IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **05-cv-00478-BNB-KLM**

EDWARD J. KERBER, et al,

Plaintiffs,

vs.

QWEST PENSION PLAN, et al,

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO [Docket No. 144] Defendants' MOTION FOR SUMMARY JUDGMENT

Plaintiffs respond opposing Docket No. 144, Defendants' renewed motion for summary judgment filed October 31, 2007. The motion in its entirety should be denied.

I. INTRODUCTION.

The central dispute in this ERISA governed case concerns the "**Pension Death Benefit**" ("**PDB**"), an actuarially funded fixed lump sum benefit paid out of Qwest's defined pension benefit plan, the successor to pension plans sponsored by U S WEST and the old AT&T. The parties disagree on the overarching issue of whether or not the PDB, by virtue of historic Governing Plan documents, summary plan descriptions (SPDs), Plan fiduciaries' representations and course of dealings, became either protected or vested when an employee became service pension eligible. Plaintiffs make numerous legal challenges to Amendment 2003-5 which ended the PDB for Plan participants retiring after January 1, 2004. (See, e.g., Second Amended Complaint, ¶ 180, Docket 29).

In a renewed motion, Defendants argue none of Plaintiffs' claims survive summary judgment on the grounds the PDB is a welfare benefit. Defendants heavily rely

upon the trial judge's conclusion about the Lucent PDB in the case of *Foss v. Lucent Tech. Inc.* (*In re Lucent Death Benefit ERISA Litig.*), 2006 WL 3437586 (D.N.J. Nov. 27, 2006), *appeal docketed*, Nos. 06-5008, 5009 (3d Cir.). But, a major difference exists between the Qwest PDB and the Lucent PDB in *Foss*. The Qwest PDB became a necessary integral for compliance with a formula to calculate an early retirement optional form of benefit - a single-sum - paid immediately after employment ended. Lucent's PDB never had this attribute. *Foss* was wrongly decided and is inapplicable to this case.

II. RESPONSE TO DEFENDANTS' "UNDISPUTED MATERIAL FACTS."

1-4. Admitted.

5. and **8.** Plaintiffs dispute. Plaintiffs agree the PDB amount shall be equal to 12 months' wages. The following are relevant portions of Section 5 of the Governing Plan document in effect from January 1, 1984 until December 28, 1994:

> (Paragraph 3. Pensioner Death Benefit Amount). . . b. **If such pensioner leaves any beneficiary bearing the relationship** to the deceased and conforming to the other conditions stated with respect to the death of an employee in Subparagraph 4(a) of this Section, **such Death Benefit shall be paid**. . .
>
> (Paragraph 4. a. Mandatory Beneficiaries). . . in the event of death by sickness, the maximum Sickness Death Benefit specified in Paragraph 2 of this Section, **shall be paid**, subject to the provisions of Subparagraph (c) of this Paragraph 4, to the spouse of the deceased employee if living with him at the time of his death, or to the unmarried child or children of the deceased employee under the age of 23 years (or over that age if physically or mentally incapable of self-support) who were actually supported in whole or in part by the deceased employee at the time of death, or a dependent parent who lives in the same household with the employee or who lives in a separate household in the vicinity which is provided for the parent by the employee.

(emphasis added) (Defts' **Ex. A-2**, Bates 3631-3637). However, Plaintiffs dispute other statements appearing in both No. 5 and No. 8 contending the PDB is limited to the 12

months' wages rate paid as of March 1, 1993. Defendants rely upon **Ex. C**, an incomplete *excerpt* of Board of Directors' resolutions, to which Plaintiffs object as heresay. The "Changes in Plan" provision in effect during January 1, 1984 through December 28, 1994 states the "Committee" makes changes. (Defts' **Ex. A-2**, Bates 3661 *and* Defts' **Ex. A-3**, Bates 3387). Defendants have no document to show the Committee made a plan amendment to freeze the PDB dollar amount as of March 1, 1993. (**Ex. 2**, Qwest VP and EBC member Felicity O'Herron Depo. Tr. 212:18-215:16).

6. Plaintiffs dispute. Historically, the PDB was administered only as a separate payment made after the retiree died leaving a qualified beneficiary. However, in 1990, the equivalent of the PDB was paid prior to death to several thousand management workers taking early retirement during a reduction in force. Effective January 1997, the Plan was amended to permanently give management workers taking early retirement the option of selecting either a traditional monthly annuity or selecting receipt of a single-sum distribution of all earned pension benefits reduced to present value. (**Ex. 1**, Bates 4711, Section 6.5(a)) The Plan further states:

> If a Participant. . . elects a lump sum (or a partial lump sum) benefit at his retirement, then the ***lump sum paid*** to the Participant ***shall be increased by the DLS Equivalent of the Death Benefit*** described in Section 7.3(a). For this purpose only, the DLS Equivalent shall include an assumption that the Participant will be survived by a Beneficiary;

(emphasis added) (**Ex. 1**, Bates 4716, Section 7.3(c)).[1] In 2001, the lump sum option was extended to occupational workers. (**Ex. 1**, Bates 4710-11 Section 6.5(a)(2))). . Bottom line: From 1997 until Amendment 2003-5, the service pension benefit was increased by

[1] "DLS Equivalent" means a benefit having the same value as the benefit that such DLS Equivalent replaces. (**Ex. 1**, Bates 4582, Section 1.12B)

the monetary equivalent of the PDB and the resulting increased pension benefit, after being actuarially reduced to present value, was provided in the form of an early retirement optional lump-sum benefit.

7. Plaintiffs dispute. As explained in No. 6, an equivalent value of the PDB was automatically added to the single sum service pension benefit payment given to thousands of departing workers who elected to receive the early retirement optional form of benefit - an immediate lump sum distribution. (See **Ex. 22**, p. 14 ¶ 25.) Plaintiffs dispute the assertion of fact that if a claim was made against Qwest in connection with a retiree's death (e.g., a claim arising due to a Qwest service truck driver negligently killing a retiree at a street crosswalk) there could be no payment of the PDB. Defendants refer to Plan terms that can only relate to a claim for payment of the "accidental" death benefit when an active *employee* dies leaving beneficiaries who may seek a wrongful death claim.

8. Plaintiffs dispute. See discussion in No. 5.

9. Plaintiffs dispute. A definition for "accrued benefit" first appeared in the December 29, 1994 restated Governing Plan document and it does *not* expressly exclude the PDB. See response to No. 11.

10. Plaintiffs dispute. Defendants assert legal arguments and they try to give meaning to the reservation of rights clause in the January 1, 1984 through December 28, 1994 Governing Plan document. But, the clause does not reserve any right to make changes to benefits. The clause - "***The Committee. . . may from time to time make changes*** *in the Plan* ***as set forth in this document. . .***," - can only be read to allow such changes as are specified *elsewhere* in the Plan document. The clause does not state there is a reserved right to terminate a particular benefit, such as the PDB.

