IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-CV-00644-WDM-KLM

EDWARD J. KERBER, *et al.*,

Plaintiffs,

vs.

QWEST GROUP LIFE INSURANCE PLAN, *et al.*,

Defendants.

QWEST'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' SIXTH, SEVENTH, AND EIGHTH CLAIMS FOR RELIEF

September 15, 2008

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Defendants Qwest Group Life Insurance Plan (the "Plan" or "Life Plan"), Qwest Employee Benefits Committee ("EBC"), Qwest Plan Design Committee ("PDC"), and Qwest Communications International Inc. (together with its affiliates, "QCII") (jointly, "Qwest") respectfully submit this motion for summary judgment on the Sixth, Seventh, and Eighth Claims in plaintiffs' Second Amended Complaint ("Complaint" or "SAC").[1]

I. MOTION FOR SUMMARY JUDGMENT ON SIXTH CLAIM

The Sixth Claim is brought solely by plaintiff Samuel Strizich ("Strizich"). Stizich alleges that Minutes and Resolutions executed by the PDC on September 14, 2006 (the "Sept. 2006 Resolutions") did not effectuate an amendment (the "2006 Amendment") reducing the life insurance benefit for Management Post-1990 Retirees, Pre-1991 Retirees, and ERO-1992 Retirees (collectively, the "Additional Retirees") to $10,000 effective January 1, 2007.

Qwest is entitled to summary judgment on this claim for reasons that parallel the reasons it is entitled to summary judgment on plaintiffs' Third, Fourth and Fifth Claims. In particular, Qwest is entitled to summary judgment on this claim because as a matter of law: (1) Qwest manifested its intent to amend the Plan by means of the Sept. 2006 Resolutions; (2) Qwest ratified the 2006 Amendment before its January 1, 2007 effective date; and (3) Strizich did not detrimentally rely on the allegedly defective Sept. 2006 Resolutions and Qwest neither concealed the 2006 Amendment from Strizich nor adopted that amendment in bad faith.

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[1] Qwest previously filed motions for summary judgment on all other claims in this case. *See* Doc. Nos. ("DN") 90 & 107.

A. Undisputed Facts Material to Sixth Claim

The undisputed facts pertinent to this Motion include certain facts supporting Qwest's Motion for Summary Judgment on Plaintiffs' First, Third, Fourth and Fifth Claims for Relief ("First Motion," DN 90), all of which plaintiffs concede are undisputed. To avoid burdening this Court with redundant factual statements and exhibits, Qwest incorporates herein Undisputed Facts ("UF") ¶¶ 13-18, 20, 35-37 & 45 in the "Statement of Undisputed Facts" section of Qwest's Brief in Opposition to Plaintiffs' Amended Motion for a Summary Judgment ("Opposition Brief," DN 91), and the exhibits supporting those facts. Qwest refers to the additional Undisputed Facts set forth below by sequential numbers beginning with "UF 46," and to the supporting exhibits as, *e.g.*, "Ex. A-7."

46. The Sixth Claim is brought solely by Strizich on behalf of a putative subclass consisting of "beneficiaries of Eligible Retirees who died after January 1, 2007 and prior to the adoption of any PLAN amendment subsequent to 'Amendment 2006-1." (SAC ¶¶ 98 & 114(C).) Strizich claims to be a member of this subclass because he is the beneficiary of an Eligible Retiree, Sharon Strizich ("Mrs. Strizich"), who died March 20, 2007. Mrs. Strizich was an "Additional Retiree" as defined above because she retired from U S WEST, Inc. in February 1990. Mrs. Strizich was thus a member of the group of retirees known as "Pre-1991 Retirees." (*Id.* ¶ 10.)

47. The gravamen of the Sixth Claim is that the Sept. 2006 Resolutions did not effectuate an amendment reducing the life insurance benefit to $10,000 effective January 1, 2007 for the Additional Retirees, including Mrs. Strizich. (*See* SAC ¶¶ 98-99; Ex. A-21, p. 16, Resp. to Interrog. 12.)

48. The PDC considered, approved, and executed the Sept. 2006 Resolutions on September 14, 2006. Those resolutions described the life insurance benefit for which the Additional Retirees were currently eligible, and then stated:

> **Recommendation:** That the Director, Employee Benefits, Health Life & Disability, Human Resources, or his delegate, be authorized to take all actions appropriate to implement for the 2007 plan year:
>
> - *Change the Basic Life Insurance Benefit for the Management Post-1990 Retirees * * * Pre-1991 Retirees * * * [and]ERO-1992 Retirees to reduce it to a fixed $10,000 benefit effective January 1, 2007. * * **
>
> *RESOLVED, that the Plan Design Committee approves of the proposed plan design recommendations for the 2007 plan year.*
>
> *RESOLVED, that the Qwest Group Life Insurance Plan* ***be and hereby is amended*** *to incorporate the design changes approved.*

(Ex. A-7 ¶¶ 2-3; Ex. A-8 ¶ 7; Ex. A-9 ¶5; Ex. A-14 p. QL06596 (emphasis added).)

