IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **05-cv-00478-BNB-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 BRIEF IN OPPOSITION TO (Docket 98) QWEST DEFENDANTS' MOTION TO STRIKE EXPERT OPINION

Named Plaintiffs, hereby submit their response brief in opposition to (Docket 98) Qwest Defendants' Motion to Strike the Expert Opinion report by Leonard Garofolo. For the following reasons, the motion to strike should be denied.

This Court Should Deny the Motion Due to Defense Counsel's Lack of a Bona Fide Effort to Comply with Local Rule 7.1.A.

This motion was filed without any bona fide effort by Defense Counsel to give the undersigned counsel a meaningful chance to confer with them about unnecessary issues raised herein. On November 2, 2006, while Named Plaintiffs' counsel was conducting a CLE presentation before the Colorado Bar Association, Labor and Employment Law Section, defense counsel called and left a voice message stating, 'today, we will be filing a motion to strike

Leonard Garofolo's report and we will assume if we don't hear back from you today, that plaintiffs will oppose the motion." No explanation of any of the issues was given. Sure enough, several hours later, Qwest Defendants efiled the motion.

Although the motion must have been composed, edited and revised over a period of several days by a 'committee' of defense lawyers, paralegals, etc., there was no real effort "to meet and confer," and give the undersigned counsel a fair chance to resolve some of the issues. This litigation tactic regularly carried out by defense counsel – after a final draft of a motion is ready to be efiled make a phone call to Named Plaintiffs' counsel only hours before the planned efiling – should not be condoned as constituting substantial compliance with Local Rule 7.1.[1] One of the purposes to be served by Local Rule 7.1A is to foster communication between opposing counsel, and to encourage an atmosphere of civility and professionalism. Qwest Defendants' counsel hardly fulfilled the requirements and purposes of Local Rule 7.1A when they simply called ahead to state they would be filing a motion to strike that very day! The failure to comply with Local Rule 7.1A is sufficient alone to warrant a denial of the motion to strike. *Echostar Communications Corp. v. News Corp.*, 180 F.R.D 391, 394 (D. Colo. 1998). Accordingly, this Court should use its discretion and, therefore, deny the motion for failure to comply with Local Rule 7.1.A.

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[1] District of Colorado Local Rule 7.1.A provides in pertinent part: "**Duty to Confer.** The court will not consider any motion, other than a motion under Fed.R.Civ.P. 12 or 56, unless counsel for the moving party or a pro se party, before filing the motion, has conferred or made reasonable, good-faith efforts to confer with opposing counsel or a pro se party to resolve the disputed matter. The moving party shall state in the motion, or in a certificate attached to the

Mr. Garofolo's Report Meets the Requirements of Rules 702 and 704.

Rule 702 of the Federal Rules of Evidence provides:

> "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Fed. R. Evid. 702.

In evaluating the admissibility of expert testimony, trial courts are guided by a trilogy of Supreme Court cases: *Daubert v. Merrell Dow Pharmaceuticals, Inc*., 509 U.S. 579, 113 S.Ct. 2786, (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999); and *General Electric Co. v. Joiner*, 522 U.S. 136, 142 (1997). Together these cases clarify the district court's gatekeeper role under Federal Rule of Evidence 702. *United States v. Lauder*, 409 F.3d 1254, 1262 (10th Cir. 2005). Under Rule 702, a district court must satisfy itself that the proposed expert testimony is both reliable and relevant, in that it will assist the trier of fact, before permitting a jury to assess such testimony. See Fed. R. Evid. 702 ("If scientific, technical, or other specialized *knowledge will assist the trier of fact* to understand the evidence or to determine a fact in issue, a *witness qualified as an expert* by knowledge, skill experience, training or education may testify" at trial.) (emphasis added).