11. Plaintiffs dispute. Again, Defendants assert legal argument and incomplete facts. The reservation of rights (**ROR**) clause in the January 1, 1984 through December 28, 1994 Governing Plan document does not contain language expressly giving the Plan sponsor the right to make changes to *benefits*. Successive Governing Plan documents contain ROR clauses that can be read to permit changes only to affect actively employed Plan participants and future participants and the changes are limited to unaccrued benefits. The ROR has evolved as follows:

ROR in Original Plan - January 1, 1984 until December 28, 1994:

> Section 10 Changes in Plan. The **Committee**, with the consent of the Chairman of the Board or, at any time when there is no Chairman of the Board, the President, and subject to the approval of the Board of Directors (or without such approval in the case of changes which, in the opinion of the Committee, are dictated by the requirements of federal or state statute applicable to the Company or to other Participating Companies or authorized or made desirable by such statutes) **may from time to time make changes in the Plan as set forth in this document, and the Company may terminate said Plan**, but such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder. (emphasis added) (Defts' **Ex. A-1**, Bates 3661; Defts' **Ex. A-2**, Bates 3387).

ROR in Latest Plan - Executed December 19, 2002 to be effective January 1, 2001:

> 11.4 Amendment by the Company. The Company expects this Plan to be permanent, but as future conditions cannot be foreseen it reserves the right to amend the Plan at any time, without prior notice to anyone. The Plan may be amended by a writing approved by the Company's Board of Directors and signed on behalf of the Company by an officer of the Company duly authorized by the Board of Directors. The Plan may also be amended in writing by the Plan Design Committee or other persons(s) to the extent authority to amend the Plan has been delegated to the Plan Design Committee or such person(s) by the Board of Directors. Each amendment shall be effective on such date as the Company or its delegee may determine. No amendment or modification that affects the rights, powers, privileges, immunities or obligations of the Trustee may be made without the consent of the Trustee. **Amendments may modify the rights and interests of Employees who are Participants in the Plan at the time thereof as well as future Participants** but amendments may not diminish the accrued benefit (as defined in Section 411(d)(6) of the Code) of any Participant as of the effective date

of such amendment. (emphasis added) (Defts' **Ex. A-1**, Bates 4730)

12. Plaintiffs dispute because Defendants' compilation of SPDs is incomplete. A more complete summary compilation is found within Plaintiffs' expert opinion report. **Ex. 15**, appendix C). The 1989 SPD issued to Mr. Kerber and Mr. Phelps states the Plan may be terminated; there is no ROR to change benefits. (Defts' **Ex. B-1**, Bates 1157-58).

13-14. Admitted.

III. STATEMENT OF *ADDITIONAL* UNDISPUTED MATERIAL FACTS. The following additional undisputed material facts sorely undercut Defendants' position.

15. The Governing Plan documents effective January 1, 1984 - December 28, 1994 established U S WEST as the "Plan Administrator," ("The Company shall be Plan Administrator and the Sponsor of the Plan as those terms are defined in the Pension Act."), and the Plan documents did ***not*** expressly give either the Plan Administrator, the Committee (EBC), any other person or entity power to make interpretative decisions about Plan terms. (**Ex.4** , Bates 3681-3689, Section 3; **Ex. 5**, Bates 3559-3569). EBC By-Laws require at least two members to take any plan action. (**Ex. 3**, Article III.4.).

16. The PDB is attributable to employment service sufficient to earn a service pension. A Plan participant who has only enough employment service to qualify for a deferred vested service pension does not qualify for the PDB.

17. Since 1984, all Plan documents have given the PDB a *higher* payment priority over several classes of accrued deferred vested benefits in the event of either Plan termination or partial Plan termination. (See citations in Section IV.A.6, below).

18. On September 2, 2003, Qwest officials, including Executive Vice President Barry Allen, announced to Kerber, Phelps and other retirees that Qwest had decided to

eliminate the PDB for all retirees. Qwest had 40,000 copies of a signed letter ready to mail to retirees. Due to Plaintiffs' and numerous retirees' protestations, the decision to go forward was delayed, although CEO Richard Notebaert stated the decision was final. (**Ex. 8**, Barry Allen Depo. Tr. 42:21-42:7, 46:19-50:14, 52:4-20, 58:6-13, 59-61:1; **Ex. 9**, Sept, 2, 2003 letter). Defendants refuse to incorporate in the Governing Plan document and SPD either an acknowledgment that the PDB is protected or incorporate a commitment to provide PDBs to service pension eligible retirees. (**Ex. 2**, O'Herron Depo. Tr. 258:6-20).

IV. ARGUMENT IN OPPOSITION TO DEFENDANTS' MOTION.

A. Plaintiffs Are Entitled to a Declaration Prohibiting Defendants From Changing or Eliminating the PDB. Therefore, Qwest is Not Entitled to Summary Judgment on Plaintiffs' Third Claim For Relief.

1. The Governing Plan Document and SPD When Issued Are Controlling, Not Later Issued Document Revisions.

In their Third Claim for Relief, pursuant to ERISA Section 502(a)(1)(B), Plaintiffs seek a declaration of their rights to the PDB. Plaintiffs Kerber and Phelps contend the Court should declare the PDB to be a protected benefit and clarify their rights to a PDB. The Court's declaration should include a ruling that the PDB must be calculated based upon the Plan participant's annual rate of wages as of the date of the Plan participant's respective retirement date, not the March 1, 1993 date being used by Defendants, as the Plan was not properly amended to use March 1, 1993 as the determinative date.

To begin, Plaintiffs Kerber and Phelps contend the Governing Plan document and SPD in effect upon their becoming service pension eligible and retiring in February 1990 should be enforceable, not later document revisions. Accordingly, the Governing Plan document as existed January 1, 1984 through December 28, 1994 is controlling.

Likewise, the SPD issued in July 1989 with an effective date of January 1, 1989 is the SPD that governs the rights of Plaintiffs Kerber and Phelps who retired in February 1990. (**Ex. 10**). Before this litigation, the Plan sponsor continuously took the stance that the SPD in effect when a person retires is the governing SPD, not later editions. (*See e.g.*, **Ex. 11**, p. 1, Bates 0009, 1999 SPD, "If you terminated employment before then [i.e., before January 1, 1999], the rules of the plan in effect at the time your employment ended govern your pension benefits. "Your benefits are described in the SPD in effect at the time you terminated; thus, many of the rules in this SPD do not apply to you"; **Ex.12**, p 2, Bates 5453, 2003 SPD "If you terminated employment before January 1, 2001, the rules of the Plan in effect at the time your employment ended govern your pension benefits." EBC member O'Herron testified that "the SPD in effect at the time a person retires summarizes the rules that apply to that person when they retire," and those rules govern his or her pension benefits. (**Ex. 2**, O'Herron Depo. Tr. 179:9-181:10).

2. The SPD Issued When Kerber and Phelps Retired Does Not Contain a Clear, Conspicuous 'Reservation of Rights' Clause.

The SPD issued to Kerber and Phelps gives insufficient notice of any right of the Plan sponsor to either reduce or takeaway the PDBs they had earned. The ROR in the SPD issued to Kerber and Phelps is limited to one situation – plan termination:

> "U S WEST reserves the right to terminate this Plan at any time. . . The current provisions of the Plan states that if there are any remaining assets. . . . **It should be noted that, as with other Plan provisions, U S WEST reserves the right to amend this provision relating to any remaining assets *in the event* of Plan termination**. ."

