IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **04-cv-02042-LTB-OES**

NELSON B. PHELPS,

Plaintiff,

vs.

QWEST EMPLOYEES BENEFIT COMMITTEE,

Defendant.

REPLY IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DISCOVERY RESPONSES and FOR IMPOSITION OF ERISA Section 502(c)(1)(B) PENALTY

Plaintiff NELSON B. PHELPS hereby submits this reply in support of his December 12, 2005 motion for an order compelling Defendant Qwest Employees Benefit Committee to answer an interrogatory and produce requested documents and for imposition of a daily penalty pursuant to ERISA Section 502(c)(1)(B) [Docket No. **18**]. Defendant's response was filed on December 27, 2005 [Docket No. **22**].

1. By Order dated December 2, 2005 [Docket No. **17**], this Court ruled Defendant is required to provide certain documents to Plaintiff pursuant to § 104(b)(4) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1024(b)(4). The Court did ***not*** give Defendant the right to turn over ***redacted*** documents. Likewise, ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4), does not permit a plan administrator to redact such documents. But, that is exactly what Defendant did on December 27, 2005, in response to Judge Babcock's Order and this motion to compel. Defendant redacted key information. Samples are attached hereto as Exhibit 1. Defendant should be ordered to turn over the full documents with nothing redacted.

2. In addition, Defendant has not yet answered Interrogatory No. 3 and, as demonstrated, Defendant's previous discovery response given to Plaintiff was untrue. Defendant falsely stated in response to Interrogatory No. 3, ". . . *The Qwest Pension Plan does **not** have a Statement of Investment Policy or other comparable "Investment Policy Guidelines" and therefore, there are no authors or drafting or adoption dates to identify*." In truth, Defendant had at least ***several*** comparable investment policy guidelines each clearly entitled "Qwest Pension Trust Investment Management Guidelines." See Exhibit 1.

3. ERISA Section 502(c)(1)(B), 29 U.S.C. § 1132(c)(B), provides that if the administrator fails to comply with a written request for instruments under which a pension plan is established or operated within 30 days of the written request, a federal court is authorized to award damages to such participant or beneficiary in the amount of up to $110 a day from the date of such failure or refusal, or order other such relief as the court deems proper. There is nothing in that statutory provision that requires a plan participant to hustle right away to federal court when the plan administrator refuses to turn over requested documents. Defendant speciously argues that Mr. Phelps waited six months to file his lawsuit. That was not unreasonable especially considering that during a six month period he confirmed Qwest's position to not turn over the Investment policies/guidelines and he awaited Qwest's response to his separate request for the proxy voting guidelines. (See Answer to Complaint ¶¶ 19 and 22-24). This case is not at all like that relied upon by Defendant, *Cytrynbaum v. the Employee Retirement Income Plan of Amoco Corp.*, 338 F.Supp. 2d 1187, 1193-94 (D. Colo. 2004), where Judge Kane awarded no penalty because of the plan participant's misconduct. Here, there has been no misconduct by Mr. Phelps or the Association of U S WEST Retirees, the group for whom Mr. Phelps made the ERISA document disclosure requests. In any event, "the focus is necessarily on the plan administrator's actions, not the participant's." *Moothart v. Bell*, 21 F.3d 1499, 1506-97 (10th Cir. 1994). Instead of filing two separate ERISA document disclosure cases in this Court, Plaintiff decided it only made good sense to submit both disputed matters in a single case. [1]

4. Plaintiff first made his request for the Investment policies/guidelines on January 9, 2004 (See Answer to Complaint ¶ 16). Defendant, by and through *numerous* attorneys, deliberated and chose not to produce the requested Investment policies/guidelines. (See Answer to Complaint ¶ 18). The requested Investment policies/guidelines were not produced until sent via mail on December 27, 2005, 688 days past the February 9, 2004 deadline. At the daily maximum rate of $110, the ERISA statutory penalty as of December 27, 2005 totals **$75,680.00**.

