (10th Cir. 2004). While this Court has broad discretion, certification is favored even if some doubt remains after a Rule 23 review. *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416, 420 (N.D. Okla. 2005). For all the foregoing reasons, Named Plaintiffs respectfully request the Court to grant their Second Amended Motion for Class Certification, Docket 63 filed on April 1, 2008.

Dated: July 15, 2008.

s/ Curtis L. Kennedy

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Life Coverage," Section 2.6 "Benefits for Eligible Retirees," Appendix 2 "Benefits Schedule," Appendix 7, "Minimum and Maximum Benefits for Certain Eligible Retirees" and Appendix 8, "Minimum and Maximum Benefits for Certain Eligible Retirees." (See Exhibit 1 filed herewith). This change was made shortly after Plaintiffs commenced this civil action seeking to enforce the existing more favorable terms of the 1998 Governing Plan Document.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2008, a true and correct copy of the above and foregoing document, together with Exhibit 1, was electronically filed with the Clerk of the Court using the CM/ECF system and a courtesy copy was emailed to Defendants' counsel of record as follows:

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Curtis L. Kennedy

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QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

Exhibit 1

RESOLUTIONS OF THE QWEST PLAN DESIGN COMMITTEE
QWEST GROUP LIFE INSURANCE PLAN
REGARDING AMENDMENT 2007-1

WHEREAS the Qwest Group Life Insurance Plan, (formerly the U S West Group Life Insurance Plan) as Amended and Restated Effective June 12, 1998 (the "Life Plan"), is sponsored by Qwest Communications International Inc. (the "Company);

WHEREAS Section 10.1 of the Life Plan provides that the Company may amend the Plan;

WHEREAS Section 8.4 of the Life Plan provides that the Company may delegate its responsibility as Plan Sponsor and, pursuant to resolutions adopted at the May 2, 2001 meeting of the Board, the Company delegated its powers as set forth therein, including the authority to amend the Plan, to the Company's Plan Design Committee;

WHEREAS the Plan Design Committee delegated the authority to amend any and all the employee benefit plans sponsored by the Company, including the Life Plan, to the Executive Vice President of Human Resources;

WHEREAS the Plan Design Committee previously amended the Life Plan: (a) on October 14, 2005 to, *inter alia*, change the Basic Life Coverage for Post-1990 Occupational Retirees to reduce such benefit to a fixed $10,000 benefit effective January 1, 2006, and (b) on September 14, 2006 to, *inter alia*, change the Basic Life Coverage for all Pre-1991 Retirees, ERO-1992 Retirees, and Management Post-1990 Retirees to reduce such benefit to a fixed $10,000 benefit effective January 1, 2007 (collectively the "Prior Life Plan Amendments"); and

WHEREAS the Plan Design Committee has determined it appropriate to further document the Prior Life Plan Amendments by amending the Life Plan as follows (capitalized terms above and below shall have the meanings set forth in the Life Plan):

◊ Effective January 1, 2007, the Section 1.1 definition of "Basic Life Coverage" was restated in its entirety as follows:

> "Basic Life Coverage" means basic life insurance coverage in an amount equal to an Eligible Employee's Annual Pay that is available as a Benefit; provided, however, that the basic life insurance coverage amount for ELIP Participants who are Eligible Employees shall be limited to no more than a maximum Benefit of $50,000 and the Benefit for an Eligible Retiree who is an ELIP Participant shall be in accordance with other Benefit limitations as set forth in the Plan and below.
>
> Effective January 1, 2006, with respect to Occupational Employees who upon their retirement become Eligible Retirees, the Basic Life Coverage is a $10,000 Benefit. Effective January 1, 2006, with respect to Post-1990 Retirees who are former Occupational Employees, the Basic Life Coverage is a $10,000 Benefit. To the extent a Post-1990 Retiree who is a former Occupational Employee has elected and maintained participation in Supplemental Life Coverage, the amount of such Benefit shall not be impacted due to this change in Basic Life Coverage.

Effective January 1, 2007, with respect to all Eligible Employees, who upon their retirement become Eligible Retirees, the Basic Life Coverage is a $10,000 Benefit. Effective January 1, 2007, with respect to all Eligible Retirees (including, but not limited to, Pre-1991 Eligible Retirees, Post-1990 Management Retirees, and Post-1990 Retirees who are former Occupational Employees), the Basic Life Coverage is a $10,000 Benefit. To the extent an Eligible Retiree has elected and maintained participation in Supplemental Life Coverage, the amount of such Benefit shall not be impacted due to this change in Basic Life Coverage.

◊ Effective January 1, 2007, Section 2.6 was restated in its entirety as set forth below to delete subsection (a) "Basic Life Coverage," and to re-designate the remaining subsections of Section 2.6 as follows:

2.6 Benefits for Eligible Retirees. An Eligible Retiree shall commence participation in the Plan on the first day of the month coinciding with or next following the date on which such former Eligible Employee becomes eligible to receive a service pension or disability benefit in accordance with the terms of the US WEST Pension Plan or its successor, the Qwest Pension Plan. The Benefit is the Basic Life Coverage as defined and set forth in Section 1.1.

Section 2.6(b) "AD&D Coverage" is now designated Section 2.6 (a)
Section 2.6(c) "Supplemental Life Coverage" is now designated Section 2.6 (b)
Section 2.6(d) "Dependent Life Coverage" is now designated Section 2.6 (c)

◊ Effective January 1, 2007, Appendix 2 "Benefits Schedule" was amended to restate the Basic Life Benefit as follows and to delete the **footnote on Appendix 2:

Plan Benefit Coverage	**Benefit Schedule**
Basic Life – Active Eligible Employees	Management - One and one-half Times Annual Pay Occupational- One Times Annual Pay Increased to the next higher $1,000 increment; Subject to age reduction schedule as set forth in Section 2.7 (a)
Basic Life – Eligible Retired Employees	The Basic Life Coverage is a $10,000 Benefit

◊ Effective January 1, 2007, Appendices 7 and 8 "Minimum and Maximum Benefits for Certain Eligible Retirees" were deleted in their entirety.

RESOLVED, that the Life Plan be and hereby is amended to further document the Prior Life Plan Amendments and to incorporate the amendments and modifications outlined above;

RESOLVED, that administrative practices previously adopted within the terms of the foregoing resolutions are hereby affirmed, approved and ratified in all respects as contemplated herein; and

FURTHER RESOLVED, that the Plan Design Committee be, and or its duly authorized delegate be, and each of them hereby is, authorized and instructed to execute any and all documents and to take any and all actions necessary or appropriate to effectuate the amendment of the Life Plan as contemplated herein.

Executed this 7 day of June, 2007.

PLAN DESIGN COMMITTEE
QWEST COMMUNICATIONS INTERNATIONAL INC.

By: _____
Teresa Taylor
Title: Executive Vice President

By: _____
Erik P. Ammidown
Title: Director, Health, Life & Disability

By: _____
Felicity O'Herron
Title: Vice President, Human Resources - Compensation