IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **05-cv-00478-MSK-PAC**

EDWARD J. KERBER,
NELSON B. PHELPS,
JOANNE WEST,
NANCY A. 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.

PLAINTIFFS' RESPONSE IN OPPOSITION To [Docket No. 34]
DEFENDANTS' December 22, 2005 MOTION TO DISMISS

Counsel for Named Plaintiffs EDWARD J. KERBER and NELSON B. PHELPS, JOANNE WEST, NANCY A. MEISTER and THOMAS J. INGEMANN, JR. submits their brief in opposition to Defendants' Fed. R. Civ. P. Rule 12(b)(1) Motion to Dismiss filed on December 22, 2005 [Docket No. 34]. Defendants' motion to dismiss is directed *only* against Plaintiffs KERBER's and PHELPS's participation in the Second and Third Claims set forth in ¶¶ 166-192 of the Second Amended Complaint. Defendants' motion is not directed against KERBER's and PHELPS's participation in the First and Fourth Claims and is not directed against any of the claims made by Named Plaintiffs WEST, MEISTER and INGEMANN. For the following reasons, this Court has subject matter jurisdiction, there is a true "case" or "controversy," and Defendants' motion to dismiss should be denied.

I. PRELIMINARY STATEMENT and ALLEGATIONS OF THE SECOND AMENDED COMPLAINT. [1]

Named Plaintiffs are participants in the Qwest Pension Plan (PLAN), each having more than 20 years employment service and having earned a retirement service pension. The Plaintiffs assert four claims for relief based upon ERISA. For many decades, a stable feature of the PLAN (and predecessor plans) has been a "Pension Death Benefit" payable upon the death of a retiree receiving a service pension and delivered to his or her surviving spouse or dependent beneficiaries. Qwest and its predecessors have a long history of treating the Pension Death Benefit as an "accrued" or protected fixed amount pension benefit payable from trust fund assets.

Plaintiff contend that AT&T and U S WEST, acting as both PLAN sponsors and PLAN administrators, designated and treated the "Pension Death Benefit" under the PLAN to be a vested, protected or accrued defined pension benefit. For instance, in all of the SPDs issued during years 1977 through at least 1996, under the heading "Type of Plan" the PLAN fiduciaries affirmatively represented that under the definitions of ERISA, the PLAN was "classified" as a "'**defined** benefit plan' for service and deferred vested pension purposes and for payment of certain sickness death benefits upon the death of a Pension Plan participant." [2] Plaintiffs contend that when U S WEST and PLAN administrators classified and represented the Pension Death Benefit to be a defined benefit plan, they elected to treat the Pension Death Benefit to be an entitlement, an "accrued benefit" under ERISA Section 3(23), 29 U.S.C. § 1002(23), subject

---

[1] This is simply a summary, and Plaintiffs incorporate all of the allegations of the Second Amended Complaint which allegations Defendants accept as true for purposes of their Motion to Dismiss. See Defendants' Brief, at p. 2, fn. 1).

[2] The PLAN sponsor deliberately chose not to classify the "payment of certain sickness death benefits" as a "welfare benefit." At the very least, that language appearing in all of the SPDs representing the "payment of certain sickness death benefits" as a "defined benefit plan" is positive indication of ambiguity, something to make you scratch your head, thus, opening the door to consideration of extrinsic evidence, including testimony of former PLAN sponsor executives, former COMMITTEE members and former PLAN administrators.

to strict vesting requirements.

When Named Plaintiffs KERBER and PHELPS retired from U S WEST and made their respective retirement elections and had to choose the structure of benefits to be received for themselves and their spouses, they specifically and detrimentally relied upon representations and assurances classifying the Pension Death Benefit to be protected, not a "take away" benefit. The Pension Death Benefit was a *huge* financial component of KERBER's and PHELPS's respective financial and estate planning. For KERBER and PHELPS and most similarly situated retirees, the Pension Death Benefit is the equivalent of the retiree's last annual salary at U S WEST.

In July 2000, U S WEST merged with Qwest, the surviving named company. Named Plaintiffs contend that after U S WEST's merger with QWEST and up until at least September 2003, PLAN administrators continued to treat the Pension Death Benefit and disseminate formal information to lead the retirees to believe the Pension Death Benefit was a vested benefit.

The Consequences of Qwest Making I.R.C. Section 420 Transfers of Pension Monies was to *Vest* Pension Death Benefits For *All* PLAN Participants as of 1998-2001.

As explained in the Second Amended Complaint at ¶¶ 167-176, beginning in 1998, the PLAN sponsor acted to take advantage of the provisions of Sections 401(h) and 420 of the Internal Revenue Code, 26 U.S.C. §§ 401(h), 420, which enable sponsors of defined benefit plans, under certain strictly defined circumstances, to make a "qualified transfer" and use certain "excess assets" in the pension plan to fund retiree medical benefits for persons who are retired participants in the same pension plan. Among the conditions and limitations imposed by Section 401(h) and 420 of the Internal Revenue Code are the requirements that pension plan assets may be subject to such a transfer only if, *inter alia*, the then existing funding level of the plan exceeds, and the funding level thereafter will remain in excess of, 125% of full funding as

defined by the Internal Revenue Code. Another mandatory requirement imposed by Section 420(c)(2) of the Internal Revenue Code is that the pension benefits of all participants and beneficiaries which were accrued under the PLAN before the date of transfer must become vested and nonforfeitable, just as they would in the event that the PLAN had terminated immediately before the transfer.

