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.

REPLY BRIEF IN SUPPORT OF QWEST'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' SIXTH, SEVENTH, AND EIGHTH CLAIMS

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Defendants (jointly, "Qwest") submit this reply brief in support of their motion for summary judgment on Plaintiffs' sixth, seventh, and eighth claims for relief ("Motion").

I. ARGUMENT

As a threshold matter, Plaintiffs' Response in Opposition to Qwest's Motion ("Response," DN 125) resorts to the same improper techniques that Plaintiffs used in responding to Qwest's Motion for Summary Judgment on Plaintiffs' Second Claim for Relief in this case and Motion for Summary Judgment in *Edward J. Kerber, Nelson B. Phelps et al. v. Qwest Pension Plan, et al.*, Case No. 1:05-cv-00478-BNB-KLM (D. Colo.) ("*Kerber I*"). *See* Docket No. ("DN") 122 pp. 3-4 & *id.* Ex. A-44 thereto, p. 3 n. 1. Among other things, Plaintiffs purport to "deny" undisputed facts ("UF") in Qwest's Motion without providing *any* facts supporting such denial, as this Court's procedures require. *See* Pretrial & Trial Procedures § 6.4 (requiring that any denial of a movant's undisputed facts include "specific reference to material in the record supporting the denial").

For example, UF ¶ 49 states that "[t]he members of the PDC unanimously intended to effectuate, by means of the Sept. 2006 Resolutions, the 2006 Amendment to the Plan." In support of this undisputed fact, Qwest attached Declarations signed by all three PDC members stating exactly that. Motion Ex. A-7 ¶ 3, Ex. A-8 ¶ 3 & Ex. A-9 ¶ 3. Although Plaintiffs purport to deny this undisputed fact, they present no contrary evidence whatsoever to support such denial. *See* Resp. p. 3 ¶ 49. The Court's statement in *Kerber I* thus applies equally here: "[P]laintiffs often claim to dispute a paragraph containing factual statements, but they neither identify the specific fact in dispute nor otherwise establish the existence of a disputed material fact. *Unsupported general statements of dispute do not create a material fact dispute.*" DN 122, Ex. A-44 p. 3 n. 1 (emphasis added).

A. Qwest Is Entitled To Summary Judgment on Strizich's Sixth Claim.

Qwest is entitled to summary judgment on Strizich's Sixth Claim for the three reasons set forth below.

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

Strizich does not dispute that under the Supreme Court's holding in *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 80 & 85 (1995), the validity of his Sixth Claim turns on whether the PDC "actually approved" the 2006 Amendment, which in turn depends on whether the company "sufficiently manifest[ed] its intention" to amend the Plan. Nor does Strizich effectively dispute *any* of the following facts, even though they show 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. UF ¶ 48.
- All three PDC members intended to effectuate the 2006 Amendment by means of those resolutions. UF ¶ 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 and Prudential 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.

As Qwest stated in its Motion, any one of these actions suffices to manifest Qwest's intent to approve the 2006 Amendment.

Against all of these undisputed facts, Strizich argues that Qwest did not "sufficiently manifest its intention" to amend the Plan because only Prudential, and not Qwest, signed a two-page document modifying the Restated Group Contract, the first page of which is entitled "Amendment to Group Contract No. G-93634" and the second page of which is entitled "Rider to be Attached to Your Booklet" (the "Amendment/Rider"). *See* Ex. A-13. Although Strizich makes this argument no less than nine times (*see* Resp. pp. 2-11), it is completely meritless.

Strizich has always understood, and indeed has affirmatively alleged, that the 1998 Plan Document is "the only known governing PLAN document." *See* Amended Complaint (DN 10), p. 17 n. 5. But because Qwest so clearly amended the Plan in accordance with the requirements of that governing Plan document, Strizich now belatedly contends that there is a *second* governing Plan document, the Restated Group Contract, that Qwest failed properly to amend. Plaintiffs had it right the first time: there is only one "governing Plan document," and the Restated Group Contract is not it. Instead, the Restated Group Contract is simply the group insurance policy that funds the payment of Plan benefits.

In any event, Strizich's repeated assertion that the Restated Group Contract can be modified only by an amendment signed by both parties (*see* Resp. pp. 3, 5, 6, 10 & 11) is flatly untrue. The Restated Group Contract expressly provides that it can be modified by *either* "(1) *an endorsement on it signed by an officer of Prudential*; or (2) an amendment to it signed by the Contract Holder and by an officer of Prudential." Ex. A-11 p. QL08262 (emphasis added). An "endorsement" is "[a]n amendment to an insurance policy; a rider."