5. Qwest is a very sophisticated plan administrator and multi-billion dollar corporate entity, unlike individual named plan administrators in the cases cited by Defendant where the penalty was substantially reduced. For instance, in the case of *Moothart*, the penalty of $30 per day was imposed on an individual, not a corporate entity.

6. Unlike in the numerous cases cited by Qwest, here there was a puppeteer - Qwest's legal counsel - and they deliberately chose to test the resolve of Mr. Phelps's and the

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[1] Qwest could have avoided a contest over the requested proxy voting policies if in-house counsel would have simply told the truth. Instead of telling Mr. Phelps that the proxy voting policies were outside the control of Qwest - an argument Defendant waited until litigation to reveal - Qwest simply told Mr. Phelps "*Qwest declines to provide the documents to you at this time*." (See Answer to Complaint ¶ 24). Prior to this lawsuit, there was never anything said by Qwest about the proxy voting guidelines being handled by another party or where Mr. Phelps should pursue that particular request. Qwest did not act in good faith.

Association of U S WEST Retirees and require this contest be litigated. Mr. Phelps has been prejudiced in his efforts to determine whether a highly risky $67 million put option made within several weeks after "9/11" was appropriate and permissible under governing Investment policies/guidelines. Certainly, Defendant was fully aware of the purpose for Mr. Phelps's request. Defendant chose to stall and prevent Mr. Phelps from continuing his investigation into the facts about this huge loss of investment. Mr. Phelps had good reason to investigate. After all, more than $66 million of that questionable investment was lost in just a few weeks. Essentially, Defendant chose to prejudice Mr. Phelps's and the Association of U S WEST Retirees' rights to police their pension plan. And, Defendant continues to try to prejudice Mr. Phelps, as Qwest has redacted key information from the Investment policies/guidelines that Judge Babcock ruled must be given to him.

WHEREFORE, Plaintiff NELSON B. PHELPS requests an order directing Defendant Qwest Employee Benefits Committee promptly answer Interrogatory No. 3 and promptly produce all **non-redacted** responsive documents to Document Request No. 2. In addition, Plaintiff requests this Court to exercise its discretion in favor of Plaintiff's request for imposition of the ERISA Section 502(c) daily penalty of $110.00 and assess a total penalty of **$75,680.00** as of December 27, 2005. Finally, Plaintiff seeks leave to submit a separate motion for an award of reasonable attorney's fees and costs, pursuant to ERISA Section 502(g)(1).

DATED: January 6, 2006.

s/ Curtis L. Kennedy
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Attorney for Plaintiff Nelson B. Phelps

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of January, 2006, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and a courtesy copy was emailed to Defendant's counsel of record as follows:

Elizabeth I. Kiovsky, Esq.
Beth Doherty Quinn, Esq.
BAIRD & KIOVSKY, LLC
2036 E. 17th Ave.
Denver, CO 80206-1106
Tele: 303-813-4500
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BethK@bairdkiovsky.com (Beth Kiovsky, Esq.)
BDQ@bairdkiovsky.com (Beth Doherty Quinn, Esq.

Also, copy of the same was delivered via email to Plaintiff Nelson B. Phelps, Executive Director, ASSOCIATION OF U S WEST RETIREES, nbphelps@worlnet.att.net.

s/ Curtis L. Kennedy

Exhibit 1

QWEST PENSION TRUST
INVESTMENT MANAGEMENT GUIDELINES

MARKET FUND
Russell 1000 Index Fund
Mellon Trust Accounts: USWG0081
Effective Date: June 4, 2001

General
[redacted] is responsible for the construction and ongoing management of portfolios (the "Account") which are expected to produce returns which closely track the Frank Russell 1000 (FR1000). Set forth below are the investment guidelines (the "Guidelines") established for the Account as of the effective date noted above.

Risk and Return Objectives
The returns of the Account are expected to track the FR1000 index returns within 20 basis points over any three-year period, after adjusting for pricing differences between the index and portfolio. Portfolio performance will be expected to closely approximate the FR1000 index returns over shorter periods of time.