The PLAN sponsor made several consecutive Section 420 transfers of pension assets in the PLAN as follows: in December 1998 approximately $60 million; in November-December 1999 approximately $120 million; in December 2000 approximately $111 million; and in December 2001 approximately $120 million. Each time the PLAN witnessed a transfer of pension assets pursuant to IRC § 420, the PLAN required (in Section 11.2(b)(ii)) that, upon PLAN termination or partial termination, plan assets are to be applied, after making the payments required by ERISA Section 4044, 29 U.S.C. § 1344, "to make provision for the payment of death benefits attributable to deaths occurring prior to the date of termination which would have been payable from the Trust Fund, and for the payment, upon the deaths of retired employees who are on the pension roll as of the date of termination and of employees eligible as of that date for retirement, of death benefits which would have been payable from the Trust Fund, had the Plan not been so terminated." The PLAN *next* required (in Sections 11.2(b)(iii), (iv), (v) and (vi)) that plan assets be applied for the payment of deferred vested pensions starting at age sixty-five and continuing until the death of the former employee.

In short, the PLAN's provisions at the time of each IRC Section 420 transfer assigned at termination of the PLAN a <u>higher</u> priority to the payment of Pension Death Benefits than payment of deferred vested pension benefits. This provision was a standard feature of the PLAN and all Named Plaintiffs contend it reflects unambiguous PLAN sponsor intent to treat the Pension Death Benefit as an accrued nonforfeitable vested benefit when a participant retired or

was eligible for a retirement service pension. In accordance with the requirements of IRC § 420, and applicable federal regulations, each time the PLAN witnessed the IRC § 420 transfer, Named Plaintiffs' and proposed class members' pension benefits became nonforfeitable in the same manner which would have been required if the PLAN had been terminated immediately before each IRC § 420 transfer. Therefore, in conformity with the requirements of IRC § 420, the PLAN included terms that vested all accrued benefits as of the date of each IRC § 420 transfer.

Since the first IRC § 420 transfer in December 1998, the PLAN has provided at Section 14.4 (a) that "[t]he Accrued Benefit of each Participant who had not terminated employment with the Company and all Participant Companies as of the date of a Qualified Transfer shall become Vested and nonforfeitable in the same manner which would be required if the Plan had terminated immediately before such Qualified Transfer." Therefore, Named Plaintiffs contend that, due to there being IRC § 420 transfers in years 1998-2001, the combined operation of IRC § 420 and the aforesaid governing PLAN language made the Pension Death Benefit an accrued nonforfeitable vested benefit.

September 2003 Threat to Take Action Contrary to Restraints Imposed Upon the PLAN Sponsor Arising From the IRC § 420 Transfers During Years 1998-2001.

In September 2003, Qwest formally announced to Plaintiffs that "Qwest is considering eliminating the death benefit for all retirees regardless of their retirement date." A letter to be mass mailed was fully prepared and signed. (See Exhibit 2 filed herewith). This was contrary to Named Plaintiffs' understanding, and they first realized they had been duped into believing the Pension Death Benefit was a protected benefit. Qwest's announced position on the Pension Death Benefit came too late for Plaintiffs to make other financial arrangements for their spouses and beneficiaries so as to replace the expected Pension Death Benefit. To the extent Named

Plaintiffs had been duped and had acted in reliance on prior statements about the Pension Death Benefit, in September 2003, they discovered grounds for assertion of ERISA statutory claims and the statute of limitations began to run on any such claims.

After Qwest Defendants' September 2003 announcement, there was a widespread uproar from U S WEST/Qwest retirees protesting Qwest leadership's threat to end the Pension Death Benefit. Thus, Defendants thought about the matter and, then, told KERBER and PHELPS that the decision to completely eliminate the Pension Death Benefit was being delayed. It is noteworthy that the decision has not been formally rescinded; implementation has merely been delayed. The announcement to merely delay implementation of a decision to completely eliminate the Pension Death Benefit created more uncertainty and anguish amongst retirees.

In approximately September 2003, KERBER and PHELPS learned Qwest Defendants had inserted new language in restated PLAN documents classifying the Pension Death Benefit as not being an accrued defined pension benefit. KERBER and PHELPS wanted original protective language appearing in former PLAN documents, including past SPDs, reinserted into the governing PLAN document. Accordingly, an internal ERISA claim was submitted on behalf of Named Plaintiffs and a proposed class of retirees and sent to Qwest Defendants seeking a resolution that the Pension Death Benefit is a protected pension benefit and would neither be eliminated nor reduced. Qwest Defendants formally denied the request and confirmed that all administrative remedies have been exhausted and that an action under ERISA § 502)(a) may be commenced. (Second Amended Complaint at ¶ 41). Essentially, Qwest Defendants' took the position there is no need to further develop any administrative record.

Qwest Defendants have repeatedly told KERBER and PHELPS that the company's position is that senior leadership could decide *at any time* to end the Pension Death Benefit for KERBER, PHELPS and similarly situated retirees. Defendants have been rather coy about the

situation, unwilling to reveal deliberations and the exact decisions that have been made. Since the Pension Death Benefit is so critical to not only KERBER and PHELPS, but to thousands of Qwest retirees and their spouses and their beneficiaries, and Qwest senior leadership continue to hold out the threat the company may some day completely eliminate that benefit, KERBER and PHELPS exercised their rights under ERISA § 502)(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to seek an order that will clarify PLAN participants' rights to future Pension Death Benefits under PLAN terms and for other declaratory, injunctive and appropriate equitable relief. The Court has jurisdiction of the claims for Relief based upon the civil enforcement provisions of ERISA, 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), 1132(a)(3), 1132(e)(1), and 1132(f), and upon 28 U.S.C. §§ 1331 and 1337.