First, the witness must be an "expert," thus making the testimony reliable. *See City of Hobbs v. Hartford Fire Ins. Co*, 162 F.3d 576, 586 (10th Cir. 1998). District courts have broad

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motion, the specific efforts to comply with this rule."

discretion in determining the competency of expert witnesses. *See Gust v. Jones*, 162 F.3d 587, 594 (10th Cir. 1998). "The fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical' but extend to all 'specialized' knowledge." Fed. R. Evid. 702 Adv. Comm. Notes (1994). Notably, where, as here, the testimony is based upon Mr. Garofolo's extensive experience and training, the Court need not apply the *Daubert* factors to determine his report's reliability. *See Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1518-19 (10th Cir. 1996); *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1435-36 (11th Cir. 1997), *cert. granted*, 118 S. Ct. 2339 (1998); *McKendall v. Crown Control Corp.*, 122 F.3d 803, 807-08 (9th Cir. 1997); *United States v. Jones*, 107 F.3d 1147, 1158 (6th Cir. 1997). Mr. Garofolo's expertise in ERISA matters exceeds the Rule 702 reliability threshold. He is well qualified, based on his training and experience with the United States Department of Labor's Employee Benefits Security Administration ("EBSA") and as an employee benefit plan practitioner to explain the application of government rules and regulations and employee benefit plan documents. Mr. Garofolo is well qualified to form opinions and inferences on how employee benefit plan officials typically apply plan documents and make decisions regarding the benefits to which participants are entitled to receive. As explained in his Report,[2] the basis for his qualifications as an expert are: i) his educational achievements;[3] ii) employment for over 25

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[2] See Garofolo Report, at 3-4, and Appendix A (Docket 87, Exhibit 1).

[3] Mr. Garofolo has degrees in accounting, business administration, and public administration. He has completed courses toward a doctoral degree in public administration and has completed numerous government and private sector courses relating to employee benefit plans, labor relations, tax law, and management.

years as a civil service employee and Regional Director of EBSA;[4] and iii) employment as a private practitioner for more than eight years providing employee benefit plan consulting services, including serving as an independent fiduciary for plans.

The second requirement for admitting Mr. Garofolo's expert testimony is that it must assist the trier of fact. *See City of Hobbs*, 162 F.3d at 586. The probative value of Mr. Garofolo's testimony cannot seriously be placed into question. Though Mr. Garofolo cannot determine all the legal elements of Named Plaintiff's claims based under ERISA, his opinion that Qwest Defendants did not adequately represent within numerous SPDs that the Pension Death Benefit was something other than a defined benefit plan does tend "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the [testimony]." Fed. R. Evid. 401. Mr. Garofolo's determination was based upon a thorough review of Qwest Pension Plan and predecessor Plan documents (the "Plan" or "Plans"), Forms 5500s filed with the U. S. Department of Labor ("DOL") and Internal Revenue Service ("IRS"), Plan actuarial reports, Qwest board of directors meeting minutes, Plan fiduciary committee meeting minutes, affidavits of Plan fiduciaries (*see* Garofolo Report, Appendix D), Qwest communications with employees and Plan participants and retirees, and letters and other communications between attorneys representing the Plan and participants and retirees. It should be noted that none of the governing Plan documents, SPDs and other bulletins and communications mass distributed to retirees are contested as not being authentic. Of course,

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[4] As Regional Director for the Department of Labor, Mr. Garofolo was responsible for i) enforcing Title I of ERISA and applicable portions of the Internal Revenue Code in a geographical area covering seven states, ii) reviewing, approving, and issuing factual investigative findings involving ERISA, and iii) coordinating all regional EBSA employee benefit matters with the Departments of Justice and Treasury, Internal Revenue Service, and

Qwest Defendants do dispute statements made in the sworn affidavits submitted by Barbara Doherty and Richard Remington, both former members of the U S WEST Employees' Benefit Committee, the named fiduciary of the U S WEST/Qwest Pension Plan.