Black's Law Dictionary p. 569 (8th ed. 2004); *see also Fidelity and Guaranty Ins. Underwriters, Inc. v. Jasam Realty Corp.*, 540 F.3d 133, 137 n. 3 (2nd Cir. 2008) (same); 1 *Couch on Insurance* § 1.3 (3rd ed. 2008) (an "endorsement" is a "written modification of the coverage of an insurance policy, usually liability or property policy (the term rider is a functional equivalent more often used regarding life or health insurance)").

In this case, an officer of Prudential (namely, its Vice President for Contracts) signed a document stating that "part of the Group Contract as of its Effective Date" is an attached "Rider To Be Attached To Your Booklet." *See* Ex. A-13. The attached Rider states in pertinent part:

> The Amount Limit Due to Retirement provision of the BASIC EMPLOYEE TERM LIFE COVERAGE section of the Schedule of Benefits is replaced by the following:
>
> > Amount limit Due to Retirement for current and future retirees: *Your amount of insurance is limited. It is $10,000.*

Id. (emphasis added). The Amendment/Rider is thus a written modification of the Restated Group Contract signed by an officer of Prudential. Nothing more is required to amend that contract.

In addition, Strizich does not even attempt to address Qwest's argument that Qwest substantially complied with the Plan's amendment procedures, which is all that the Tenth Circuit and applicable trust law requires. *See Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002) (stating that "the doctrine of substantial compliance may have application in ERISA cases," and that even though the plan sponsor in *Allison* did not "compl[y] in full with the requirements of" the plan's amendment procedures, it could have "met its obligation . . . by performing substantially equivalent procedures"); *Restatement*

(Third) of Trusts § 63 (2003) comment *i* (a settlor can exercise a power to amend the trust via a particular method "by substantial compliance with the method prescribed"); *Unif. Trust Code* § 602(c)(1), 7C U.L.A. 546 (2006) (same). Here, the PDC substantially complied with the Plan's amendment procedures—which provided that Qwest could "amend the Plan at any time, in any manner" (Resp. Ex. 1 § 10.1)—by executing a written resolution stating that the Plan "be and hereby is amended" to reduce the life insurance benefit for the Additional Retirees to $10,000. If that weren't enough, the Restated Group Contract was modified to this same effect by means of the Amendment/Rider. UF ¶ 24.

Although Strizich asserts that "[t]he 1998 Plan document expressly requires an adoption date for a plan amendment" (Resp. p. 9), what that document actually requires is an *effective* date for a plan amendment. *See* Resp. Ex. 1 § 10.1 ("[a]ny such amendment of the Plan shall be effective on such date as the Plan Sponsor may determine"). Strizich concedes that "the Plan does not define the word 'adopt' and the Plan does not state a prescribed method for an adoption." (Resp. p. 9.) His counsel has also asserted, correctly, that the word "adopt" "generally means 'to accept[] formally and to put into effect.'" *See* DN 91, Ex. A-2, Ex. 3 thereto, p. 2; *accord Black's Law Dictionary* (5th ed. 1979) (defining "adopt" to mean "[t]o accept, consent to, and put into effective operation"). The Sept. 2006 Resolutions provide that the Life Plan "be and hereby is amended to incorporate" a "Change [in] the Basic Life Insurance Benefit" for the Additional Retirees "to reduce it to a fixed $10,000 benefit effective January 1, 2007." Ex. A-12 p. QL02123. By Strizich's own admission, nothing more was required.

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.

Strizich cites but two cases—*Allison* and *Peckham v. Gem State Mut. of Utah*, 964 F.2d 1043 (10th Cir. 1992)—to rebut Qwest's argument that, 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. Plaintiffs apparently believe that *Allison* trumps the Supreme Court's holding on ratification in *Curtiss-Wright*—a quirky belief, especially since *Allison* contains no holding regarding ratification. Strizich also asserts that *Peckham* is "not helpful to Defendants" on the ratification issue, even though Qwest does not cite *Peckham* to support its ratification argument and *Peckham* makes no mention of ratification.