The Illegal PLAN Amendment and Resulting Illegal Action Taken by Qwest.

In numerous versions of the Summary Plan Description (SPD) and PLAN publications issued to KERBER, PHELPS and the proposed class of PLAN participants, both before and after starting their respective retirements, there were fiduciary representations that the Pension Death Benefit was an ***entitlement***. (See the numerous SPDs quoted in the Second Amended Complaint at ¶¶s 74-90). Plaintiffs contend that in **none** of those PLAN publications and SPDs issued by AT&T (Baby Bells), U S WEST and Qwest were there statements and disclosures to advise PLAN participants that the sponsoring company reserved the right to reduce or eliminate the Pension Death Benefit after a PLAN participant had retired, in the absence of a PLAN termination. (Second Amended Complaint at ¶ 93). [3]

---

[3] For instance, in a SPD mass mailed to retirees in April 2003, Qwest Defendants reported the following: "Under what circumstances will Sickness/Accidental Death Benefits [Pension Death Benefit] not be paid?

- If a claim for benefits is received more than one year following the death of an eligible participant;

Notwithstanding all of the prior SPD representations and that Pension Death Benefits became vested and nonforfeitable due to the IRC Section 420 transfers during years 1998-2001, Qwest Defendants decided to partially eliminate the Pension Death Benefit. On December 5, 2003, the PLAN sponsor executed PLAN Amendment 2003-5 which changed PLAN Section 7.3, *inter alia*, as follows: ". . . no Death Benefits shall be made under Section 7.3(a), (b), or (d) with respect to a Former Participant who Terminates on or after January 1, 2004. . . . no lump sum payments shall be made under Section 7.3(c) on or after January 1, 2004, except to the extent the Participant Terminates prior to January 1, 2004. . . " (Second Amended Complaint at ¶177). As of the date of execution of PLAN Amendment 2003-5, all Named Plaintiffs had earned a retirement service pension, all had become entitled to receive the Pension Death Benefit and none consented to the partial termination of the Pension Death Benefit.

PLAN Amendment 2003-5 is contrary to PLAN provisions controlling when KERBER and PHELPS retired in year 1990. When KERBER and PHELPS retired, the controlling PLAN document stated at Section 4.8: . . . "The Company undertakes to preserve the integrity of the U S WEST Management Pension Fund as a fund held in trust or by an insurance company or companies as permitted by law to be applied solely to pension and death benefits purposes and to

---

- If a suit for damages on account of the death of an employee is brought against any Participating Company or against any other company with which arrangements have been made for the interchange of benefit obligations (for example, an Interchange Company under the MPA);
- If there are any claims (other than under the Plan) presented for damages on account of the death of an employee is brought against any Participating Company or against any other company with which arrangements have been made for the interchange of benefit obligations; or
- If the employee's TOE [beginning term of employment] date is March 1, 1993 or later
- You are eligible for a Sickness, but no Accident, Death benefit if you de while on a transitional or surplus transitional leave, even if you are not terminated from employment.

(See <u>Exhibit 1</u> filed herewith). Notably, Qwest Defendants did not include in this list of disqualifying circumstances a clear disclosure that Qwest Defendants considered the Pension Death Benefit to be an ancillary or welfare benefit subject to being reduced or eliminated at any time, at the whim of Qwest Defendants.

take such action as may be necessary or appropriate to insure the application of the entire fund to such purposes." PLAN Amendment 2003-5 was created so as to remove millions of dollars of liabilities for Pension Death Benefits and allow QWEST to show a curtailment income gain for corporate income reporting purposes. PLAN Amendment 2003-5 is completely contrary to the long standing purposes of the PLAN.

Therefore, *all* Named Plaintiffs contend in the Second Claim for Relief that PLAN Amendment 2003-5 which partially terminated Pension Death Benefits conflicts with the PLAN's prior commitments and is null and void. Named Plaintiffs contend this PLAN amendment violates the anti-cutback provisions of ERISA Section 204(g), 29 U.S.C. § 1054(g), since Pension Death Benefits, part of the accrued retirement service pensions earned by numerous PLAN participants, have been eliminated. Named Plaintiffs contend the actions by Defendants were a violation of the PLAN provisions which expressly provided for the full vesting of all benefits under the PLAN which were accrued as of each IRC § 420 transfer of pension assets. Since January 1, 2004, PLAN administrators have wrongfully withheld payment of Pension Death Benefits for PLAN participants retiring on or after January 1, 2004. Named Plaintiffs have standing to challenge PLAN Amendment 2003-5 and to seek an order reforming the PLAN and striking that amendment. Named Plaintiffs seek an order requiring the PLAN to notify and make payment of the correct amount of the Pension Death Benefit, together with prejudgment and post-judgment interest, to each PLAN participant and qualified mandatory beneficiary to whom the Pension Death Benefit became payable after January 1, 2004.