Mr. Garofolo has also reviewed relevant portions of the legislative history of ERISA, numerous interpretive guidance issued by the IRS, DOL, Department of the Treasury, relevant authoritative treaties and books, and court cases related to the issues in this litigation. In addition, Mr. Garofolo's determination that the Plans are pension plans (as opposed to welfare plans), that the Plans' communications did not adequately inform participants and retirees that Pension Death Benefits could be taken away, and that service pension eligible participants and retirees are and were vested in Pension Death Benefits assists the trier of fact. The Garofolo Report is not based on subjective belief or unsupported speculation. These determinations are based upon his analysis of the documents and instruments governing the Plan, the Plan's SPDs, and the Plan's vesting, accrual, and reservation of rights clauses, as well as guidance issued by government regulators and the federal courts.

Rule 704 of the Federal Rules of Evidence provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." As explained below, in his expert report, Mr. Garofolo simply states his understanding of the law and applies it to ultimate issues in this case. This is permissible under Rule 704. *E.g., United States v. Buchanan*, 787 F.2d 477, 483-484 (10th Cir. 1986) ("Experts are allowed to testify that certain drugs come within a particular statutory classification, *see United States v. Carroll*, 518 F.2d 187, 188 (6th Cir. 1975), and that certain

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other federal and state departments and agencies.

expenses are deductible under the federal tax laws, *see United States v. Fogg*, 652 F.2d 551, 556-557 (5th Cir. 1981), *cert. denied*, 456 U.S. 905(1982)); *U.S. v. Toushin*, 899 F.2d 617, 620 n. 4 (7th Cir. 1990). The Fifth Circuit's explanation in *Fogg* is particularly insightful:

> Fogg also objects to Agent Tepper's testimony because in it he stated legal conclusions. Fogg specifically object to the following statement: "Without any other evidence those monies (from FOJC) would be considered constructive dividend (sic) to the taxpayer." It appears to this Court that Agent Tepper merely stated his opinions as an accountant, and did not attempt to assume the role of the court. Since the court below instructed the jury about the weight to be afforded the testimony, Agent Tepper's statements were placed in the proper perspective. In United States v. Milton, 555 G.2d 1198, 1204 (5th Cir. 1977), a prosecution for conducting an illegal gambling business, we affirmed the lower court's admission of expert testimony although it appeared to be a legal conclusion. In reaching the decision to affirm, we considered the testimony in its context, the complexity of the case, and the correctness of the witness' statement. We also emphasized 'the trial court's admonitions to the jury to accord no unusual deference to the expert testimony and to take the court's instruction as the sole source of applicable law…

652 F.2d at 556-557. The opinions in the Report reflect Mr. Garofolo's experience as a government official who was part of an agency charged with enforcing and interpreting many provisions of ERISA[5] and will be of great assistance to the Court. In this case, which is a bench trial, the Court is easily capable of determining how much weight to afford the Report without treating any statements as legal conclusions. *Id*.

Thus, Mr. Garofolo's testimony and opinion evidence enhances Named Plaintiffs' claims that there was lack of any disclosure or forewarning that the Pension Death Benefit could some

[5] ERISA § 505, 29 U.S.C. § 1135, provides that the "Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title."

day be treated as a mere ancillary or takeaway benefit in a manner that is admissible under Rules 702 and 704. This is exactly the type of opinions Mr. Garofolo expressed in hundreds of voluntary compliance letters issued as a DOL Regional Director.

When expert testimony is proffered, the trial judge must, at the outset, "assess the reasoning and methodology underlying the expert's opinion and determine whether it is scientifically valid" and relevant to the case at hand. *Goebel v. Denver & Rio Grande W. R.R.*, 215 F.3d 1083, 1087 (10th Cir. 2000) (following the general framework established by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). Thus, an expert's opinion must rest on a "reliable foundation." *Id.* at 597. While Leonard Garofolo's proposed testimony might more properly be characterized as "technical or other specialized knowledge" as opposed to "scientific . . . knowledge," the *Daubert* analysis still controls. *See Berry v. City of Detroit*, 25 F.3d 1342, 1350 (6th Cir. 1994) ("Although, as indicated, *Daubert* dealt with scientific experts, its language relative to the 'gatekeeper' function of federal judges is applicable to all expert testimony offered under Rule 702."). Generally, the district court should focus on the expert' methodology rather than the conclusions. *Daubert*, at 595. The purpose of the *Daubert* inquiry is always the same: "[t]o make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Hollander v. Sandoz Pharmaceuticals Corp*., 289 F.3d 1193, 1210-11 (10th Cir. 2002) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