(emphasis added) (Defts' **Ex. B-1**, Bates 1157-58). The ROR does not suggest there could be changes to benefits. The ROR doesn't come anywhere near language in which

courts have ruled clearly establishes the plan sponsor's right to reduce or terminate benefits. See, e.g., *Sprague v. General Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998) (en banc) (stating SPD specifically provided that General Motors "reserve[d] the right to amend, change or terminate the Plans and Programs described in this booklet"), *cert. denied*, 524 U.S. 923 (1998). In *Balestracci v. NSTAR Electric and Gas Corp.*, 449 F.3d 224, 232 (1st Cir. 2006), the court noted an *explicit* "reservation of rights," stating, "[T]he company reserves the right, subject to the provisions of any collective bargaining agreement, to amend, modify or terminate the [dental benefits] Plan at any time."

The SPDs controlling Mr. Kerber's and Mr. Phelps's rights have no language that can be construed as granting the Plan sponsor *unlimited* discretion to change benefits *at any time*, for *any* reason. "In light of all the surrounding facts and circumstances, a reasonable employee [making a retirement decision] would [have] perceive[d] an ongoing commitment by the employer to provide employee benefits." *Belanger v. Wyman-Gordon Co.*, 71 F.3d 451, 455 (1st Cir. 1995) (quoted with approval in *Deboard v. Sunshine Min. & Refining Co.*, 208 F.3d 1228, 1239 (10th Cir. 2000)). The lack of a sufficiently straightforward ROR in either the SPDs or any information brochures given to Mr. Kerber and Mr. Phelps proves most significant and clearly invalidates Defendants' position.

This Court should look at provisions of the SPDs from the viewpoint of the objectively reasonable employee.[2] *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir.1996) (court gives words their common and ordinary meaning, as a reasonable person

[2] As noted in Plaintiffs' Statement of Additional Undisputed Material Facts, the Governing Plan document during January 1, 1984 through December 31, 2004 did not give either the Plan Administrator or the named fiduciary plan interpretative authority. (See Section IV ¶ 1, at p. 7 herein above).

in the position of the plan participant would have understood them). Applying this analysis, this Court must conclude the SPDs given Kerber and Phelps contain no ROR to either reduce or eliminate the PDB after a person earned a service pension.

3. SPDs and Government Filings Confirm the PDB Was Classified As a Defined Benefit Plan Entitlement, Not a Welfare Benefit.

Plaintiffs incorporate herein the Affidavit, deposition testimony and expert report by Leonard Garofolo, former Regional Director for the Department of Labor's Employee Benefits Security Administration. (**Exs. 13-15).** Mr. Garofolo testified it is his opinion the PDB is not a welfare or ancillary benefit but a protected or accrued benefit that became vested. (**Ex. 14**, Garofolo Dep. Tr. 56:6-22, 58: 1-6, 67:18-67:4, 69: 1-14, and errata sheet, p. 60, line 14). His conclusions are summarized in **Ex. 15**, at pp. 40 and 49. His report has a comprehensive summary compilation of the SPDs (**Ex. 15**, Appendix C, p. 62, et seq.). All SPDs issued during the course of Kerber's and Phelps's employment and after they retired confirm the PDB is *not* a welfare benefit. The Plan sponsor deliberately chose to classify the PDB as a defined benefit plan. Every SPD issued during 1984 through at least 1999 made the following representation:

> **Type of Plan.** The Plan is classified as both a pension plan and a welfare plan under the definitions of ERISA. **It is 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**. [3] The Plan is a "welfare plan" for purposes of providing disability pensions and other death benefit payments.

[3] Under a defined-benefit plan, "the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Ala. Power Co. v. Davis*, 431 U.S. 581, 593 n. 18, 97 S.Ct. 2002, 52 L.Ed.2d 595 (1977).

(**Ex. 15**, Appendix C, p. 62 et seq.). Even in the latest SPD distributed in April 2003, Qwest explains that the *only* welfare benefits provided by the Qwest Pension Plan are those benefits paid from insurance policies out of operating revenues. The current SPD states:

> "**What type of plan is the Plan?** In general, it is a pension plan, specifically a "defined benefit plan." A "defined benefit plan" is a retirement plan that provides an explicit benefit determined by a formula based on factors such as compensation, age and/or service. The DLS formula is a pension equity formula and the Account Balance formula is a cash balance formula. The Plan document also contains a **"welfare plan" to the extent certain death benefit payments [are made] from insurance policies**. The Plan document also contains an "excess plan" to the extent it provides certain benefits in excess of certain IRS limits directly out of operating expenses of the Participating Companies."

(**Ex. 12**, p. 69, Bates 5520) (emphasis added). The choice words Defendants repeatedly use in their Brief to describe the PDB - "ancillary benefit" and "incidental benefit" - cannot be found within the SPDs which are required to accurately describe the PDB. (See also **Ex. 2**, O'Herron Depo. Tr. 174:12-179:8, 182:6-183:21 and 203:12-204:9).

Plan sponsor U S WEST sent Annual Form 5500 reports to the U.S. Department of Labor and the Internal Revenue Service. In these Annual Form 5500 reports, the Plan administrator, under penalty of perjury, consistently submitted schedules confirming the PDB liability was included in the *vested benefits* accounting column.[4] Defendants' interrogatory responses and EBC member Felicity O'Herron confirmed that the Form 5500s included as part of the total "present value of **vested** benefits" the dollar amount of

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[4] Sections 102 and 103(a)(1)(A) of ERISA, 29 U.S.C. §§ 1022, 1023(a)(1)(A), require plans to issue both SPDs and Annual Returns (Form 5500s). They are an integral part of compliance with ERISA's statutory scheme and constitute binding, controlling documents under which plan benefits are characterized for statutory purposes. During at least a 10 year period, the "Instructions for Schedule B (Form 5500) Actuarial Information" consistently required an entry in a column to disclose "**the current liability attributable to vested benefits**." (See **Ex. 19**, year 1993 and 2003 Instructions). For as far back as Form 5500 records could be found, Defendants concede the PDB was indeed *included* in that disclosure column which tallied up "vested" benefits.

PDB obligations for retirees. (**Ex. 16**, Defts' Resps. Interrogs. 9 and 10; **Ex. 2**, O'Herron Depo. Tr. 196:4-197:19). Since Plan fiduciaries and Plan sponsors habitually represented to the DOL and IRS that the PDB qualified as a defined benefit plan, and the PDB was a vested benefit liability, the Court should consider those filings as a significant factor in determining whether the benefit should be treated as such, not treated as a welfare benefit or ancillary benefit. See *Stern v. International Business Machines Corp*., 326 F.3d 1367. 1374 (11th Cir.2003) ("The way in which an employer characterizes its plan may be one factor, among others, in determining ERISA coverage"); *Kanne v. Connecticut Gen. Life Ins*., 867 F.2d 489, 492 (9th Cir.1988). Since the PDB was not classified as a welfare benefit, when Qwest spun off Qwest Dex, the total Plan assets transferred to the new owners included actuarially determined funds to cover the $25 million total cost of PDBs for all service pension eligible transferred workers. (**Ex. 20**, Bates 6296-6300 and 6355).[5]

4. Chief HR Officers and Past Members of the Employee Benefits Committee Confirm the ROR Did Not Allow Detrimental Changes to the PDB Which Benefit Was Always Treated As a Protected or Vested Benefit, Not a Mere Ancillary or Welfare Benefit.