Likewise, all Named Plaintiffs have standing to pursue their claim that Qwest Defendants be ordered to correct a current SPD and other formal PLAN documents, including a Summary of Material Modifications, which papers falsely state and classify the Pension Death Benefit as an ancillary benefit, a welfare benefit, subject to reduction or elimination at any time. Pursuant to

ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), Named Plaintiffs request this Court to grant injunctive relief requiring Defendants to correct faulty PLAN language and issue a corrected SPD with language disclosing the Pension Death Benefit is a vested, protected or accrued defined pension benefit, not subject to reduction or elimination absent a PLAN termination.

II. ARGUMENT.

A. This Federal Court Has Subject Matter Jurisdiction of Named Plaintiffs' Claims Arising Under Federal Law ERISA.

Federal courts have exclusive jurisdiction over suits for ERISA breach of fiduciary duty. 29 U.S.C. § 1132(e)(1). The federal district courts have jurisdiction "without respect to the amount in controversy or the citizenship of the parties" under ERISA § 502(f), 29 U.S.C. § 1132(f) For example, a federal court has jurisdiction to decide questions of the purposes for which a pension fund is established. *Lipton v. Consumers Union of the United States*, 37 F. Supp. 2d 241, 246 (S.D.N.Y. 1999). Likewise, federal courts have jurisdiction of causes of action under ERISA Section 502(a)(1)(B), in which a participant or beneficiary seeks "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B); *see Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 418 (6th Cir. 1998) (noting that ERISA Section 502(a)(1)(B) "provides a contract-based cause of action to participants and beneficiaries to recover benefits, enforce rights, or clarify rights to future benefits under the terms of an employee benefit plan"). Venue is not an issue. [4]

Defendants' contend KERBER's and PHELPS's participation in the Second and Third

[4] ERISA's venue provision (Section 502(e)(2), 29 U.S.C. § 1132(e)(2)), provides that venue is appropriate where the plan is administered, where the breach took place, or where a defendant resides or may be found. This provision is liberally interpreted as Congress intended to expand rather than restrict the ERISA plaintiff's choice of forum. *Varsic v. U.S. Dist. Ct. for Central Dist.*, 607 F.2d 245, 247 (9th Cir. 1979).

Claims for Relief should be dismissed arguing these two Named Plaintiffs have not asserted a "case" or "controversy," that they have suffered no injury and their claims are not ripe for judicial review. [5] Article III, Section 2 of the United States Constitution extends the federal judicial power only to "cases" or "controversies." A dispute is an Article III "case" or "controversy" if a plaintiff can establish what is known as "constitutional standing." *Carolina Cas. Ins. Co. v. Pinnacol Assurance*, 425 F.3d 921, 926 (10th Cir. 2005). Constitutional standing exists if the plaintiff: show[s] [that] he asserts a claim showing (1) "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* (quotation omitted). As the Supreme Court has explained, "Congress may enact statutes creating legal rights, the invasion of which creates [constitutional] standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (stating that "[t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights," and that this "principle involve[s] Congress' elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law") (quotations omitted); *Akins v. Fed. Election Comm'n*, 101 F.3d 731, 736 (D.C. Cir. 1996) (*en banc*) ("Although Congress may not "create" an Article III injury that the federal judiciary would not recognize, . . . Congress can create a legal right (and, typically, a cause of action to protect that right) the interference with

---

[5] The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 n.18 (1993). Because a ripeness concern challenges the federal court's power to resolve a case, the court must be convinced the questions presented satisfy the several ramifications of "case or controversy" jurisdiction. Courts apply the analysis set forth in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

which will create an Article III injury." (citations omitted)), *vacated on other grounds*, 524 U.S. 11 (1998). In determining whether a case is ripe for judicial review, courts apply the analysis set forth in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Broadly, *Abbott Laboratories* cautions against the courts "entangling themselves in abstract disagreements." 387 U.S. at 148-49. To assure a live "case" or "controversy," *Abbott* instructs courts to assess "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id*. at 149.

Here, this civil action clearly presents a "case" or "controversy" concerning statutory rights created by Congress and causes of action given to KERBER and PHELPS under ERISA to protect those rights, to-wit: 1) alleged breaches of ERISA fiduciary duty and ERISA estoppel; 2) ERISA statutory right to enforce the legal affect of IRC Section 420 transfers which nullifies PLAN Amendment 2003-5; 3) ERISA statutory right to seek federal court clarification of their rights to expected future pension benefits; and 4) ERISA statutory right to have PLAN documents reformed and a corrected SPD issued.

1. Defendants' Motion to Dismiss Makes No Attack on the Second Claim For Relief Which Claim is Based Upon the IRC Section 420 Transfers and Seeks Reformation of the PLAN and Nullification of PLAN Amendment 2003-5.

While Defendants' motion to dismiss is labeled as being directed at KERBER's and PHELPS's participation in both the Second and Third Claims for Relief, Defendants have fully limited their arguments to *only* attacking the Third Claim for Relief, the claim wherein KERBER and PHELPS seek to exercise their rights under ERISA Section 502(a)(1)(B) to obtain federal court declaration and clarification of their rights to future pension benefits. Notably, no where within Defendants' motion to dismiss is there any argument to attack the basis for KERBER's and PHELPS's claims arising from the IRC Section 420 transfers and their claim that PLAN

Amendment 2003-5 must be stricken as null and void. Defendants' supporting brief [Docket No. 35] filed on December 22, 2005 doesn't mention either IRC Section 420 or PLAN Amendment 2003-5. Lacking supportive argument, Defendants' motion to dismiss KERBER's and PHELPS's participation in the Second Claim must be denied.