49. The members of the PDC unanimously intended to effectuate, by means of the Sept. 2006 Resolutions, the 2006 Amendment to the Plan, under which the life insurance benefit for the Additional Retirees was reduced to $10,000 effective January 1, 2007. (Ex. A-7 ¶ 3; Ex. A-8 ¶ 3; Ex. A-9 ¶ 3.)

50. In accordance with ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4), at all times between September 14, 2006 and the present, the Sept. 2006 Resolutions have been available for inspection by Plan participants and beneficiaries in QCII's offices, and Qwest has been prepared to produce to any Plan participant or beneficiary who requested copies of Plan documents a copy of those resolutions. (Ex. A-9 ¶ 11.)

51. In October 2006 the Striziches and other Additional Retirees received from Qwest a document entitled "Summary of Material Modifications of the Qwest Health

Care and Qwest Life Insurance Plan 2007 Plan Year" (the "Oct. 2006 SMM"). (*See* Ex. A-21, p. 2, Resp. to RFA 3.) This document stated it was "intended to serve as a summary of material modification as described in section 104(b)" of ERISA, and that "[e]ffective Jan. 1, 2007, the Basic Life Insurance Benefit for eligible Pre-1991 Retirees will be reduced to a flat ten thousand dollar ($10,000) benefit payable upon the death of the eligible retiree." (Ex. A-22, pp. QL00149-50.)

52. Strizich does not challenge the adequacy or propriety of the Oct. 2006 SMM. (*See* SAC.)

53. Also in October 2006, the Striziches and other Additional Retirees received from Qwest a Benefit Program Guide (the "Oct. 2006 Guide"). (*See* Ex. A-21, p. 3, Resp. to RFA 4.) The Oct. 2006 Guide likewise stated that "[e]ffective Jan. 1, 2007, the Basic Life Insurance benefit for eligible Pre-1991 Retirees will be reduced to a flat ten thousand dollar ($10,000) benefit payable upon the death of the eligible retiree." (Ex. A-23 p. QL06745.)

54. Also in October 2006, the Striziches and other Additional Retirees received from Qwest a Benefit Enrollment Statement (the "Oct. 2006 Statement"). (*See* Ex. A-21, p. 2, Resp. to RFA 2.) The Oct. 2006 Statement sent to the Striziches stated that the amount of life insurance payable on the death of Mrs. Strizich would be $10,000 effective January 1, 2007. (Ex. A-25 p. QL08530.)

55. Strizich does not allege that Qwest attempted to conceal from him or his wife the reduction in life insurance coverage that would take effect on January 1, 2007 by virtue of the 2006 Amendment. To the contrary, he has alleged that Qwest "formally announced" the reduction in life insurance benefits effectuated by that amendment in

October 2006. (First Amended Complaint (DN 10) ¶¶ 3 & 96.) Strizich also admits that he knew before January 1, 2007 that Qwest intended to change the amount of the life insurance benefit payable under the Plan upon the death of his wife to $10,000 effective January 1, 2007. (Ex. A-21, p. 8, Resp. to RFA 26.)

56. In late 2006, Qwest and Prudential Insurance Company of America ("Prudential"), the company that had issued a group life insurance policy on the lives of Plan participants (the "Restated Group Contract"), agreed that the policy would be amended to reflect the change in benefits that was the subject of the 2006 Amendment. Prudential understood prior to January 1, 2007 that a binding agreement existed with Qwest to change the benefit payable to the beneficiaries of the Additional Retirees to $10,000 effective on that date. Pursuant to that agreement, Prudential administered the Plan in accordance with the 2006 Amendment by paying a $10,000 benefit to beneficiaries of Additional Retirees, including Strizich, who died on or after January 1, 2007. Prudential and Qwest also entered into a written amendment to the Restated Group Contract, which Prudential executed on or about February 7, 2007, providing that the benefit payable to beneficiaries of the Additional Retirees and other retirees was $10,000. (Ex. A-9 ¶ 6; Ex. A-19 ¶¶ 6 & 7.)[2]

57. After stating that the Plan "be and hereby is amended and restated" to reduce the life insurance benefit for the Additional Retirees to $10,000 effective January 1, 2007, the Sept. 2006 Resolutions authorize a Qwest official to "approve and execute the final form of such restatement." (Ex. A-12 p. QL02124.) When the PDC executed the Sept. 2006

[2] Pursuant to D.C.COLO.LCivR 56.1(C), Qwest has filed only the pertinent pages of the lengthy attachments to Ex-19, the Declaration of Edith Ewing of Prudential. Qwest has previously produced the entirety of those attachments to plaintiffs in discovery.