An ERISA plan is to be interpreted like any other contract. *Capitol Cities / ABC, Inc. v. Ratcliff*, 141 F.3d 1405, 1411 (10th Cir. 1998) saying "[t]he Supreme Court has directed us to interpret an ERISA plan like any contract." *See also Matthews v. Sears Pension Plan*, 144 F.3d 461, 465 (7th Cir. 1998) ("ordinary principles of contract interpretation govern the interpretation of pension plans covered by ERISA"). Under

[5] In *United Foods, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 816 F.Supp. 602, 609-10 (N.D. Cal. 1993), the trial court determined the fixed lump sum PDB to be directly related to service pension benefits and, hence, part of the employer's liability for withdrawal from the pension plan, stating: "Although death has not occurred and therefore liability is not currently payable, these benefits will in fact be paid, thereby affecting the fiscal soundness of the plan.". *Id.* at 611.

ordinary principles of contract interpretation, "a course of dealing between the parties gives meaning to or supplements or qualifies their agreement." *Restatement (Second) of Contracts* § 223(2). "A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions or other conduct." *Id*. § 223(1).

The Affidavits of former U S WEST Chief HR Officers Barbara Doherty and Richard Remington, who were also past members of the Committee, the named fiduciary, set forth "course of dealing" evidence confirming U S WEST, which served as both Plan sponsor *and* Plan Administrator, never considered the PDB to be a mere ancillary or welfare benefit. Their testimony is that the PDB was considered a protected benefit. (**Ex. 17**, Barbara Doherty Affd, ¶¶ 5-8; **Ex. 18**, Richard Remington Affd ¶¶ 5-10). This evidence sorely undermines successor Qwest's belated changed position.

Defendants argue a self-serving interpretation for the ambiguous ROR placed in the January 1, 1984 through December 28, 1994 Governing Plan document. Since that Plan document did not vest the Plan Administrator with discretionary interpretive authority, the Tenth Circuit says this Court should look at that provision *de novo* and apply principles of *contra proferentem*, construing the ambiguous language against the drafter. See *Miller v. Monumental Life Insurance Company*, 502 F.3d 1245 (10th Cir. 2007):

> . . . we have reserved the question of whether this court would apply contra proferentem in reviewing an ambiguous ERISA plan de novo. See *Blair*, 974 F.2d at 1222 (resolving ambiguities in favor of the drafter "without resort to the contra proferentem rule, and without resolving whether that rule should be applied to contracts governed by ERISA"). Today, we answer that question in the affirmative. . . Failure to employ contra proferentem would "afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted, a result that would be at odds with the congressional purposes of promoting the interests

> of employees and beneficiaries and protecting contractually defined benefits. . . . *Id.* at 1253. [6]

The original ROR in the January 1, 1984 through December 28, 1994 Governing Plan document is a private anti-plan amendment provision. That language does not simply mimic or track the anti-cutback language set forth in ERISA Section 204(g). It goes much further. In *Call v. Ameritech Management Pension Plan*, 475 F.3d 816 (7th Cir. 2006), the pension plan contained a provision stating, "no amendment will reduce a Participant's accrued benefit to less than the accrued benefit that he would have been entitled to receive if he had resigned [from Ameritech] on the day of the amendment." The Seventh Circuit ruled that pension plan provision was a private anti-cutback provision, "designed to prevent cutbacks by amendment that are not covered by the statutory anti-cutback rule" *Id.* at 820. The appellate court reasoned the plan sponsor could not unilaterally eliminate that private anti-cutback provision by enacting a subsequent amendment, as that would make the original provision superfluous and empty. *Id* at 821. The court ruled the provision should be interpreted as preserving benefits ERISA would otherwise permit to be curtailed.

Applying that analysis, this Court should conclude that both the founding ROR and subsequent ROR clauses restrict the Plan sponsor's right to diminish or eliminate PDB benefits retirees earned and became entitled to have paid to their qualified beneficiaries.

5. <u>The Plan Sponsor Habitually Confirmed that Service Pension Eligible Retirees Were *Entitled* to the PDB.</u>

The SPDs issued previous to and when Plaintiffs Kerber and Phelps retired stated:

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[6] Should Defendants argue the Tenth Circuit's instruction in *Miller* can only be applied to welfare benefit plans and not the defined benefit plan at issue, that argument would be counterintuitive, as Defendants devoted their entire memorandum brief to their argument that the PDB is a welfare benefit.

> "Your **qualified beneficiaries are protected by the Plan's** sickness and accident **death benefit provisions for the entire period** of your employment and **during your retirement on a service pension**. . . A benefit equal to one year's pay at retirement **will be paid** to the mandatory beneficiary (if any) of an employee who dies after retirement while receiving a service or disability pension." (emphasis added)

(Defts' **Ex.B**, Bates 1539, 1577, 1099, 5684-85).[7] Those SPDs lack qualifying language about changes to or elimination of the PDB. U S WEST habitually reassured retiree applicants that the PDB **will** be paid, language that is consistent with vesting. *In re New Valley Corp.*, 89 F.3d 143, 151-52 (3rd Cir. 1996) (language that a benefit "will be paid" was consistent with vesting). Plan sponsor U S WEST issued a formal brochure stating:

> A benefit equal to one year's pay immediately prior to your retirement **will be paid** under the U S WEST Pension Plan to any "qualified" beneficiar(ies) you may have at the time of your death. (emphasis added).

(**Ex. 23**, ¶ G of March 1989 brochure). When confirming their acceptance for the 1990 special retirement "window," the Plan Administrator issued a letter dated March 26, 1990 to Mr. Kerber, Mr. Phelps and thousands of others who took the special offering, stating:

> A benefit equal to one year's pay immediately prior to your retirement **will be paid** under the U S WEST Management Pension Plan to any "qualified" beneficiar(ies) you may have at the time of your death. **The death benefit is paid in addition to benefits paid under the Group Life Insurance Program**. (emphasis added).

(**Ex. 24**, Bates 6397). The SPD issued after Kerber and Phelps retired reassured them that:

> "As a retiree with a TOE [meaning term of employment] date of February 28, 1993 or earlier, your eligible beneficiaries are eligible to receive this benefit. If your TOE date is February 28, 1993 or earlier, your eligible beneficiaries **are entitled** to this benefit." (emphasis added).

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[7] The 1989 SPD issued to Mr. Phelps and Mr. Kerber states unequivocally, "If you should die after retirement while receiving a service or disability pension, a benefit equal to one year's pay at retirement ***will*** be paid to the mandatory beneficiary (if any). (Defts' **Ex. B**, Bates 1155) (emphasis added).