2. KERBER and PHELPS Have Suffered And Show Injury-in-Fact.

KERBER and PHELPS contend that in September 2003 they first learned the basis for a breach of ERISA fiduciary duty claim when Qwest senior leadership announced to them and other Association of U S WEST Retirees (AUSWR) Board members that Qwest had made the decision to eliminate the Pension Death Benefit because Qwest Defendants' position was that the Pension Death Benefit was *not* a protected vested or accrued pension benefit and Qwest wanted to reduce pension liabilities. (See. e.g., Exhibit 2, September 2, 2003 formal notification letter prepared for mass mailing). At that point in time, KERBER and PHELPS first realized they had been duped. In many prior years Named Plaintiffs were told otherwise and they specifically relied in good faith upon the SPDs and other formal PLAN past contrary representations about the Pension Death Benefit. KERBER and PHELPS contend that if Qwest's position first disclosed to them in September 2003 is legally correct, then past PLAN administrators repeatedly provided them and the proposed class of retirees with contrary written assurances about specific entitlements to the Pension Death Benefit while withholding material information about a substantial risk that loomed in the background.

The past SPDs and publications reported the Pension Death Benefit was an entitlement, meaning a protected benefit. [6] Relying upon those SPDs and official PLAN publications,

---

[6] For example, in March 1993, a PLAN publication was issued containing the following text: "*If you are a participant of the U S WEST Pension Plan as of 2-28-93,* ***you will always remain eligible*** *to a death benefit to the extent an eligible beneficiary under the plan is living*."

KERBER and PHELPS made important and irrevocable financial planning decisions, foregoing the purchase of life insurance as an alternative to the Pension Death Benefit. When Qwest senior management made the September 2003 announcement, Defendants put KERBER and PHELPS on notice that, assuming Qwest leadership was right and the Pension Death Benefit was, indeed, a 'take-away' benefit, KERBER, PHELPS and all the other similarly situated retirees had been mislead all those prior years and there had been a breach of ERISA fiduciary duty. Therefore, since Qwest Defendants made a real threat and formally announced a diametrically opposed position about the Pension Death Benefit, KERBER, PHELPS and other similarly situated retirees have ample basis for pursuing their claim to clarify their rights to future pension benefits.

The injury KERBER, PHELPS and others have suffered is the inability to change their prior pension elections which choices heavily factored in the Pension Death Benefit as an "entitlement" according to previously issued SPDs. (Second Amended Complaint ¶¶ 99-100). Since Qwest Defendants refuse to remove PLAN language that is contrary to prior commitments and representations, KERBER and PHELPS are entitled to participate in the Third Claim for Relief which is brought pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B). As the statute permits, all Named Plaintiffs request this Court to clarify their rights to future Pension Death Benefits under the terms of the PLAN. KERBER and PHELPS join with the other Named Plaintiffs seeking a declaration that those persons receiving a monthly pension annuity and their mandatory beneficiaries, to the extent there are any at time of death, are entitled to the Pension Death Benefit payable from the PLAN. All Named Plaintiffs seek a declaration that persons who retired on or after January 1, 2004 and received a lump sum distribution are entitled to an additional payment representing the unpaid Pension Death Benefit,

---

(Second Amended Complaint ¶ 87).

plus interest.

Moreover, in the Fourth Claim for Relief, all Named Plaintiffs contend the current governing PLAN documents have faulty language contrary to prior commitments and representations that the Pension Death Benefit is an entitlement. The new language classifying the Pension Death Benefit as a mere ancillary or welfare benefit, as opposed to a protected defined pension benefit, is fully traceable to Qwest Defendants' conduct and a favorable ruling by this Court will redress this problem. In this case, relief may take the form of an order to reform the latest PLAN documents to include the original "entitlement" language as set forth in the prior PLAN documents distributed to KERBER, PHELPS and other retirees.

In making their arguments for dismissal, Defendants rely upon several ERISA rulings that are inapposite. In *Devlin v. Transportation Communications Int'l Union*, 175 F.3d 121 (2nd Cir. 1999), the appellate court upheld the trial court's ruling that the plaintiffs lacked standing to deny the union's planned elimination of a Cost of Living Adjustment ("COLA"), because the COLA had not yet been eliminated. Id. at 130. But, unlike in this case, the *Devlin* plaintiffs did not complain about faulty plan language in the governing PLAN documents, nor did the *Devlin* plaintiffs complain about a breach of fiduciary duty. Likewise, in the case of *International Union UAW v. Facet Enterprises*, 601 F. Supp. 292 (S.D. Mich. 1984), the trial court was asked by plaintiffs to enter a declaratory judgment since the employer had threatened to unilaterally reduce benefits. The trial court noted that the union would not consent and since the employer - Facet - "apparently will not reduce benefits without the union's consent and since there is no possibility of obtaining such consent, plaintiff's 'injury' or potential 'injury' is too abstract and speculative to satisfy standing requirements." Id. at 297. In this case, all Named Plaintiffs are not speculating, they specifically contend there has been a breach of fiduciary duty and the current PLAN documents contain faulty language and must be reformed to accurately reflect past

fiduciary commitments about the Pension Death Benefit.