Resolutions, PDC member Erik Ammidown, who typically handled logistical issues relating to restatements or amendments of Life Plan documents, contemplated that the lengthy 1998 Plan Document would be restated in its entirety, and that the new and restated Plan document would incorporate the amended terms set forth in the Sept. 2006 Resolutions. But after the Sept. 2006 Resolutions were executed, Mr. Ammidown decided against creating an entirely new and restated Plan document. (Ex. A-9 ¶ 7.)

58. In lieu of creating an entirely new and restated Plan document, on June 13, 2007, the PDC reviewed, approved, and executed a document entitled "Resolutions of the Qwest Plan Design Committee—Qwest Group Life Insurance Plan Regarding Amendment 2007-1" (the "June 2007 Resolutions"). (Id. ¶ 8; Ex. A-7 ¶ 4; Ex. A-8 ¶ 8; Ex. A-14.) The June 2007 Resolutions stated in part that "the Plan Design Committee *previously amended the Life Plan . . . on September 14, 2006* to, *inter alia*, change the Basic Life Coverage for all Pre-1991 Retirees, ERO-1992 Retirees, and Management Post-1990 Retirees to reduce such benefit to a fixed $10,000 benefit effective January 1, 2007." (Ex. A-14. p. QL06596 (emphasis added).) The June 2007 Resolutions then stated that "[e]ffective January 1, 2007, the Section 1.1. definition of 'Basic Life Coverage' [*i.e.*, *not* the entire Plan] was restated" to include the provision set forth above. (*Id.* pp. QL06596-97.)

59. All three PDC members understood that the purpose and effect of the June 2007 Resolutions was in part to restate the 2006 Amendment that the PDC had approved and enacted by means of the Sept. 2006 Resolutions. For this reason, and because all affected Plan participants had already received SMMs and other notices regarding the 2006 Amendment, Qwest did not send Plan participants or beneficiaries SMMs or other

notices following execution of the June 2007 Resolutions because none were required. (Ex. A-7 ¶ 4; Ex. A-8 ¶ 8; Ex. A-9 ¶ 9.)

60. Strizich did not read the Sept. 2006 Resolutions until after the March 20, 2007 death of his wife and the March 30, 2007 filing of this lawsuit. (Ex. A-21 p. 10, Resp. to RFA 32.) Strizich admits that, except to support his claims in this lawsuit, he did not detrimentally rely in any way on the alleged deficiencies in the Sept. 2006 Resolutions. (*Id.* pp. 16-17, Resp. to Interrog 12-13.)

B. Qwest Is Entitled To Summary Judgment on the Complaint's Sixth Claim.

Qwest is entitled to summary judgment on the Complaint's Sixth Claim because as a matter of law: (1) Qwest manifested its intent to amend the Plan by means of the Sept. 2006 Resolutions; (2) Qwest ratified the 2006 Amendment in multiple ways before its January 1, 2007 effective date; and (3) Strizich did not detrimentally rely on the allegedly defective Sept. 2006 Resolutions and Qwest neither concealed the resulting 2006 Amendment from Strizich nor adopted that amendment in bad faith. Because the legal issues raised by Strizich's Sixth Claim are largely identical to those raised by plaintiffs' Third, Fourth, and Fifth Claims, Qwest simply summarizes below the discussion of those issues in Qwest's First Motion, and incorporates herein that motion's more detailed discussion of those issues (*see* DN 90 at pp. 6-17).

1. Qwest Manifested Its Intent To Amend the Plan by Means of the Sept. 2006 Resolutions.

Because plaintiffs have stipulated that the PDC possessed plan amendment authority (*see* UF ¶ 16), the validity of the Sixth Claim turns on whether the PDC "actually approved" the 2006 Amendment by means of the Sept. 2006 Resolutions. *Curtiss-Wright v.*

Schoonejongen, 514 U.S. 73, 85 (1995). This in turn depends on whether the company "sufficiently manifest[ed] its intention" to amend. *Id.* at 80. The following facts are among those showing that, as a matter of law, Qwest sufficiently manifested its intent to effectuate a Plan amendment by means of the Sept. 2006 Resolutions:

- The Sept. 2006 Resolutions state that the Plan "be and hereby is amended" to reduce the life insurance benefit to $10,000 for the Additional Retirees effective January 1, 2006, and all three PDC members intended to effectuate the 2006 Amendment by means of those resolutions. (UF ¶¶ 48-49.)