Strizich asserts that, unlike in *Curtiss-Wright* and *Haliburton Co. Benefits Comm. v. Graves,* 463 F.3d 360, 374 (5th Cir. 2006), the issue in this case is whether the plan amendment was "properly executed" by the parties and properly "adopted" by the plan sponsor. Resp. p. 10. But if the plan amendments in *Curtiss-Wright* and *Haliburton* had been properly "executed" and "adopted," the courts in those cases would not have needed to consider whether the amendments were later ratified. Indeed, the issue in *Curtiss-Wright* was whether the plan amendment had been properly authorized, *i.e.*, adopted. *See* 514 U.S. at 85 ("If the new plan provision is found not to have been properly authorized when issued, the question would then arise whether any subsequent actions . . . served to ratify the provision *ex post*"). *Halliburton* likewise involved the very situation that Strizich alleges occurred here, *i.e.*, a plan sponsor's alleged failure properly to execute a document purporting to amend the plan. *See* 463 F.3d at 374 ("even if the Vice President's signature had been required . . . to

amend the retiree program, Halliburton's subsequent actions served to ratify the provision *ex post*").

Qwest's uncontroverted evidence shows that Qwest ratified the 2006 Amendment prior to its January 1, 2007 effective date by (among other things): (1) sending SMMs explaining the amendment to the Additional Retirees; (2) sending separate Benefit Enrollment Statements providing additional written notice of the amendment to those retirees; and (3) administering the Plan in accordance with the amendment by paying a $10,000 benefit to the beneficiaries of Additional Retirees who died after January 1, 2007. *See* DN 108 pp. 3-5 & 9. Under these circumstances, Qwest ratified the 2006 Amendment 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.

Qwest cited four cases in its Motion holding that, even if the document by which a plan sponsor seeks to amend a plan is deficient in some respect, the amendment is nevertheless effective unless the plan participant proves detrimental reliance by him or bad faith or active concealment by the plan sponsor. *See* Motion p. 9. Strizich does not dispute the holdings of these cases, makes no attempt to distinguish them, and cites no contrary cases. *See* Resp. p 11. Strizich also admits that he did not detrimentally rely on the allegedly defective Sept. 2006 Resolutions. *See id.* ("[i]t is true that Mr. Strizich did not rely upon the defective resolutions") & *id.* p. 5 ¶ 60. Strizich also does not present evidence contradicting Qwest's evidence that Qwest acted in good faith and did not conceal the 2006 Amendment. Nor could he, since this Court has already ruled that Qwest had every right to reduce life insurance benefits under the Plan, and Qwest promptly and repeatedly notified Strizich and

the other Additional Retirees of the forthcoming change. *See* DN 47 p. 12 & UF ¶¶ 50-51 & 53-54.

Strizich's sole response to Qwest's argument is to assert yet again that the Restated Group Contract "prohibit[s] enforcement of a change in benefits absent an amendment executed by both Qwest and Prudential." Resp. p. 11. This response is without merit for the reasons set forth above. Qwest is entitled to summary judgment on Strizch's Sixth Claim for the additional reason that Strizich has failed to set forth a reasonable factual inference to support a finding of detrimental reliance, active concealment or bad faith.

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

In response to Qwest's motion for summary judgment on Plaintiffs' Seventh Claim, Plaintiffs assert that when the EBC members began considering a reduction in Plan benefits, they "should have (1) resigned from the EBC, quit serving as a Plan fiduciary and obtained the appointment of persons or an entity free from a conflict of interest, and (2) informed the Plan participants and all known designated beneficiaries that the Plan was not a reliable source of life insurance benefits and that they might need to make alternative arrangements." Resp. at 14 (emphasis omitted). Whether the EBC members had those duties is an issue of law. As a matter of law, they did not.

As Plaintiffs themselves point out, "a person may assume both the role of the named fiduciary of an ERISA plan and act as an officer of the employer sponsoring that plan." *Id.* p. 13 n. 4, *citing In re Luna*, 406 F.3d 1192, 1207 (10th Cir. 2005). In evaluating Plaintiffs' fiduciary breach claim, the "threshold question" is thus whether the individual "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). Here, the action

taken by Erik Ammidown and Felicity O'Herron (who served on both the EBC and the PDC) was to consider and approve the 2005 and 2006 Amendments. Plaintiffs admit Mr. Ammidown and Ms. O'Herron took these actions in a non-fiduciary role. *See* DN 80 p. 16 ("when the purported Plan amendments were being made the characters involved were acting as the Plan sponsor, in a non-fiduciary role"). If individuals were obligated to resign as plan fiduciaries every time they approve a reduction in plan benefits in a non-fiduciary role, the "dual hat" doctrine enunciated in *Pegram* and other cases would be a dead letter.