Also, in the case of *United Mine Workers of America Int'l Union v. G.M&W. Coal Co.*, 642 F. Supp. 57 (W.D. Pa 1985), the court dismissed the plaintiffs' claim for a declaration that they had the right to retirement benefits under an ERISA plan because within the complaint "no showing [was] made that defendants have threatened or have contemplated such action." Id. at 62. Here, there is no disputing the fact that Qwest threatened Named Plaintiffs and AUSWR Board members to immediately completely end the Pension Death Benefit and had a letter drafted ready to send out to all retirees. Qwest's current position is that the decision has been delayed, not rescinded. Thus, the threat continues to this day.

3. The Fourth Claim For Relief – Not Subject to Defendants' Motion to Dismiss – is a Claim of Breach of ERISA Fiduciary Duty Due to Faulty Language in Current Governing PLAN Documents and This Fourth Claim Necessarily Requires a Determination of the Same Case or Controversy Giving Rise to the Second and Third Claims For Relief.

Qwest Defendants do not seek dismissal of the Fourth Claim for Relief which is based upon and incorporates the same factual allegations and circumstances giving rise to KERBER's and PHELPS's participation in the Second and Third Claims for Relief. Because KERBER and PHELPS contend they are entitled to the Pension Death Benefits as a vested benefit, they contend Qwest has wrongfully inserted contrary and faulty language in the current governing PLAN documents – language that does not comport with commitments set forth in prior SPDs and other formal information issued to KERBER and PHELPS confirming the Pension Death Benefit was either vested or a protected entitlement. (See Second Amended Complaint at ¶s 193-198). Pursuant to ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), all Named Plaintiffs, including KERBER and PHELPS, seek equitable and remedial relief for the benefit of the PLAN as a whole including an order requiring the Qwest Pension Plan Design Committee, the Qwest Employee

Benefits Committee and PLAN administrators to correct the current faulty language in the PLAN's current SPD and issue a corrected SPD with language disclosing the Pension Death Benefit is a vested, protected or accrued defined pension benefit, not subject to reduction or elimination absent a PLAN termination. (Second Amended Complaint, Prayer ¶ G).

Hence, in order to decide the merits of this Fourth Claim for Relief and whether to grant or deny Named Plaintiff's request for reformed PLAN documents, the Court will necessarily have to make a determination as to KERBER's and PHELPS's rights to future PLAN benefits, the very claim they assert in the Third Claim for Relief, pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B).

In their Fourth Claim for Relief, all Named Plaintiffs are exercising their right to seek appropriate equitable relief to enforce ERISA's requirement that governing plan documents contain correct plan language. For instance, ERISA Section 102, 29 U.S.C. § 1022 provides in pertinent part that a summary plan description (SPD) must contain "the plan's requirements respecting eligibility for participation and benefits . . . [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits. . ." [7] KERBER and PHELPS contend the current SPD issued by Qwest Defendants fails to correctly report the Pension Death Benefit is, indeed, an entitlement as to KERBER and PHELPS and other similarly situated retirees, and the PLAN documents fail to report the Pension Death Benefit is a protected accrued defined pension benefit for which the plan sponsor and any successor company is required to maintain sufficient funding within the trust fund. The maintenance of incorrect plan documents is a clear violation of ERISA and breach of fiduciary duty. None of the Named Plaintiffs are required to suffer "harm" before they become entitled to seek relief for the benefit of the PLAN to have the PLAN

---

[7] In addition to ERISA Section 102, there are a plethora of regulations that require the SPD, the core disclosure document, to contain correct information. *See* 29 C.F.R. § 2520.102-3.

documents reformed to report the truth. *Larson v. Northrop Corp.*, 21 F.3d 1164, 1171 (D.C. Cir. 1994) (holding a plaintiff need not suffer harm (i.e., be denied pension benefits) before he becomes entitled to bring an action under 29 U.S.C. § 1104(a), agreeing with Ninth and Third Circuit decisions)) (citations omitted).

It is unquestionable that *all* Named Plaintiffs have standing to assert a claim for ERISA breach of fiduciary duty and to insure that PLAN documents are accurate. *See Alexander v. Anheuser-Busch Cos., Inc.*, 990 F.2d 536, 538 (10th Cir. 1993) (holding that "[p]ursuant to 29 U.S.C. § 1132, a 'participant' has standing to bring a civil action to enforce his rights under the terms of an ERISA plan or to enforce ERISA's provisions."). KERBER's and PHELPS's participation in the Fourth Claim for Relief - to get the governing PLAN documents reformed and to get a corrected SPD issued - necessarily emphasizes how there is, indeed, a real case or controversy existing with respect to KERBER's and PHELPS's asserted Second and Third Claims for Relief - the legal effect of the IRC Section 420 transfers and a declaration as to their future Pension Death Benefits.

4. There Has Been A *Final* Administrative ERISA Decision Adverse to KERBER's and PHELPS's ERISA Section 502(a)(1)(B) claim.

Qwest Defendants do not dispute that KERBER and PHELPS completely exhausted the PLAN's internal two-step administrative claims process for their claim under ERISA Section 502(a)(1)(B). Those events are fully alleged in the Second Amended Complaint at ¶¶ 33-41). By letter dated May 28, 2004, Defendants reported to Named Plaintiffs that their ERISA Section 302(a)(1)(B) claim was fully denied and reiterated that "the EBC's December 22, 2003 denial letter made clear that its decision was final and that all administrative remedies under the Pension Plan had been exhausted." Acknowledging that there was, indeed, a case or controversy, Defendants told Named Plaintiffs that they "*have the right to bring a civil action under ERISA §*

502(a)." (See Second Amended Complaint, ¶¶ 36 and 41). Defendants should be judicially estopped to assert otherwise.