(Dkt# 33, Defts' Answer to ¶ 90 of Second Amd. Complt). [8] The restated Governing Plan document created after Plaintiffs Kerber and Phelps retired states unequivocally:

> "**Individuals who have a Term of Employment that includes any period prior to March 1, 1993**, including individuals who are re-employed on or after March 1, 1993 and whose Term of Employment is bridged so that it includes periods before March 1, 1993, **shall be entitled to a frozen [Pension Death] benefit** under this Article VII as of February 28, 1993."

(emphasis added) (Defts' **Ex. D**, § 7.11, Bates 4502). All of this clear and express language, as well as the "shall be paid" language quoted in the Statement of Facts No. 5 above, proves the Plan sponsor's intent for contractual vesting of the PDB when Plaintiffs became service pension eligible.

6. In the Event of Plan Termination, the Governing Plan Documents Have *Always* Given the PDB a Higher Payment Priority Than Several Categories of Deferred Vested Pensions.

Since U S WEST was established in 1984, all Governing Plan documents have stated that upon plan termination or partial plan termination, plan assets are to be applied, after making the payments required by ERISA § 4044, 29 U.S.C. § 1344, and payments required for service pensioners and deferred vested pensioners on the pension payroll:

> Second: To making provisions for the payment of deaths attributable to deaths occurring prior to the date of termination which would have been payable from the [Plan] 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 [Plan] had the Plan not been so terminated.

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[8] Qwest Pension Plan Administrator Margie Dobis testified: Q: So, if a retiree asked you in 2002, after you had become plan administrator, "How do I become entitled to the pension death benefit," what would you say? A: Well, I would say that they would have to have a term [term of employment date] prior to 3/1/1993, they would have to be service pension eligible, and they would have to have a qualified beneficiary." (**Ex. 21**, Margie Dobis Depo. Tr. 36:20-37:1).

(See, e.g., **Ex. 4**, Bates 3764-65; **Ex. 5**, Bates 3620, Section 11.2(b)(ii)). The Governing Plan documents *next* required that plan assets be applied for the payment of several categories of *deferred* vested pensions starting at age 65. (**Ex. 4**, Bates 3766-69; **Ex. 5**, Bates 3621-27, Sections 11.2(b)(iii), (iv), (v) and (vi)). Payment of PDBs has always held a ***higher*** payment priority status than many deferred vested pension benefits which indisputably are accrued benefits. This proves unequivocally that the Plan sponsor expressed intent to treat the PDB as a protected benefit, a treatment that would not be appropriate for a welfare or mere ancillary benefit.[9] Indeed, the framers of the Governing Plan documents stressed the importance of the PDB as a permanent and fixed part of an employee's entire compensation package. The original Governing Plan documents stated:

> "The pension funds **shall be** held by a trustee or trustees or an insurance company or companies as permitted by law **for pension and death benefit purposes only** and shall be disbursed as directed by the Company. . . The Company undertakes to preserve the integrity of the U S WEST Pension Plan 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 benefit purposes** and to take such action as may be necessary and appropriate to insure the application of the entire fund to such purposes."

(emphasis added) (**Ex. 4**, Bates 3756-57, Section 4.8; **Ex. 5**, Bates 3613).

7. In 1997, the Plan Sponsor Created a New Early Retirement Optional Form of Benefit Partially Valued By the PDB. Amendment 2003-5 Impermissibly Cuts Back.

On page 5 of their brief, Defendants coyly make a single admission that "*a discounted version of the Pensioner Death Benefit" was made a part of an optional lump-sum form of payment*. ERISA's Section 204(g) anti-cutback provision prohibits a plan

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[9] Qwest EBC member Felicity O'Herron testified: Q: "Well, why did the company have that priority for a termination of the plan? Why did the death benefit have a higher priority than payment of deferred vested pensions? A: I don't know." (**Ex. 2**, O'Herron Depo. Tr. 254:7-11)

amendment that serves either to cut back or terminate an "optional form of benefit." [10] An "optional form of benefit" exists for purposes of ERISA's anti-cutback rule when a plan participant has a choice as to how payments will be made or applied to him. See *Ross v. Pension Plan for Hourly Employees of SKF Indus., Inc*., 847 F.2d 329, 333 (6th Cir. 1988); 26 C.F.R. § 1.411(d)-4 Q & A-1(b) (2007) (defining the ability to receive benefits as a single-sum distribution as an "optional form of benefit").

Effective January 1997, Plan sponsor U S WEST began to permanently allow management Plan participants the ability to receive an early retirement lump-sum distribution payment. In 2001, the single-sum option was extended to all non-management or occupational Plan participants. The early retirement optional single-sum service pension payment included the present value of the PDB. The Plan states:

> If a Participant. . .elects a lump sum (or a partial lump sum) benefit at his retirement, then the ***lump sum paid*** to the Participant ***shall be increased by the DLS Equivalent of the Death Benefit*** described in Section 7.3(a). For this purpose, only, the DLS Equivalent shall include an assumption that the Participant will be survived by a Beneficiary. . . If such an increase is paid, no other Death Benefit shall be payable pursuant to this Article VII at any time, including the Participant's death. . . "

(emphasis added) (Defts' **Ex. A-1**, Bates 4716-17, Section 7.3(c)). For every Plan participant selecting the early retirement single-sum optional distribution, payment of the PDB equivalent was not discretionary; the DLS Equivalent of the PDB was automatically

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[10] 29 U.S.C. § 1054(g) provides: "(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section §302(d)(2) [i.e., approved by the Secretary of Treasury] or 4281 [benefits under certain terminated plans]. (2) For purposes of paragraph (1), **a plan amendment which has the effect of— (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits**...." (emphasis and bracketed portions added). Internal Revenue Code § 411(d)(6) is essentially, for all practical purposes, the same as the above quoted ERISA section. Both sections have been amended over time, but with no significant changes.

calculated into the lump-sum benefit payment. And, the recipient was made ineligible for the PDB at death, since the discounted equivalent was made part of the lump-sum pension payment. Conversely, every Plan participant who chose a different service pension payment option in the form of an annuity, remained eligible for payment of the PDB at death. That situation proves remarkably that Plan sponsor U S WEST intended the PDB, which remained linked to the annuity option, to be treated as a protected benefit.[11]

In any event, the optional early retirement lump sum payment became a protected benefit. Courts have unanimously concluded ERISA specifically protects a participant's right to receive an optional lump-sum payment of benefits. In *Counts v. Kissack Water & Oil Serv., Inc*., 986 F.2d 1322, 1324 (10th Cir. 1993), the appellate court stated:

> Since 1984, 29 U.S.C. § 1054(g)(2) has prohibited the amendment of a pension plan to eliminate accrued benefits, including "an optional form of benefit." The payment of benefits in a lump sum is one such "optional form of benefit." See 26 C.F.R. § 1.411(d)-4, Q & A-1(b). Thus, unless an exception exists, by its very terms, the 1990 Plan amendment violated the proscription of 29 U.S.C. § 1054(g)(2).[12]