Investment Approach and Strategy
[redacted] will construct an optimized portfolio which closely matches the risk and industry characteristics of the FR1000 index. The optimization process, using the BARRA software, selects an optimal portfolio to match the risk and industry characteristics of the FR1000 index. The number of securities held in the portfolio is a trade-off between tracking error (how closely the return of the portfolio tracks the return of the index) and trading and administrative expenses. Generally, the more securities held the lower the tracking error, however, the greater the trading and administrative costs. [redacted] will review and adjust the number of holdings as needed, but in no case will the portfolio contain less than 500 securities.

Each month, the Public Equity Team will monitor the realized and predicted tracking error of the Account. On an ongoing basis, periodic rebalancings will be executed as appropriate to maintain the annualized predicted tracking error (as measured by BARRA) below 20 basis points.

[redacted] is expected to act in a prudent manner and comply with all laws concerning investment and fiduciary responsibilities, including ERISA's prohibited transaction regulations.

[redacted] has hired [redacted] to conduct all proxy voting for the Account.

QWEST PENSION TRUST
INVESTMENT MANAGEMENT GUIDELINES

MARKET FUND
Russell 1000 Index Fund
Mellon Trust Accounts: USWG0081
Effective Date: October 1, 2004

General
[redacted] is responsible for the construction and ongoing management of portfolios (the "Account") which are expected to produce returns which closely [redacted]. Set forth below are the investment guidelines (the "Guidelines") established for the Account as of the effective date noted above.

Risk and Return Objectives
The returns of the Account are expected to track the FR1000 index returns within 25 basis points over any three-year period, after adjusting for pricing differences between the index and portfolio. Portfolio performance will be expected to closely approximate the FR1000 index returns over shorter periods of time.

Investment Approach and Strategy
[redacted] will construct an optimized portfolio which closely matches the risk and industry characteristics of the FR1000 index. The optimization process, using the BARRA software, selects an optimal portfolio to match the risk and industry characteristics of the FR1000 index. The number of securities held in the portfolio is a trade-off between tracking error (how closely the return of the portfolio tracks the return of the index) and trading and administrative expenses. Generally, the more securities held the lower the tracking error, however, the greater the trading and administrative costs [redacted] will review and adjust the number of holdings as needed, but in no case will the portfolio contain less than 500 securities.

Each month, the Internal Team will monitor the realized and predicted tracking error of the Account. On an ongoing basis, periodic rebalancings will be executed as appropriate to maintain the annualized predicted tracking error (as measured by BARRA) below 25 basis points.

[redacted] is expected to act in a prudent manner and comply with all laws concerning [redacted] responsibilities, including ERISA's prohibited transaction regulations.

[redacted] has hired [redacted] to conduct all proxy voting for the Account.

Investment Criteria
Equity securities
The primary emphasis of the Account will be to invest in publicly traded equity securities which are members of the FR1000. If the Account should come to hold securities that are not members of the FR1000, such noncompliance will not be deemed a breach of these Guidelines, but it shall be reported as part of the monthly reporting process. In addition, without regard to cause, the Account shall be brought into compliance in a timely and orderly manner.

QWEST PENSION TRUST
INVESTMENT MANAGEMENT GUIDELINES

ENHANCED EQUITY INDEX
Mellon Trust Account: USWF5000
Effective Date: June 4, 2001

General
[redacted] responsible for the construction and ongoing management of an enhanced equity index portfolio (the "EEI" or the "Account") maintained as [redacted]. Set forth below are the investment guidelines (the "Guidelines") established for the EEI as of the effective date noted above.

Risk and Return Objectives
It is expected that the total return for the EEI will exceed the benchmark index:

The Frank Russell 1000

Over the long-term, the EEI is expected to achieve a minimum excess return of 50 basis points and maintain a tracking error target of 1.0% relative to the benchmark measured on any rolling three-year basis, after adjusting for pricing differences between the index and portfolio.