The Tenth Circuit teaches that in determining whether an ERISA administrative action is fit for judicial resolution, the courts must consider "the legal nature of the question presented and the finality of the administrative action." *Schwob v. Standard Insurance* Co., 2002 U.S. App. LEXIS 11651 (10th Cir. June 12, 2002) [8] (citing *Mountain Radar, Inc. v. FCC*, 158 F.3d 1118, 1123 (10th Cir. 1998) (quotation omitted). The Tenth Circuit further stated that the courts should engage in a three-part inquiry to determine: (1) whether delayed review would cause hardship to [plaintiff]; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented. (citing) *Roe #2 v. Ogden*, 253 F.3d 1225, 1231 (10th Cir. 2001) (quotation omitted).

Unlike in the *Schwob* case where the plan administrator said he would take another look at the plaintiff's claim, here, Qwest Defendants have proclaimed all administrative remedies have been fully exhausted and Defendants do not seek to further develop any administrative record. Thus, the court's actions will not interfere with further ERISA administrative action. Named Plaintiffs and putative class members alike will suffer hardship if they are not allowed to go forward with this civil action and gather formal discovery and take depositions to preserve needed testimony. Many anticipated key witnesses concerning fiduciary commitments made long ago and with knowledge about the pre-Qwest era administration of the Death Pension Benefit are elderly.

Finally, with respect to both KERBER's and PHELPS's claim that PLAN Amendment

---

[8] The *Schwob* decision is attached as Exhibit A to Defendants' brief.

2003-5 is void and null and KERBER's and PHELPS's ERISA Section 502(a)(1)(B) claim for clarification of their rights to future pension benefits, it is undisputed that the parties' positions have crystallized and the conflict of interest is real and immediate. KERBER and PHELPS should be allowed to forestall the accrual of potential damages by allowing this civil action to go forward for a declaratory judgment and other equitable relief to remedy breaches of fiduciary duty.

III. CONCLUSION and REQUEST FOR ORAL ARGUMENT

For all the foregoing reasons, the Court should deny [Docket No. 34] Defendant's Motion to Dismiss. Due to the unique and novel legal issues presented in this civil action which case is being monitored by thousands of putative class members, an oral argument hearing is requested.

Dated: January 19, 2006.

s/ Curtis L. Kennedy
Curtis L. Kennedy
8405 East Princeton Avenue
Denver, CO 80237-1741
Telephone: 303-770-0440
Facsimile: 303-843-0360
e-mail CurtisLKennedy@aol.com
Attorney for Named Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of January, 2006, a true and correct copy of the above and foregoing document, together with Exhibits 1-2, was electronically filed with the Clerk of the Court using the CM/ECF system which system will send notice of such filing to all counsel of record and a courtesy copy was emailed to Defendants' 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
Fax: 303-813-4501
BethK@bairdkiovsky.com (Beth Kiovsky, Esq.)
BDQ@bairdkiovsky.com (Beth Doherty Quinn, Esq.

Also, copy of the same was delivered via email to Named Plaintiffs as follows:

Edward J. Kerber
33302 Neacoxie Lane
Warrenton, OR 97146
EJKMAK@aol.com (Edward J. Kerber)

Nancy A. Meister
12400 48th Ave., N.
Plymouth, MN 55442-2008
dnmeister@comcast.net (Nancy A. Meister)

Nelson B. Phelps
1500 So. Macon St.
Aurora, CO 80012-5141
nbphelps@worldnet.att.net (Nelson B. Phelps)

Thomas J. Ingemann, Jr.
955 Ford Road
Newport, MN 55055-1515
tingemann@comcast.net (Thomas Ingemann)

Joanne West
10172 South Miner Drive
South Jordan, UT 84095-2421
bikenbabe@qwest.net (Joanne West)

/s Curtis L. Kennedy
Curtis L. Kennedy
8405 East Princeton Avenue
Denver, CO 80237-1741
Telephone: 303-770-0440
Facsimile: 303-843-0360
e-mail CurtisLKennedy@aol.com
Attorney for Named Plaintiffs

Exhibit 1

1801 California Street
45th Floor
Denver CO 80202

April 2003

Dear Employee/Participant:

Enclosed is your Qwest Savings & Investment Plan and/or Qwest Pension Plan Summary Plan Description (SPD). These booklets describe the current plan features. A few of the highlights to note are:

Savings Plan

- You may still contribute both before-tax (BT) and after-tax (AT) dollars. However, contributions no longer automatically switch from BT to AT when you reach the BT annual limit. Once you reach the BT $12,000 annual limit, your BT contributions will cease until next year and automatically re-start at the beginning of the next year. You can always access the system and elect to contribute AT dollars. You control when the after-tax election starts or stops.
- You now have the option of investing your Qwest Company Match in funds other than the Qwest Shares Fund. You can reinvest existing funds as well as have your regular deposits moved automatically from the Qwest Shares Fund. You can take advantage of the automated feature by speaking with a Participant Services Representative.
- If you establish a Schwab Personal Choice Retirement Account® (PCRA), you can elect to have some or all of your payroll deducted contributions and Qwest Company Match deposited directly to your PCRA.
- Additional before-tax contributions up to $2,000 for 2003 are allowed for participants age 50 and older. These "catch-up" contributions can be elected as either additional dollars or an additional percent of pay.