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[11] In light of current clarifying Treasury Regulations, Plaintiffs believe the IRS would have shared Plaintiffs view about U S WEST's treatment of the PDB, thus deeming the benefit was made protected. Teas. Reg. § 1.441(d)-3(g)(6)(ii)(B), as revised and effective after August 12, 2005, clarifies that a death benefit made part of one form of optional benefit, but not another form of optional benefit, is to be treated as a protected benefit. "Death benefits. If a death benefit is payable after the annuity starting date for a specific optional form of benefit and the same death benefit would not be provided if another optional form of benefit were elected by a participant, then that death benefit is part of the specific optional form of benefit and is thus protected under section 411(d)(6). Furthermore, Treas. Reg. § 1.441(d)-3(g)(2), as revised and effective after August 12, 2005, states: The term ancillary benefit means – (v) A death benefit under a defined benefit plan other than a death benefit which is part of an optional form of benefit. However, these current regulations were not in effect when Defendants enacted Amendment 2003-5. *See* page 26 of http://www.irs.gov/pub/irs-regs/td_9219.pdf stating "Plan Amendments adopted before August 12, 2005 are to be evaluated in light of the applicable authorities without regard to these regulations. . . No implication is intended concerning whether or not a rule adopted prospectively in these regulations is applicable law before the effective date in these regulations."

[12] See also *Steiner Corp. Retirement Plan v. Johnson & Higgins of California*, 31 F.3d 935, 939-41 (10th Cir. 1994) *cert. denied*, 513 U.S. 1081, 115 S.Ct. 732 (1995) (concluding that when a lump sum is offered as an alternative to an annuity, it is an "optional form of benefit" within the meaning of ERISA Section 204(g)(2)(B); *Williams v. Cordis* Corp., 30 F.3d 1429, 1431 (11th Cir.1994) ("The

After January 1997 and before Amendment 2003-5 was put into effect, at least 10,000 Plan participants received the optional lump-sum service pension payment, which included the DLS Equivalent value of the PDB. That fact alone belies Defendants' argument that the PDB only existed "as a compassionate [welfare] payment." (Defts' Brief at p. 9). Amendment 2003-5 eliminates the DLS Equivalent of the PDB from the formula for the protected optional lump-sum benefit and significantly diminishes its value. Amendment 2003-5 runs afoul of ERISA § 204(g)(2)(B), 29 U.S.C. § 1054(g)(2)(B) and Plan terms controlling when Amendment 2003-5 was enacted.

Defendants cannot escape liability by contending ERISA § 204(g) has no application on the grounds the PDB should be deemed a welfare benefit. See *Romback v. Nestle USA, Inc.*, 211 F.3d 190, 193-94 (2nd Cir. 2000) (holding ERISA's anti-cutback rule is not applicable to an employee welfare benefit plan). Defendants' enforcement of Amendment 2003-5 causes the early retirement optional benefit to be reduced.

Likewise, Defendants cannot escape liability by contending the early retirement optional benefit has not been reduced, but only the DLS Equivalent value has been eliminated from the formula. Since the DLS Equivalent adds significant value above the accrued pension benefit, reduced to present value for immediate optional lump-sum payment, the DLS Equivalent is deemed to be a "retirement-type subsidy,"[13] also protected

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payment of benefits in a lump sum is one example of a 29 U.S.C. § 1054(g)(2)(B) 'optional form of benefits.'"); *Perreca v. Gluck*, 295 F.3d 215, 231 (2d Cir. 2002) (characterizing lump-sum payment option to early retirees as optional form of benefit); *Call*, 475 F.3d at 821; *Wilmington Shipping Co. v. New England Life Ins. Co.*, 496 F.3d 326, 334 (4th Cir. 2007);

[13] Treas. Reg. § 1.441(d)-3(g)(6)(iv)(B), as revised and effective after August 2005, defines " Retirement-type subsidy", as follows: "The term retirement-type subsidy means the excess, if any, of the actuarial present value of a retirement-type benefit over the actuarial present value of the accrued benefit commencing at normal retirement age or at actual commencement date, if later, with both such actuarial present values determined as of the date the retirement-type benefit commences. Examples of

by ERISA § 204(g)(2)(A)'s anti-cutback prohibition. Defendants can present no evidence that continuing the practice of factoring in the DLS Equivalent of the PDB, when paying the single-sum option created significant burdens or complexities for the Plan. After all, this payment practice lasted about seven full years, causing no problems for the Plan.

8. Plaintiffs Are Entitled to an Order Clarifying Their Rights.

In their Third Claim for Relief, pursuant to ERISA Section 502(a)(1)(B), Plaintiffs Kerber and Phelps seek a declaration of their future rights to the PDB. As the undisputed facts in Section II.5 above reveal, the Plan sponsor never complied with the formal amendment procedures to legally limit or freeze the PDB to the value of the Plan participant's annual wage rate as of March 1, 1993. The excerpt of a purported resolution made by the Board of Directors in December 1992 is not a formal plan amendment.[14] During 1992 and 1993, the express terms of the Plan only empowered the Committee with authority to amend the Plan, and EBC By-Laws require at least two members to act. Those terms must be enforced. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002). A company is "bound" to "whatever level of specificity [the] company ultimately chooses in an amendment procedure." *Curtis-Wright v. Schoonejongen*, 514 U.S. 73, 83

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retirement-type subsidies include a subsidized early retirement benefit and a subsidized qualified joint and survivor annuity.

[14] Defendants' **Ex. C** is only an excerpt, not the full document and, as such, is inadmissible heresay and Plaintiffs object to that document. The only other document Defendants might try to present is, again, a mere resolution signed by the Secretary of the U S WEST Employee Benefits Committee, which document does not constitute a formal plan amendment acted upon by at least two Committee members. See Docket 97-9, Defts' **Ex. U.** which contains on page 4 a resolution stating "*That the Sickness/Accident Death Benefits provided by the U S WEST Management Plan shall be frozen for employees on the payroll on February 28, 1993 at the death benefit amount in effect on February 28, 1993.*" That resolution is completely irrelevant because, as of January 1, 1993, the U S WEST Management Plan no longer existed and all of its assets were transferred to the other pension plan, the U S WEST Pension Plan, the surviving pension plan. There is neither a resolution nor a formal plan amendment by the EBC freezing the amount of the PDB within the U S WEST Pension Plan.

(1995). The requirement of formal amendments reflects ERISA's overall goal of protecting "'the interests of participants in employee benefit plans and their beneficiaries." *Miller v. Coastal Corp*., 978 F.2d 622, 624 (10th Cir. 1992) (quoting 29 U.S.C. § 1001(b)) *Cirulis v. Unum*, 321 F.3d 1010, 1014 (10th Cir. 2003) (right to amend requires compliance with amendment procedures). This Court should declare the PDB to be payable to all Plaintiffs and their putative class is based upon the annual wage rate as of the date of retirement.