- Qwest treated the Sept. 2006 Resolutions as part of the Plan's governing documents by making them available for inspection and copying, and by producing them to plaintiffs' counsel upon request, as required by ERISA Section 104(b). (UF ¶ 50.)

- Qwest sent Strizich and the other Additional Retirees the Oct. 2006 SMM, the Oct. 2006 Guide, and the Oct. 2006 Statements, all of which stated that the life insurance benefit would be reduced to $10,000 for the Additional Retirees effective January 1, 2007. (UF ¶¶ 51-54.)

- Qwest provided this same information to its life insurer in 2006, and the group life insurance policy was amended to reflect the terms of the 2006 Amendment. (UF ¶ 56.)

- Qwest and its insurer administered the Plan in accordance with the 2006 Amendment by providing beneficiaries of the Additional Retirees who died on and after January 1, 2007 with a life insurance benefit at the reduced $10,000 level. (UF ¶ 56.)

Any one of these actions would have sufficed to manifest Qwest's intent to approve the 2006 Amendment. Against all of the undisputed facts described above, Strizich cannot set forth the slightest quantum of evidence to support a finding that Qwest did not "sufficiently manifest its intention" to amend the Plan in accordance with the 2006 Amendment effective January 1, 2007. Moreover, even if the Sept. 2006 Resolutions did not fully comply with the Plan's amendment procedures (which they did), the resolutions substantially complied with those procedures, which is all the Tenth Circuit requires. *Allison v. Bank One-Denver*, 289 F.3d

1223, 1236 (10th Cir. 2002); *Peckham v. Gem State Mut. of Utah*, 964 F.2d 1043, 1052-53 (10th Cir. 1992).

2. Even If Qwest Failed To "Actually Approve" the 2006 Amendment by Means of the Sept. 2006 Resolutions, Qwest Ratified that Amendment Before Its Effective Date.

In *Curtiss-Wright*, the Supreme Court stated that even if an attempted plan amendment is defective, the plan sponsor can render the amendment effective through ratification. 514 U.S. at 85. Overwhelming and undisputed evidence in this case—including the evidence summarized in the preceding Section I(B)(1)—shows that Qwest ratified the 2006 Amendment prior to its January 1, 2007 effective date. *See* UF ¶¶ 48-56. In light of that undisputed evidence, the 2006 Amendment is effective because Qwest ratified it before its effective date as a matter of law.

3. Strizich Did Not Detrimentally Rely on the Allegedly Defective Sept. 2006 Resolutions and Qwest Neither Concealed the Resulting 2006 Amendment Nor Adopted that Amendment in Bad Faith.

Finally, even assuming that the Sept. 2006 Resolutions were defective, Strizich is not entitled to the relief he seeks—nullification of the 2006 Amendment—unless he proves detrimental reliance by him or bad faith or active concealment by Qwest. *See, e.g., Loskill v. Barnett Banks, Inc. Severance Pay Plan*, 289 F.3d 734, 738 (11th Cir. 2002); *Alford v. Kimberly-Clark Tissue Co.*, 14 F. Supp. 2d 1290, 1299 (S.D. Ala. 1998); *Whitfield v. Torch Operating Co.*, 935 F. Supp. 822, 831 (E.D. La. 1996); *Franklin v. First Union Corp.*, 84 F. Supp. 2d 720, 729 (E.D. Va. 2000). Strizich cannot do so.

- Strizich could not have relied to his detriment on the alleged deficiencies in the Sept. 2006 Resolutions because he did not see those resolutions until after the death of his wife and the filing of this lawsuit. (UF ¶ 60.) And long before Strizich saw those resolutions, Qwest had sent him SMMs and other documents clearly stating that the

life insurance benefit would be reduced to $10,000 effective January 1, 2007. (UF ¶¶ 51-54.)

- Far from actively concealing the 2006 Amendment, Qwest promptly told Strizich and the other Additional Retirees that the Plan's terms had been revised in accordance with the terms of that amendment. (*Id.*)

- Rather than acting in bad faith, Qwest acted in utmost *good faith*, because in reducing the life insurance benefit for Additional Retirees it was taking an action it had every right to take (*see* Dismissal Order (DN 47) p. 12) and it promptly notified Strizich and the other Additional Retirees of the change (*see* UF ¶¶ 51-54).