On page 2, of their Motion to Strike, Qwest Defendants state that the Garofolo Report "engages in a broad discourse on the state of the law, applies what Mr. Garofolo deems

controlling law to the facts of the case, and generally expresses Mr. Garofolo's legal opinion." (Docket 98, p. 2). Far from rendering a legal opinion or conclusion, the Garofolo Report, at pages 6-20, merely provides background information on the law and regulations issued by the government regulators, and applies relevant factual evidence to the issues presented in this litigation. This is exactly what is required and permitted by Rule 702. *See* Advisory Committee Note to Rule 704.[6] An expert may refer to the law in expressing his opinion. *Frase*, 444 F.2d at 1231 (citing *Specht v. Jensen*, 853 F.2d 805, 809 (10th Cir. 1988).

In addition, the Garofolo Report, at pages 20-35, merely applies facts or relevant evidence, as defined by Rule 401, applicable to the issues in this litigation. Mr. Garofolo's opinions regarding ERISA plan interpretation are admissible once this Court determines particular SPDs are, indeed, ambiguous. To the extent that SPDs have ambiguous terms and provisions, Mr. Garofolo's opinions are additionally relevant to the meaning of the same in light of industry custom and the DOL's past enforcement practices. *See Employers Reinsurance Corp., v. Mid-Continent Cas. Co.*, 202 F.Supp.2d 1212, 1217 (D. Kan. 2002) (wherein the trial court ruled not to strike expert testimony regarding contract interpretation).

As recognized and stated in the Garofolo Report, at pages 4, 39, 50, and Mr. Garofolo's deposition at 65:21-25, 66:1-25, and 67:1-3 (See Exhibit 1 filed herewith), the opinions expressed in the Report are a product of Mr. Garofolo's specialized knowledge and experience as

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[6] In pertinent part, the Advisory Committee Note provides the following: "Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence that wastes time…They also stand to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, 'Did T have capacity to make a will' would be excluded, while the question, 'Did T have sufficient mental capacity to know the nature and extent of property and the natural objects of his bounty and to formulate a rational scheme of distribution?' would be allowed."

an employee benefit plan practitioner and former U. S. Department of Labor Regional Director. In fact, the opinions expressed in the Garofolo Report are views as to how government officials would interpret the relevant evidence and the conclusions that such officials would likely reach:

- "During my fifteen-year tenure as Regional Director, I initiated thousands of employee benefit plan investigations relating to ERISA reporting and disclosure to participants and EBSA, plan loans to participants, the administration of plans, plan participant benefit disputes, the management and investment of plan assets, and the propriety of fees paid to plan service providers…These investigations involved the application of ERISA's fiduciary standards, the review and interpretation of plan documents, and the implementation of remedies where ERISA violations were uncovered." (Garofolo Report at 3-4)

- "Absent clear guidance on this specific type of benefit under the law, from regulatory authorities and federal courts, if I were serving as Regional Director of DOL's EBSA, I would refer to the appropriate documents and instruments governing the Plan to determine whether the PDBs are ancillary or welfare benefits." (*Id*. at 39).

- "The opinions and conclusions expressed in this Report are based on my experience interpreting plan documents as a former DOL Regional Director." (*Id*. at 50).

Consistent with the above caveats, the Garofolo Report and deposition clearly indicate and recognize that only courts can render conclusions of law. In addition, Defendants' counsel was told in Mr. Garofolo's deposition, at 152:24-153:14, that he was not rendering legal opinions and that only "Courts render legal opinions."