Since the protected early retirement optional form of benefit – a single-sum service pension payment - has been impermissibly diminished, as it no longer includes the DLS Equivalent value of the PDB, the full value must be restored. But, it is impossible to restore the DLS Equivalent of a Plan participant's PDB, if the Plan's terms state the Plan participant's PDB no longer exits. Such is the case right now, due to the existence of Amendment 2003-5. Therefore, Amendment 2003-5 must be stricken and former terms concerning the PDB restored to the Plan. Plaintiffs West, Meister and Ingemann can prove their claim that this Court should declare, among other declarations of their rights, that the optional lump sum and the PDB are necessarily protected and, therefore, Amendment 2003-5 is void and should be stricken. Defendants' motion for summary judgment on the Third Claim must be denied.

B. Under ERISA § 502(a)(3), Plaintiffs May Seek an Order Striking Amendment 2003-5, Reforming the Plan and Ordering Notice to Plan Participants. Defendants Are Not Entitled to Summary Judgment on the Second Claim.

In their Second Claim for Relief, Plaintiffs contend they are entitled to equitable relief allowed by ERISA Section 502(a)(3), which authorizes an action:

> (A) to enjoin any act or practice which violates any provision of this title [i.e., 29 U.S.C §§ 1001-1191] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce

any provisions of this title or the terms of the plan.

(bracketed portions added) 29 U.S.C. § 1132(a)(3). As established in Argument Section IV.A above, the founding Governing Plan document and SPDs in effect when Mr. Kerber and Mr. Phelps retired gave no right to the Plan sponsor, the Committee, or any other entity, to make detrimental changes to benefits or to eliminate benefits. The January 1, 1984 through December 29, 1994 Governing Plan document contained only a ROR to terminate the Plan, not a reserved right to terminate a particular benefit. The clause stating "***The Committee. . . may from time to time make changes*** *in the Plan* ***as set forth in this document. . .*** ," can only be read to allow such changes as are specified or delineated *elsewhere* within the Plan document. The Founders of the initial Governing documents could have said something about permissible changes to benefits, but, they did not. Notably, the ROR does not state "The Committee. . . may from time to time make changes to benefits." There is no express authority to terminate a particular benefit, such as PDBs.

A prior unsuccessful effort was made in this District for court reformation of the Plan so as to reinstate the original 1984-1994 ROR, but the effort was considered premature, because there had not yet been any negative changes to any pension benefits. (See Defts' **Ex. E-3**, *Jarvis v. U S WEST,* Judge Nottingham's Order at p. 12 (dismissing the claim and stating, "because there is no allegation that any participant's life insurance or death benefits have been in any way impacted, the allegation of plaintiff's argument on this point eludes me."). Certainly, now, the issue is fully ripe. This Court should follow the reasoning in *Call* and declare that the Plan sponsor could not unilaterally eliminate the 1984-1994 private anti-cutback provision by enacting a subsequent amendment, as that would make the original provision superfluous and empty. *Call*, 475 F.3d at 821.

A "pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite number of years." *Hurd v. Illinois Bell Tel. Co.*, 234 F.2d 942, 946 (7th Cir.), cert. denied, 352 U.S. 918, 77 S.Ct. 216 (1956), quoted in *Pratt v. Petroleum Prod. Management Employee Sav. Plan*, 920 F.2d 651, 661 (10th Cir.1990). As the analysis in Section IV.A demonstrates, Plaintiffs Kerber and Phelps can prove their claim that subsequent revisions to the original ROR placed in January 1, 1984 through December 28, 1994 Governing Plan document should have no effect on their rights to Plan benefits, including the PDB. Plaintiffs can prove their claim to equitable and injunctive relief, directing Plan documents be reformed to reflect Mr. Kerber's and Mr. Phelps's (and their putative class members') rights to the PDB as originally established and reflected in the SPD issued to them.

Also, pursuant to ERISA Section 502(a)(3), Plaintiffs West, Meister and Ingemann seek an order striking Amendment 2003-5, reforming the Plan and ordering revised Plan documents, together with notices about the PDB, sent to Plan participants As the analysis in Section IV.A demonstrates, Plaintiffs West and Meister, who received the optional early retirement lump-sum payment, minus the DLS Equivalent PDB value, can prove their claim that the harm resulting from Amendment 2003-5 should be undone. Plaintiffs West and Meister (and their putative class members) should receive an adjustment payment with interest. Likewise, Plaintiff Ingemann can prove his claim for restoration of his (and his putative class members') eligibility for the PDB, tied to the earned service pension.

C. Defendants Are Not Entitled to Summary Judgment on the First Claim for Relief Because Defendants Breached ERISA Statutory Duties and Plan Terms.

As established in Section IV.A above, since Amendment 2003-5 violates the anti-

cutback provisions of ERISA Section 204(g), Plaintiffs West, Meister and Ingemann can prove their claim that Plan fiduciaries have violated ERISA Section 404(a) duties to comply with ERISA's statutory requirements.

Plaintiffs also contend in their First Claim for Relief that this Court should apply principles of equitable estoppel. When both Mr. Kerber and Mr. Phelps retired and chose the structure of benefits to be received for themselves and their spouses, they specifically and detrimentally relied upon representations and assurances in the 1989 SPD issued to them classifying the PDB as a defined benefit, a fixed amount that "will be paid," not a "take away" benefit. (**Ex. 6**, Kerber Affd. ¶s 5-7; **Ex. 7**, Phelps Affd. ¶s 6- 9). The SPD guided them as they made retirement choices and estate-planning decisions. The PDB was a *huge* financial component, and represented a promised payment equivalent to their last annual salary at U S WEST. (Id.). There was no notice given that any benefits, including the PDB, could be reduced or eliminated. (Id). There is no disputing the fact that the SPDs issued to Plaintiffs Kerber and Phelps represent there is only a reserved right to terminate the Plan, not a reserved right to change, reduce or eliminate any benefits, including the PDB. To the extent Defendants persist with their argument and interpretation of the ROR in the Governing Plan document effective during January 1, 1984 through December 28, 1994 (which interpretation Plaintiffs especially disagree with), it proves there exists an ambiguity and the SPD and the Governing document have conflicting terms. In *Semtner v. Group Health Serv. of Oklahoma, Inc.*, 129 F.3d 1390 (10th Cir. 1997), the court ruled:

> "[w]hen the summary plan description and the plan language differ, then summary plan description is binding." S*ee Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1515 (10th Cir.1996). "A summary must be 'written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such

> participants and beneficiaries of their rights and obligations under the plan." *Williams v. Midwest Operating Eng'rs Welfare Fund*, 125 F.3d 1138, 1140 (7th Cir.1997) (quoting 29 U.S.C. § 1022(a)(1))."

Id. at 1393. Accordingly, "[b]ecause the SPD best reflects the expectations of the parties to the plan, the terms of the SPD control the terms of the plan itself." *Chiles*, 95 F.3d at 1515-19 (holding a plan participant may secure relief under ERISA § 502(a)(3), based on ambiguous or faulty SPD representations relied upon, or otherwise upon showing prejudice from the inconsistency between the SPD and the master plan document). It is unreasonable to allow plan sponsors to place promises such as "benefits will be paid" or "you will always remain eligible for benefits" in the SPD and official plan bulletins and then to allow plan sponsors to rely on an obscure incomprehensible disclaimer in an undisclosed governing document and, thereby, to renege on false promises. Here, the facts cry out for application of the principles of equitable estoppel, compelling a judicial determination that SPD terms more favorable to Plaintiffs' PDB rights should control.