In summary, Qwest is entitled to summary judgment on the Sixth Claim for the additional reason that Strizich cannot set forth a reasonable factual inference to support a finding of detrimental reliance, active concealment or bad faith.

II. MOTION FOR SUMMARY JUDGMENT ON SEVENTH CLAIM

Plaintiffs' Seventh Claim alleges that the EBC breached its fiduciary duties under ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1), by failing to urge Qwest to include provisions in the 2005 and 2006 Amendments that would have allowed Plan participants to convert their pre-amendment life insurance benefits into individual policies or to pay premiums sufficient to continue their pre-amendment benefit levels. But as Qwest pointed out in its motion to dismiss this claim (DN 79),[3] because there was no fiduciary duty to *include* such language in the 2005 and 2006 Amendments, there could not possibly be a fiduciary duty to *advocate* for its inclusion. Qwest is therefore entitled to summary judgment on plaintiffs' Seventh Claim.

[3] Although that motion is pending, Qwest is filing this summary judgment motion to comply with the Court's September 15, 2008 deadline for such motions. (*See* DN 77.)

A. Undisputed Facts Material to Seventh Claim

The undisputed facts pertinent to this Motion include certain facts supporting Qwest's First Motion, all of which plaintiffs concede are undisputed. To avoid burdening this Court with redundant factual statements and exhibits, Qwest incorporates herein UF ¶¶ 13-19, 24-25, 45 & 47-48 in the "Statement of Undisputed Facts" section of Qwest's Opposition Brief (DN 91), and the exhibits supporting those facts. Qwest also incorporates herein UF ¶¶ 47-48 set forth *supra* pp. 2-3.

61. Qwest and Prudential have been parties to two contracts insuring the lives of Plan participants—a "Group Contract" and a "Restated Group Contract." The Group Contract included provisions discussing the possibility that Plan participants could continue coverage under, or convert coverage to, an individual life insurance policy under limited circumstances. The Restated Group Contract includes provisions discussing a similar possibility to "convert" to an individual life insurance policy under limited circumstances. One precondition to any ability to "continue" or "convert" under these contracts is that the participant's insurance coverage under the contracts must have been completely terminated rather than merely reduced. Accordingly, Plan participants had no right to "continue" or "convert" their group coverage to individual coverage as a result of the reduction in the life insurance benefit to $10,000. (Ex. A-9 ¶ 10.)

62. In 2005, EBC member Erik Ammidown discussed with Prudential representatives the availability of "continuation or conversion" if the life insurance benefit was reduced to $10,000 and was advised that "continuation or conversion" was inapplicable in those circumstances. (*Id.*)

B. Qwest Is Entitled To Summary Judgment on Plaintiffs' Seventh Claim

Plaintiffs' Seventh Claim asks this Court to hold that the EBC breached its fiduciary duty of loyalty under ERISA Section 404(a)(1) by failing to help Plan participants "mitigate against the reduction of PLAN benefits" (SAC ¶ 106) by "investigat[ing] or advocat[ing] a means for Plan participants to secure either conversion or continuation privileges with either Prudential, the current insurer of the group policy, or some other insurance provider." (DN 80 at 16, *citing* SAC ¶¶ 104-05.) Such a holding would have no support in the statutory language, regulations, or case law.

Absent express "vesting" language (which indisputably does not exist here), an employer has every right to reduce or eliminate benefits provided under welfare benefit plans. Reducing or eliminating such benefits is invariably detrimental to plan participants. Plaintiffs nevertheless urge this Court to rule that, whenever an employer reduces or eliminates welfare plan benefits in a manner detrimental to plan participants—which is to say, whenever an employer reduces or eliminates such benefits—the plan fiduciary has a broad obligation to help Plan participants "mitigate against the reduction of PLAN benefits" (SAC ¶¶ 106), and a specific obligation to "investigate or advocate a means for Plan participants to secure" equivalent benefits in some other way—in this case, by "secur[ing] either conversion or continuation privileges" with Qwest's existing group life insurance provider or some other such provider. (DN 80 at 16; *see also* SAC ¶¶ 105-106.)

If, as plaintiffs suggest, plan fiduciaries have a duty to help plan participants "mitigate against" the effect of an employer's reduction or elimination of benefits under welfare plans, then every time an employer fails to offer participants an alternative way to secure benefits being reduced or terminated, participants can bring a class action lawsuit

alleging that the plan fiduciary failed to help them "mitigate against" the adverse effects of the employer's decision by "investigating" whether they can obtain replacement benefits and/or "advocating" for such benefits. How diligently must the fiduciary "investigate"? How strenuously must it "advocate"? ERISA provides no answers, because it imposes no such duties. But if the rule espoused by plaintiffs were adopted, attempting to answer these unanswerable questions would be the new domain of federal courts.