There are no specific requirements for, or restrictions against, the realization of net investment gains or losses during a calendar year.

Investment Approach and Strategy
The EEI's expected excess returns are driven by value investing and overreaction of market participants. The EEI is the result of a research and development project which focused on developing an FR1000 index-like strategy which overweights value stocks and underweights glamour stocks relative to the index.

Value stocks are defined as stocks that have performed poorly in the past *and are expected* by market participants in general to perform poorly in the future. Glamour stocks are defined as stocks that have performed well in the past *and are expected* by market participants to perform well in the future. Value and Glamour stocks are identified using cashflow-to-price and historical growth-in-sales data. The strategy is based on the fact that Value stocks have historically achieved higher returns than Glamour stocks.

Construction of the EEI portfolio focuses on stock-specific expected excess returns determined by Value and Glamour scores. Based on the expected excess returns, a BARRA optimization is used to determine the portfolio that has the maximum return for a predicted tracking error relative to the FR1000 index of 100 basis points annually.

The EEI will be re-optimized four times per year, based on expected excess returns generated from current cashflow-to-price and growth-in-sales information from *Compustat*. The predicted tracking error of the Account will be monitored on a monthly basis and is targeted at 100 basis points. If the annualized predicted tracking error exceeds 125 basis points, the Account will be rebalanced to a 100-basis point predicted tracking error. If the return of the Account differs from rebalanced to a 100-basis point predicted tracking error. If the return of the Account differs from the FR1000 index by more than 200 basis points over any calendar quarter, a complete analysis of the tracking difference will be undertaken. If the reason for the difference can not be satisfactorily addressed, the EEI will be terminated upon the concurrence of the Director Team and the Executive Director.

During periods between rebalances, Value stocks will be monitored for negative earnings surprises. Should a stock report a negative surprise below a certain trigger level, it will be sold from the portfolio. The Public Equity Team will monitor the cash position of the Account and will reinvest cash balances when the portfolio manager determines that the predicted tracking error and/or the Value/Glamour/Neutral exposures require adjustment. Cash may be invested in stocks from the most recent Value universe, ETF's, or equitized with U.S. equity index futures.

[redacted] is expected to act in a prudent manner and comply with all laws concerning investment and fiduciary responsibilities, including ERISA's prohibited transaction regulations.

QAM has hire[redacted] to conduct all proxy voting for the EEI.

Investment Criteria

Equity securities

The Account will invest in publicly traded equity securities, which are members of the FR3000. If the Account should come to hold securities that are not members of the FR3000, such noncompliance will not be deemed a breach of these Guidelines, but it shall be reported as part of the monthly reporting process. In addition, without regard to cause, the Account shall be brought into compliance in a timely and orderly manner.

Decisions on corporate actions such as tender and exchange offers will be documented. For any stock affected by a corporate action, the decision will be taken as appropriate to the Account's tracking error and return objectives, while minimizing trading costs and considering liquidity issues.

The Account may invest in exchange traded funds (ETF's), based on U.S. equity indexes, for the purpose of eliminating cash drag and maintaining the targeted tracking error. The use of ETF's will be based on liquidity and other considerations versus U.S. index futures at the discretion of [redacted] The market value of ETF's shall not exceed 5% of the Account.

Equity positions in Qwest Communication International Inc. companies, or companies controlled by Qwest Communications International Inc. shall be permitted as long as the transactions comply with all applicable Securities and Exchange Commission, ERISA, and Internal Revenue Service regulations governing the purchase and/or sale of "employer securities". The Account is not subject to Qwest Communications International Inc. insider trading restrictions as a component of the maintenance of an index-like portfolio.

The Account may not sell securities short, trade on margin, or purchase non-U.S. dollar denominated securities.

QWEST PENSION TRUST
INVESTMENT MANAGEMENT GUIDELINES

ENHANCED EQUITY INDEX
Mellon Trust Account: USWF5000
Effective Date: August 29, 2005

General
is responsible for the construction and ongoing management of an enhanced equity index portfolio (the "EEI" or the "Account") maintained as part of the Qwest Pension Trust (the "Trust"). Set forth below are the investment guidelines (the "Guidelines") established for the EEI as of the effective date noted above.