If opinions of a government official (or former official) regarding the statute and/or regulations that such official was charged with interpreting constitute legal opinions, the logical result would be to require all DOL Regional Directors to be licensed attorneys. This is not the case and Regional Directors regularly express their views regarding the application of the statute and/or regulations through voluntary compliance letters. It should also be noted that the EBSA

Enforcement Manual specifically instructs a Regional Director to advise "plan fiduciaries or others of the results of an investigation, including which section(s) of ERISA have been violated." *See* EBSA Enforcement Manual, Chapt. 34, ¶ 8. at **http://www.dol.gov/ebsa/oemanual/cha34.html**.

The Motion to Strike, at pages 5-6, infers that Mr. Garofolo expresses a legal conclusion on page 14, footnote 4 of the Garofolo Report with respect to an accrued benefit of participants being the "same thing as a benefit protected under the anti-cutback rule of ERISA and the Code." The Garofolo Report, at pages 14-15, including footnote 4, is merely a recital of the express provisions of ERISA and the Internal Revenue Code. These pages of the Garofolo Report are not conclusions of law.

In the Motion to Strike, at page 6, the Qwest Defendants' counsel take out of context Mr. Garofolo's response that vesting under ERISA is a "legal concept" and cites Mr. Garofolo's deposition testimony, at 76:22-77:5. The question that was being asked by Defendants' counsel was "how a communication from A to B makes a difference as to whether a benefit is vested or not vested." (*See* Garofolo deposition at 77:6-8). Mr. Garofolo's response to the question was that "plan documents [are either] crystal clear with regard to vesting [or]the documents [are] silent, [or] the plan documents can be ambiguous." See Garofolo deposition at 78:5-7. In addition, in response to Defendants' counsel's deposition question, Mr. Garofolo emphasizes in his deposition, at 78:13-16, that the whole vesting issue depends on "whats being communicated to employees and whats not being communicated to them. Is the communication accurate?"

Mr. Garofolo Authenticated His Report During His Sworn Deposition Testimony.

Qwest Defendants' contention that Mr. Garofolo's report should not be considered because it has not been authenticated or sworn to simply distorts the facts. Of course, this is the very example of an issue that could have been resolved had their been some good faith compliance with Local Rule 7.1.A. Mr. Garofolo gave sworn deposition testimony fully authenticating his report. (See Exhibit 1, Garofolo Depo. Tr. 125:21-126:21 "I own this report. It's my report."). The Garofolo Report was the primary deposition exhibit during the extensive cross-examination conducted by two of Qwest Defendants' lawyers nitpicking the Garofolo Report. (*Id*., Garofolo Depo. Tr. 31:9-202:5). Qwest Defendants can claim no prejudice. Finally, Qwest Defendants' contention that Mr. Garofolo's report is wholly based upon hearsay is a major stretch. There is no dispute that all of the governing Plan documents, SPDs and other bulletins and communications mass distributed to retirees that Mr. Garofolo reviewed and considered within his report are authentic documents. Of course, Qwest Defendants do dispute statements made in the sworn affidavits submitted by Barbara Doherty and Richard Remington, both former members of the U S WEST Employees' Benefit Committee, the named fiduciary of the U S WEST/Qwest Pension Plan. Yet, key opinions made by Mr. Garofolo are not based upon those affidavits, but, on the governing Plan documents and the SPDs.

CONCLUSION

The decision whether or not to allow Named Plaintiffs' expert witness into evidence rests in the sound discretion of this Court. The Tenth Circuit will review a district court's application of *Daubert* to exclude expert opinion evidence for an abuse of discretion. *See General Electric*

v. Joiner, 522 U.S. 136, 143 (1997); *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 780 (10th Cir. 1999). For all the foregoing reasons, Named Plaintiffs' expert opinion report by Leonard Garofolo should be accepted into evidence. Accordingly, Docket 98, Qwest Defendants' motion to strike should be denied.

Dated: November 14, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2006, 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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