In this case, plaintiffs concede that "when the purported Plan amendments were being made the characters involved were acting as the Plan sponsor, *in a non-fiduciary role*." (DN 80 at 16 (emphasis added).) This concession is compelled by the "settlor function" rule, under which a plan sponsor can reduce or eliminate non-vested welfare plan benefits as it sees fit. *See, e.g., Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("the act of amending a pension plan does not trigger ERISA's fiduciary provisions"); *Curtiss-Wright,* 514 U.S. at 78 ("Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."); *Jones v. Kodak Medical Assistance Plan*, 169 F.3d 1287, 1292 (10th Cir. 1999) (an employer's broad authority to amend an ERISA benefit plan without implicating any fiduciary duties includes the authority to alter plan terms as it sees fit).

Under the rule espoused by plaintiffs, the "settlor function" rule would become a dead letter. No employer would be willing to create a welfare benefit plan that could be amended or terminated only if the plan fiduciary first tries to "mitigate" the adverse impact of such changes on plan participants. The amendment of welfare benefit plans would become a morass into which no sensible employer would venture. And if employers cannot amend welfare benefit plans, they will stop offering such plans.

Plaintiffs cite no statutory language, regulation, or case law imposing the extraordinary duties that they ask this Court to impose on the EBC. Had Congress wanted to require plan fiduciaries to "mitigate" the effect of amendments to welfare benefit plans, it would have done so expressly. Because ERISA's fiduciary standards do not impose the duty alleged by plaintiffs, Qwest is entitled to judgment as a matter of law on plaintiffs' Seventh Claim.

III. MOTION FOR SUMMARY JUDGMENT ON EIGHTH CLAIM

Plaintiffs' Eighth Claim is asserted by Plaintiff Nelson Phelps ("Phelps") solely against the EBC. (*See* SAC ¶¶ 109-113.) In it, Phelps asks this Court to assess statutory penalties against the EBC due to its alleged inadequate response to Phelps' requests for copies of Plan documents pursuant to ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4). But the undisputed facts set forth below show that the EBC fully (or at a minimum substantially) complied with Phelps' Section 104(b)(4) request in good faith, by timely producing more than 40 documents comprising 869 pages. Those facts also show that Phelps was not even remotely prejudiced by the sole deficiency in Qwest's response, *i.e.*, untimely production of a single document that did not affect Phelps or any other retiree. Entry of summary judgment for the EBC on the Eighth Claim is therefore warranted.

A. Undisputed Facts Material to Eighth Claim

63. In December 2005 the EBC received a Section 104(b)(4) request for documents from Curtis Kennedy, Esq. ("Kennedy") on behalf of certain Qwest retirees, including Phelps, relating to the Qwest Pension Plan. In January 2006 the EBC sent Kennedy a letter responding to this request (the "Pension Plan Response") and enclosed therewith, *inter alia*, copies of QCII Board of Directors' Resolutions dated July 12, 2000, August 10,

2000, May 8, 2001 and October 29, 2001 (the "Four Board Resolutions"). (Ex. A-9 ¶ 13; Ex. A-15.)

64. Since August 2003, Qwest has responded to at least 22 different Section 104(b)(4) requests submitted by Kennedy or retirees he represents relating to various Qwest-sponsored benefit plans. In November 2006 the EBC received a November 15, 2006 request for documents under Section 104(b)(4) from Kennedy, on behalf of Phelps and other Qwest retirees, relating to the Life Plan (the "2006 Life Plan Request"). (Ex. A-9 ¶ 14; Ex. A-16.)

65. On December 18, 2006, Kennedy received the EBC's eight-page letter responding to the 2006 Life Plan Request (the "2006 Life Plan Response"), together with the 1998 Plan Document and more than 40 other documents relating to the Life Plan, which totaled 869 pages. (Ex. A-9 ¶ 15; Ex. A-17 & *id.* p. QL07416.)

66. The 2006 Life Plan Response included the following paragraph:

> As you [Mr. Kennedy] are aware from previous correspondence, the EBC operates in accordance with the procedures established by the Board of Directors Resolutions dated July 12, 2000, August 10, 2000, May 8, 2001, October 29, 2001 [*i.e.* the Four Board Resolutions], the plan document and the March 2004 delegations of authority. These documents have been provided several times in response to other requests. *Please advise immediately if you want another copy of these documents*.