Risk and Return Objectives
It is expected that the total return for the EEI will exceed the benchmark index:

The Russell 1000

Over the long-term, the EEI is expected to achieve a minimum excess return of 87 basis points and maintain a tracking error target of 175 basis points relative to the benchmark measured on any rolling three-year basis.
There are no specific requirements for, or restrictions against, the realization of net investment gains or losses during a calendar year.

Investment Approach and Strategy
The EEI's expected excess returns are driven by value investing and overreaction of market participants. The EEI is the result of a research and development project which focused on developing an FR1000 index-like strategy which overweights value stocks and underweights glamour stocks relative to the index.

Value stocks are defined as stocks that have performed poorly in the past *and are expected* by market participants in general to perform poorly in the future. Glamour stocks are defined as stocks that have performed well in the past *and are expected* by market participants to perform well in the future. Value and Glamour stocks are identified using cashflow-to-price and historical growth-in-sales data. The strategy is based on the fact that Value stocks have historically achieved higher returns than Glamour stocks.

Construction of the EEI portfolio focuses on stock-specific expected excess returns determined by Value and Glamour scores. Value and Glamour scores are refined by integrated momentum and earnings quality rankings. Based on the expected excess returns, a BARRA optimization is used to determine the portfolio that has the maximum return for a predicted tracking error relative to the FR1000 index of 175 basis points annually.

The EEI will be re-optimized four times per year, based on expected excess returns generated from current cashflow-to-price and growth-in-sales information from *Compustat.* The predicted tracking error of the Account will be monitored on a monthly basis and is targeted at 175 basis points. If the annualized predicted tracking error exceeds 225 basis points, the Account will be reviewed with the Internal Committee to determine whether a rebalance to a 175-basis point predicted tracking error is needed. If the return of the Account differs from the FR1000 index by more than 260 basis points over any calendar quarter, a complete analysis of the tracking difference will be undertaken. If the reason for the difference can not be satisfactorily addressed, the EEI will be terminated upon the concurrence of the

will monitor the cash position of the Account and will reinvest cash balances when the portfolio manager determines that the predicted tracking error and/or the Value/Glamour/Neutral exposures require adjustment. Cash may be invested in stocks from the most recent Value universe, ETF's, or equitized with U.S. equity index futures.

is expected to act in a prudent manner and comply with all laws concerning investment and fiduciary responsibilities, including ERISA's prohibited transaction regulations.

QAM has hired to conduct all proxy voting for the EEI.

Investment Criteria

Equity securities

The Account will invest in publicly traded equity securities which are members of the FR3000. If the Account should come to hold securities that are not members of the FR3000, such noncompliance will not be deemed a breach of these Guidelines, but it shall be reported as part of the monthly reporting process. In addition, without regard to cause, the Account shall be brought into compliance in a timely and orderly manner.

Decisions on corporate actions such as tender and exchange offers will be documented. For any stock affected by a corporate action, the decision will be taken as appropriate to the Account's tracking error and return objectives, while minimizing trading costs and considering liquidity issues.

The Account may invest in exchange traded funds (ETF's), based on U.S. equity indexes, for the purpose of eliminating cash drag and maintaining the targeted tracking error. The use of ETF's will be based on liquidity and other considerations versus U.S. index futures at the discretion of The market value of ETF's shall not exceed 5% of the Account.

No positions in Qwest Communications International Inc. securities will be permitted.

The Account may not sell securities short, trade on margin, or purchase non-U.S. dollar denominated securities.

Diversification

There are two constraints that will be applied to the Barra optimization process at every rebalance:

1. Security overweight max position is 75 basis points
   Security underweight max position is 0
2. Barra sectors exposures shall be within +/- 100 basis points relative to benchmark

Fixed income

The Account may not invest in fixed income securities other than cash equivalents.