Though the Tenth Circuit has neither adopted nor rejected an equitable estoppel rule in the ERISA context, the Tenth Circuit has outlined a framework of rules and elements to be followed when analyzing an equitable estoppel claim. *Cannon v. Group Health Serv.* 77 F.3d 1270, 1276-77 (10th Cir. 1996), *cert. denied*, 519 U.S. 816, 117 S.Ct. 66 (1996). [15] *Kaus v. Standard Life Ins.* Co., 176 F.Supp. 2d 1193, 1198 (D. Kan. 2001).

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[15] In *Cannon*, the Tenth Circuit considered whether the plaintiff had stated an equitable estoppel claim applying the five elements of equitable estoppel which the Eleventh Circuit has identified: (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted upon or had reason to believe that the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation. *Cannon*, 77 F.3d at 1276-77 (citing *National Cos. Health Benefit Plan*, 929 F.2d at 1572).

Assuming the Tenth Circuit, like numerous other appellate courts,[16] will recognize Plaintiffs' ERISA equitable estoppel claim, it is quite obvious the original Governing Plan documents with the "Changes in Plan" language is ambiguous - as reasonable people differ as to its meaning. Therefore, this Court should consider extrinsic evidence constituting an interpretation of the ambiguity, including bulletins and brochures sent to Plan participants, the intent of the prior Plan sponsor as reflected in annual DOL and IRS filings, the transfer of plan assets including the value of PDBs upon the sale of Qwest Dex, and the affidavits of Barbara Doherty and Richard Remington, both former U S WEST Chief Human Resources Officers. *Deboard v. Sunshine Min & Ref. Co.*, 208 F.3d 1228, 1241 (10th Cir. 2000). The cumulative evidence proves Plaintiffs' claims. Defendants should not be granted a summary judgment on Plaintiffs' First Claim for Relief.

D. This Court May Enter Partial Summary Judgment For Plaintiffs.

This Court has seen the relevant Plan document provisions and, in view of ERISA Section 204(g), can declare, as a matter of law, the value of the PDB became a core element of a protected early retirement optional form of benefit and, thus, rule Amendment 2003-5 which eliminated the PDB and diminished the protected benefit is illegal and should be stricken. District Courts are empowered to enter summary judgment *sua sponte*

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[16] The majority of Circuit Courts recognize equitable estoppel as a viable claim in an ERISA context. See *See Sprague, et al. v. General Motors Corp.*, 133 F.3d 388, 403 (6th Cir. 1998) (en banc), *cert. denied*, 524 U.S. 923, 118 S. Ct. 2312 (1998); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 458 n.12 (11th Cir. 1996), *cert. denied*, 519 U.S. 1149, 117 S.Ct. 1082 (1997); *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 542 (7th Cir. 1996); *Fink v. Union Central Life Ins. Co.*, 94F.3d 489, 492 (8th Cir. 1996); *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72, 78 (2nd Cir. 1996); *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation*, 58 F.3d 896, 907 (3rd Cir. 1995); *Greany v. Western Farm Bureau Life Inss. Co.*, 973 F.2d 812,821-22 (9th Cir. 1992); *Cleary v. Graphic Communications International Union Supplemental Retirement and Disability Fund*, 841 F.2d 444, 447 (1st Cir. 1988).

under limited conditions, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2554 (1986). Here, the entry of a partial summary judgment *sua sponte* in favor of Plaintiffs is warranted because the following conditions are met: (1) there is no dispute of material fact with respect to this legal issue that the Court may rule upon as a matter of law; and (2) the losing parties - Defendants - have had an adequate opportunity to address the legal issues involved, including an adequate amount of time to develop any facts necessary to oppose such a partial summary judgment. *David v. City and County of Denver*, 101 F.3d 1344, 1358-1359 (10th Cir. 1996).

V. CONCLUSION and REQUEST FOR ORAL ARGUMENT

For all the foregoing reasons, this Court should deny Defendants' motion for summary judgment in its entirety. Since this case presents some vigorously contested novel ERISA legal issues and the outcome will be important to thousands of U S WEST/Qwest retirees, an oral argument hearing may materially aid the Court.[17]

DATED: November 14, 2007.

Respectfully submitted,

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[17] This is the second of three cases in this District to preserve Plan participants' benefits:
a. The first case, *Phelps v. U S WEST, et al*, Case No. 95-Z-2759, ended with an agreed upon memorialization of a lifetime guarantee of health care coverage for 30,500 Plan participants;
b. This is the second case; and
c. The third case, *Kerber, et al v. Qwest Group Life Insurance Plan, et al*, Case No. 07-cv-00644-WDM-CBS, concerns the Group Life Insurance basic benefit that Qwest leadership reduced to a mere $10,000.00, which monetary loss makes the outcome of this second case all the more important to thousands of U S WEST/Qwest pensioners and their beneficiaries.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2007, a true and correct copy of the above and foregoing document, together with the following exhibits:

Exhibit 1	2002 Governing Plan Document - Qwest Pension Plan
Exhibit 2	Deposition Transcript - Felicity O'Herron, EBC member and Rule 30(b)(6) witness
Exhibit 3	EBC By-Laws and Rules of Procedure
Exhibit 4	1984-1994 Governing Plan Document - U S WEST Pension Plan
Exhibit 5	1984-1994 Governing Plan Document - U S WEST Management Pension Plan
Exhibit 6	Affidavit of Named Plaintiff Edward J. Kerber
Exhibit 7	Affidavit of Named Plaintiff Nelson B. Phelps
Exhibit 8	Deposition Transcript - Barry Allen, Qwest Executive Vice President
Exhibit 9	September 2, 2003 letter from Jill Sanford to Retirees
Exhibit 10	1989 SPD
Exhibit 11	1999 SPD
Exhibit 12	2003 SPD
Exhibit 13	Affidavit by Leonard Garofolo, Plaintiffs' Expert Witness
Exhibit 14	Deposition Transcript - Leonard Garofolo, Plaintiffs' Expert Witness
Exhibit 15	Expert Opinion Report by Leonard Garofolo, ERISA Consulting Group
Exhibit 16	Defendants' Amended Response to Interrogatories Nos. 9 and 10
Exhibit 17	Affidavit of Barbara Doherty, U S WEST EBC member
Exhibit 18	Affidavit of Richard Remington, U S WEST EBC member
Exhibit 19	Instructions for Schedule B to Form 5500 for years 1993 and 2003
Exhibit 20	PDB Transfer Regarding Qwest Dex Service Pension Eligible Employees
Exhibit 21	Deposition Transcript - Margie Dobis, Qwest Pension Plan Administrator
Exhibit 22	Defendants' Responses to Request for Admissions Nos. 23-30
Exhibit 23	May 1989 Plan brochure
Exhibit 24	March 26, 1990 letter from U S WEST Plan Administrator John Shea to Retirees

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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