(Ex. A-17 p. QL07411 (emphasis and bracketed material added).) Before they first asserted the Eighth Claim in March 2008, neither Phelps nor Kennedy ever advised the EBC in response to this paragraph that they wanted another copy of the Four Board Resolutions. (Ex. A-9 ¶ 19.)

67. When the EBC issued its 2006 Life Plan Response, it did not realize that PDC resolutions dated September 2000 (the "Sept. 2000 Resolutions") included three

short paragraphs that amended the Life Plan to provide that the "benefit available to non-union employees is 1.5 times base pay" effective January 1, 2001. The Sept. 2000 Resolutions amended the Life Plan solely with respect to non-union employees, and *not* with respect to Phelps or other retirees on whose behalf Kennedy had submitted the 2006 Life Plan Request. (*Id.* ¶ 21-23; Ex. A-18, pp. QL08504-10.)

68. Because the EBC did not realize that the Sept. 2000 Resolutions included paragraphs amending the Life Plan, it did not enclose those resolutions with the 2006 Life Plan Response. When the EBC became aware of this oversight in May 2008, it immediately provided a copy of the Sept. 2000 Resolutions to Kennedy, together with a cover letter transmitted via both email and regular mail on May 29, 2008. (Ex. A-9 ¶¶ 21-24 & Ex. A-18.)

69. With the exception of its delay in providing a copy of the Sept. 2000 Resolutions, Qwest fully and timely responded to the 2006 Life Plan Request and provided all documents that Phelps properly requested under Section 104(b)(4). (Ex. A-9 ¶ 15.)

70. Although the Eighth Claim alleges that the EBC failed to comply with a February 28, 2007 Section 104(b)(4) request from Phelps, Phelps now admits that he never submitted such a request to Qwest. (*Cf.* SAC ¶ 111 *with* Ex. A-21 p. 7, Resp. to RFA 19.)

B. Qwest Is Entitled to Summary Judgment on Plaintiffs' Eighth Claim

ERISA Section 104(b)(4) provides that a Plan administrator "shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated." 29 U.S.C. § 1024(b)(4). Section 502(c)(1)(B) provides that if within 30 days a

plan administrator "fails or refused to comply with a request" from a participant for documents required to be furnished under Section 104(b)(4), the court has discretion to assess a penalty of up to $100 per day for each day of violation. 29 U.S.C. § 1132(c)(1)(B). By regulation, the maximum amount of this penalty is currently $110 a day. *See* 29 C.F.R. § 2575.502c-1.

Significantly, ERISA does not impose liability for every violation of Section 104(b)(4). Instead, after proof of a violation of Section 104(b)(4), liability is imposed only "in the court's discretion." 29 U.S.C. § 1132(c)(1). A district court's refusal to award discretionary penalties under ERISA § 502 is reviewed for abuse of discretion, and will be reversed only if the appellate court has "a definite and firm conviction" that a mistake has been made. *Macklin v. Retirement Plan for Employees of Kansas Gas & Electric Co.*, 99 F.3d 1150, 1996 Westlaw 579940 *4 (10th Cir. Oct. 9, 1996) (unpublished, Ex. A-27).

In exercising its discretion regarding imposition of penalties, a district court should consider whether the plan administrator "substantially complied" with Section 104(b)(4). For example, the plan administrator in *Macklin* "did not immediately provide [Plaintiff Macklin] with the pre-1985 plan description and amendments he requested," but "it did provide him with the latest summary plan description, annual report, plan document, and trust agreement within 30 days of request." *Id.* at * 4. In affirming entry of summary judgment for the plan administrator on plaintiff's Section 104(b)(4) claim, the Tenth Circuit stated (*id.*):

> [T]he Company Plan . . . supplied all but two of the documents he requested within 30 days. Thus, the district court was accurate in characterizing the Company Plan's compliance with ERISA § 104 as "substantial," and was well within its discretion in denying Mr. Macklin's claim for statutory penalties. Its

award of summary judgment on Mr. Macklin's second claim was therefore appropriate.