Pension Plan

- A description of the new Account Balance Formula which was effective for Management employees beginning January 1, 2001.
- A description of how and when the prior pension formulas apply for Management employees.
- New Pension Band rates for Occupational employees.
- Availability of new payment options, including lump sum payments for Occupational employees.
- How to access the new pension website to review your pension information and request an estimate.

We hope these SPDs are informative and answer your general questions. If you have questions that are not covered in these SPDs you should contact the Service Center at 800-729-7526.

Sincerely,

Todd A Flessner

Todd A. Flessner
Sr. Director Pension and Savings Plans

Qwest Communications International Inc.

Pension Plan Summary Plan Description

Effective January 1, 2001

Qwest Pension Plan

Who are my qualified beneficiaries for purposes of Sickness and Accidental Death Benefits under the Plan?
If you are eligible for a Sickness or Accidental Death Benefit at the time of your death, it will be paid to your qualified beneficiaries in the following manner:

- **100% to your surviving spouse.** (If you have dependent children who do not live in your spouse's household at the time of your death, the death benefit will be divided equally among your spouse and all dependent children. For purposes of the preceding sentence, children away at school or college will be considered members of the household where they normally reside, or where they previously resided before leaving for school if they now maintain their own residence.)
- **If you do not have a surviving spouse, 100% in equal shares to all eligible dependent children.** (Dependent children are defined as your dependent and unmarried children (natural or adopted) who are under age 23, or, if over age 23, unmarried, disabled and dependent upon you for support. Unborn children at the time of a participant's death are not eligible.)
- **If you do not have a surviving spouse or eligible dependent children, 100% in equal shares to all eligible dependent parents.**
- **If you do not have a surviving spouse, eligible dependent children or eligible dependent parents, 100% in equal shares to other eligible dependent relatives.** (Dependent relatives are defined as grandchildren, brothers, sisters, grandparents, deceased spouse's parents, and deceased spouse's grandparents who are dependent on you for support.)
- **If you do not have a surviving spouse, eligible dependent children, eligible dependent parents or other eligible dependent relatives (as described above), no sickness or accidental death benefit is paid.**

The Plan contains additional rules for proving dependency. A conservatorship is required to make payments to children under age 18.

May my beneficiary roll over the Sickness or Accidental Death Benefit?
Yes, if your beneficiary is your spouse. **However, your spouse may not rollover Accidental Death Benefits to the extent that the Accidental Death Benefit is not paid from the Plan.**

Under current federal tax laws, if your spouse is your beneficiary for one of these death benefits, he or she may generally request a rollover of all or part of the lump-sum distribution to an IRA or another qualified plan. (If your spouse is age 70 1/2 or older, minimum annual distribution rules apply.) If the distribution is made payable to an IRA, no tax withholding will apply. However, if your spouse elects to receive the distribution directly, the Plan will automatically reduce the amount of the distribution by the mandatory 20% federal tax withholding (see the "Taxes on Lump Sums" section for additional information regarding tax consequences). If the benefit is paid to a beneficiary other than a surviving spouse, the distribution is not eligible to roll over under current law and the mandatory withholding requirements do not apply.

Under what circumstances will Sickness/Accidental Death Benefits not be paid?
Neither the Sickness Death Benefit nor the Accidental Death Benefit is paid under any of the following circumstances:

- If a claim for benefits is received more than one year following the death of an eligible participant;
- If a suit for damages on account of the death of an employee is brought against any Participating Company or against any other company with which arrangements have been made for the interchange of benefit obligations (for example, an Interchange Company under the MPA);
- If there are any claims (other than under the Plan) presented for damages on account of the death of an employee is brought against any Participating Company or against any other company with which arrangements have been made for the interchange of benefit obligations; or
- If the employee's TOE date is March 1, 1993 or later
- You are eligible for a Sickness, but not Accident, Death benefit if you die while on a transitional or surplus transitional leave, even if you are not terminated from employment.

Special Rules Regarding Rehire as an Occupational Participant

These rules apply if you left as an Occupational Participant, are rehired as an Occupational Participant and remain employed after December 31, 2000.

How are my benefits determined if I am rehired after 2000?
This depends upon whether you previously commenced benefits and whether you bridged your earlier TOE.

Exhibit 2

September 2, 2003

Dear Qwest Retiree:

As part of our commitment to ensure we provide you a valuable package of benefits, we continually review our benefit plans. Recently, we determined that certain retired employees are eligible for a death benefit from both the Pension Plan and the Qwest Group Life Insurance Plan (outside of the Pension Plan). As a business, it is our responsibility to wisely steward our financial resources, and in these cases, the company is paying twice for the same benefit. Therefore, it made financial sense for us to delete one of the duplicate benefits.

Effective October 1, 2003, we will eliminate the Sickness Death Benefit from the Pension Plan. As you recall, the Sickness Death Benefit was paid upon the death of a retired participant who was hired prior to March 1, 1993, and was receiving, or eligible to receive, a service pension from the Plan and who had a surviving dependent.

Please note that these changes do not affect the survivor benefits that may be payable under the form of pension you elected or any life insurance benefits provided through the Qwest Group Life Insurance Plan.

If you have any questions, please contact the Qwest Service Center at 800-729-7526, select option 3 (other), then option 3 (pension), then *0 to speak with a representative.

Regards,

Jill Sanford

Jill R. Sanford
Vice President of Human Resources