

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

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

EDWARD J. KERBER,  
NELSON B. PHELPS,  
JOANNE WEST,  
NANCY MEISTER,  
THOMAS J. INGEMANN, JR.,  
Individually, and as Representative of plan participants  
and plan beneficiaries of the QWEST PENSION PLAN,

Plaintiffs,

vs.

QWEST PENSION PLAN,  
QWEST EMPLOYEES BENEFIT COMMITTEE,  
QWEST PENSION PLAN DESIGN COMMITTEE,  
QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

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**DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS THE  
SECOND AND THIRD CLAIMS FOR RELIEF SET FORTH IN THE SECOND  
AMENDED COMPLAINT ASSERTED BY NAMED PLAINTIFFS EDWARD  
KERBER AND NELSON PHELPS.**

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Defendants Qwest Pension Plan, Qwest Employees Benefit Committee, Qwest Pension Plan Design Committee and Qwest Communications International, Inc. (collectively "Qwest" or "Defendants"), through their counsel Baird & Kiovsky, LLC, and pursuant to Fed. R. Civ. P. 12(b)(1), submit the following Reply Brief in Support of Defendants Motion to Dismiss the Second and Third Claims for Relief Set Forth in the Second Amended Complaint asserted by Named Plaintiffs Edward Kerber and Nelson Phelps.

## INTRODUCTION

Defendants' Motion to Dismiss is a narrow one. Defendants seek dismissal for lack of standing and ripeness only of Named Plaintiffs Edward J. Kerber and Nelson B. Phelps ("Pre-2004 Retirees") Second and Third claims for Relief. The Second Claim is titled "Violation Due to Illegal Elimination of Pension Death Benefits". The Third Claim seeks a clarification of Pre-2004 Retirees' right to future death benefits pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Second Amended Compl. at ¶¶ 166-192. Qwest has not moved to dismiss the Pre-2004 Retirees' First or Fourth Claims for Relief or any of the claims asserted by the other three named plaintiffs ("Post-2004 Retirees").

Notwithstanding the narrow confines of Qwest's Motion to Dismiss, Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss ("Plaintiffs' Response") addresses all four claims asserted by all five named plaintiffs. Plaintiffs' lengthy and confusing reiteration of the Amended Complaint attempts to obscure a simple, yet critical, fact: Qwest has not eliminated the death benefit for Pre-2004 Retirees and has no present intent to do so. Kerber and Phelps allege merely a risk of future harm, which is insufficient to confer standing or to invoke the jurisdiction of this Court.

Unless and until Qwest changes the Death Benefit for Pre-2004 Retirees it is impossible to know the contours of any future class. Named Plaintiffs Kerber and Phelps may be unaffected entirely by any change in the benefit. Plaintiffs Kerber and Phelps will not suffer undue hardship if the Court were to decline jurisdiction in the present case.

## ARGUMENT

### **I. This Court Lacks Subject Matter Jurisdiction Over the Pre-2004 Retirees Second and Third Claims for Relief**

Plaintiffs' Second Claim for Relief asserts Qwest transferred excess pension plan assets as permitted by Section 420 of the Internal Revenue Code, 26 U.S.C. § 420 beginning in 1998. By doing so, according to Plaintiffs, accrued pension benefits of participants and beneficiaries, including the death benefit, became vested. Second Amended Complaint at ¶¶ 167-170.<sup>1</sup> Thus, the argument continues, the 2003 Plan amendment that eliminated the Death Benefit for Post-2004 Retirees violated the vesting requirements of Section 420. Second Amended Complaint at ¶ 177. Even assuming this argument has merit under the law of ERISA, which it does not, it applies only to the Post-2004 Retirees. It is undisputed that the 2003 plan amendment did not apply to the Pre-2004 Retirees. Kerber and Phelps have suffered no injury as a result of the 2003 plan amendment and, therefore, lack standing to assert the Second Claim for Relief alleging that the elimination of the Death Benefit for Post-2004 Retirees violates the requirements of Section 420.

As asserted by Kerber and Phelps, the Third Claim for Relief for benefits is based on a hypothetical injury—the mere possibility that Qwest may eliminate the Death Benefit at some uncertain future time. Kerber and Phelps concede Qwest has not terminated the benefit for Pre-2004 Retirees, they concede there is no current proposal to do so, Plaintiffs' Response at 5-6, and they do not contest that *if* the benefit is eliminated

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<sup>1</sup> Plaintiffs acknowledge that the Pension Plan explicitly excludes the Pension Death Benefit from the definition of Accrued Benefit, Second Amended Complaint at ¶117, but somehow claim that the Pension Death Benefit was required to be vested pursuant to the requirements that accrued benefits vest under Section 420.

Named Plaintiffs Kerber and Phelps may not be impacted. Thus, Plaintiffs have acknowledged that they have not suffered an injury in fact. Plaintiffs fail to cite a single case in which a court agreed to decide whether a plan sponsor has the right to alter an ERISA benefit *before* the change was made under 29 U.S.C. § 1132(a)(1)(B).

Moreover, Plaintiffs Kerber and Phelps fail to show how they would suffer undue hardship if the Court declines jurisdiction in the present case. Plaintiffs' merely claim that their Second and Third claims are related to their breach of fiduciary duty claims. This, however, is not a "direct and immediate dilemma" sufficient to establish undue hardship under the ripeness analysis. See, e.g., Morgan v. McCotter, 365 F.3d 882, 891 (10<sup>th</sup> Cir. 2004). Delaying resolution of a case until plaintiffs actually suffer a concrete injury "cannot itself constitute an independent harm [.]" Id.

Unable to articulate an injury in fact, Plaintiffs next assert Qwest acknowledged the existence of a "case or controversy" by virtue of the plan administrator's denial of the administrative claims submitted by Plaintiff Phelps. See Plaintiffs' Response at 18-19. This argument fails for several reasons. First, ERISA requires every plan administrator to "provide a statement of the claimant's right to bring a civil action under Section 502(a) of the Act [29 U.S.C. Section 1132] following an adverse benefit determination..." 29 C.F.R. §. 2560.503-1(g)(iv). This provision does not – and cannot - confer the power to determine federal jurisdiction on plan administrators. Second, Qwest denied Phelps' administrative claim because it was premature. See Second Amended Complaint at ¶ 36. Even assuming Qwest had conceded jurisdiction, the parties cannot consent to subject matter jurisdiction where none exists. Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinee, 456 U.S. 694, 701 (1982).

Given the speculative nature of the Second and Third Claims for Relief asserted by Plaintiffs' Kerber and Phelps they cannot establish the elements of standing or ripeness. Accordingly, this Court lacks subject matter jurisdiction over these claims.

WHEREFORE, Defendants respectfully request that the Court dismiss the Second and Third Claims for Relief asserted by Named Plaintiffs Kerber and Phelps.

Respectfully submitted this 30<sup>th</sup> day of January, 2006.

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**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on January 30, 2006, I electronically filed the foregoing DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS THE SECOND AND THIRD CLAIMS FOR RELIEF SET FORTH IN THE SECOND AMENDED COMPLAINT ASSERTED BY NAMED PLAINTIFFS EDWARD KERBER AND NELSON PHELPS to the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

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and, I also certify that I have e-mailed or served the document via U.S. Mail, postage prepaid, to the following non-CM/ECF participants:

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