Two additional factors that district courts may consider in deciding whether to award statutory penalties for noncompliance with Section 104(b)(4) are whether the participant was prejudiced by such noncompliance and whether the plan administrator responded to the participant's request in good faith. In *DeBoard v. Sunshine Mining & Refining Co.*, 208 F.3d 1228, 1243-44 (10th Cir. 2000), the Tenth Circuit rejected plaintiffs' argument that the district court erred in relying on the absence of prejudice to plaintiff, and the absence of bad faith by defendants, in refusing to impose penalties under Section 502, and stated that "the presence or absence of these factors can certainly be taken into account by a district court in deciding whether to exercise its discretion and impose a penalty." Many courts have rejected plaintiffs' claims seeking an award of Section 502 penalties as a matter of law based on these very factors. *See, e.g., Cytrynbaum v. Employee Retirement Plan of Amoco*, 338 F. Supp. 2d 1187, 1193-94 (D. Colo. 2004) (entering summary judgment for defendant on claim seeking Section 502 penalties, even though defendant's Section 104(b)(4) response was untimely, where plaintiff was not prejudiced by delay and delay was not due to bad faith); *Crosby v. Rohm & Hass Co.*, 480 F.3d 423, 431-32 (6th Cir. 2007) (affirming summary judgment for defendant on claim seeking Section 502 penalties where plaintiff was not prejudiced by defendant's deficient response and defendant's delay was not due to bad faith); *Fenster v. Tepfer & Spitz, Ltd.*, 301 F.3d 851, 858 (7th Cir. 2002) (same).

Phelps alleges that the EBC's 2006 Life Plan Response was inadequate because, *if* Qwest contends its corporate resolutions establish a Plan "amendment and adoption procedure" under ERISA Section 402(b)(3), *then* the EBC should have provided

those resolutions to him under Section 104(b)(4). (*See* SAC ¶ 112.) But Qwest does *not* contend its corporate resolutions establish a Plan "amendment and adoption procedure." Qwest instead contends the 1998 Plan Document, which the EBC produced as part of its 2006 Life Plan Response, establishes such a procedure. *See* DN 79 at pp. 6-9. Moreover, the EBC disclosed as part of its 2006 Life Plan Response the relevant corporate resolutions (*i.e.*, the Four Board Resolutions) regarding the Life Plan. Because it had already provided copies of those resolutions to Phelps as part of its 2005 Pension Plan Response, the EBC stated in its 2006 Life Plan Response that it had previously provided those resolutions in response to other requests, and asked Kennedy to "advise immediately if you want another copy of these documents." Prior to this litigation, neither Kennedy nor Phelps ever advised the EBC that they wanted another copy of the Four Board Resolutions.

Phelps has also alleged that the EBC's production of a copy of the Sept. 2000 Resolutions was untimely. However, this deficiency in the EBC's production of this single document was *de minimus* in the context of the EBC's timely and overwhelmingly complete response to the 2006 Life Plan Request—a response that included more than 40 documents comprising 869 pages. Moreover, the EBC produced the Sept. 2000 Resolutions immediately after learning that a few paragraphs in those resolutions were responsive to Phelps' 2006 Life Plan Request. Finally, the absence of any contemporaneous complaint by Phelps or his counsel regarding the adequacy of the EBC's response undermines any claim of prejudice to Phelps or bad faith by the EBC. *See, e.g., Pastore v. Witco Corp. Severance Plan*, 388 F. Supp. 2d 212, 223 (S.D.N.Y. 2005) (stating that plaintiff's failure to make a follow-up request for a plan document not produced in response to his Section 104(b)(4) request "preclude[s] any reasonable fact finder from justifying the imposition of statutory

penalties"), *vacated in part and remanded on other issue,* 196 Fed. Appx. 18, 2006 Westlaw 2335161 (2nd Cir. August 10, 2006) (unpublished, Ex. A-28).

In *Sage v. Automated, Incorporated Pension Plan and Trust*, 845 F.2d 885, 894 n. 4 (10th Cir. 1988), the Tenth Circuit stated that "a district court, in its discretion, may impose a penalty" when "plan representatives are completely indifferent to reasonable requests for plan and benefit information." The EBC here was completely *responsive*, not indifferent, to Phelps' 2006 Life Plan Request, and it responded to that request in utmost good faith. Moreover, Phelps was not prejudiced by the EBC's tardiness in producing a single document that affected neither Phelps nor any other retiree. For all these reasons, this Court should grant summary judgment in the EBC's favor on Phelps' Eighth Claim.

IV. CONCLUSION

For the reasons set forth above, Qwest respectfully requests that this Court enter summary judgment in its favor on plaintiffs' Sixth, Seventh and Eighth Claims.

DATED: September 15, 2008.

s/ Christopher J. Koenigs

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2008, I electronically filed the foregoing **Qwest's Motion for Summary Judgment on Plaintiffs' Sixth, Seventh, and Eighth Claims for Relief** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Curtis L. Kennedy, Esq. at CurtisLKennedy@aol.com

s/Patricia Eckman
Patricia Eckman