Plaintiffs nevertheless present the opinion of their putative expert, law professor Don Bogan, that plan fiduciaries have a duty to resign "when they recognize that they're serving in a conflict circumstance." Resp. p. 15. The Tenth Circuit has repeatedly held that an expert may not do what Professor Bogan seeks to do, namely, "state legal conclusions drawn by applying the law to the facts." *A.E. By and Through Evans v. Ind. Sch. Dist. No. 25*, 936 F.2d 472, 476 (10th Cir. 1991); *accord Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1328 (10th Cir. 1998); *Specht v. Jensen*, 853 F.2d 805, 808 (10th Cir. 1988). Professor Bogan's legal opinion cannot create a genuine issue for trial, and indeed must be stricken as inadmissible. *See Christiansen v. City of Tulsa*, 332 F.3d 1270, 1283 (10th Cir. 2003) (holding that trial court properly excluded expert's opinion that defendants acted "recklessly" because it was a legal conclusion; summary judgment for defendant affirmed); *Anderson v. Suiters*, 499 F.3d 1228, 1237 (10th Cir. 2007) (rejecting plaintiff's argument that professor's legal opinion concerning the ultimate matter at issue created a genuine issue for trial; summary judgment for defendant affirmed).

Moreover, Professor Bogan's legal conclusion is flatly wrong. The only case Professor Bogan cites to support his opinion, *Metropolitan Life Ins. Co. v. Glenn*, __ U.S. __,

128 S. Ct. 2343 (2008), provides no such support. *Glenn* merely holds that in the common situation where a single entity (*e.g.*, an employer or insurance company) "both determines whether an employee is eligible for benefits and pays the benefits out of its own pocket," a reviewing court should consider that entity's conflicting interests as one factor among many when deciding whether the entity abused its discretion in denying benefits. *Id*. at 2346.

To further support their contention that Mr. Ammidown had a duty to resign from the EBC, Plaintiffs cite his Declaration filed as part of Qwest's Opposition to Plaintiffs' Second Amended Motion for Class Certification (DN 86). Mere words (as opposed to actions) cannot possibly constitute a fiduciary breach. In any event, Mr. Ammidown said only that in certain circumstances, Qwest would *consider* taking an action that it indisputably *has every right to take*. By way of background, Qwest's union agreement allowed it to take an action that Post-1990 Occupational Retirees opposed—namely, "to implement 'caps,' or maximums, effective January 1, 2006 on the amount Qwest would contribute towards the cost of providing Health Plan benefits" to those retirees. DN 86 Ex. D ¶ 3. To accommodate the desires of those retirees, the PDC approved the 2005 Amendment reducing their Plan benefit to $10,000 "to offset the enormous cost of postponing for three years the obligation of Post-1990 Occupational Retirees to pay amounts in excess of the Health Plan benefit caps." *Id.* ¶ 7. As Mr. Ammidown stated:

> [If Qwest] loses the savings provided by the 2005 Amendment, Post-1990 Occupational Retirees will receive an enormous windfall, because they will have received a substantial benefit (postponement of implementation of the Health Plan caps) without incurring the corresponding cost (reduction of the life insurance benefit to $10,000).

Id. ¶ 8. Mr. Ammidown simply stated that in light of these facts, if the 2005 Amendment were invalidated "Qwest would need to *consider* implementing various means of recovering

the resulting windfall enjoyed by Post-1990 Occupational Retirees," possibly including the elimination of Plan benefits for those retirees. *Id.* (emphasis added). Because "employers or other plan sponsors are generally free under ERISA, for any reason at any time, to . . . terminate welfare plans," *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996), Mr. Ammidown's statement that Qwest might consider doing what it is entitled to do under the Plan cannot possibly qualify as a fiduciary breach.

Turning to Plaintiffs' contention that the EBC had a duty to inform Plan participants that "the Plan was not a reliable source of life insurance benefits and that they might need to make alternative arrangements," Qwest and its predecessors had informed Plan participants of this very fact on multiple occasions over nearly three decades before Qwest approved the 2005 and 2006 Amendments. As Qwest pointed out in its First Motion to Dismiss, Plaintiffs' own complaint alleges that Plan participants were advised that Plan benefits might be reduced or eliminated by means of SPDs that Qwest and its predecessors issued in 1977, 1978, 1981, 1982, 1986, 1987, 1991, 1994, 1996, and 2001. *See* DN 16, pp. 6-10 and exhibits cited therein. In essence, Plaintiffs' complaint is that the EBC members did not tell Plan participants once again what Qwest "had told them many times before—namely, that the terms of the plan were subject to change." *Sprague v. General Motors Corp.*, 133 F.3d 388, 393-94 (6th Cir. 1998). Any such omission is simply not actionable. *See id.*

Although Plaintiffs repeatedly invoke the common law of trusts to support their Seventh Claim (*see* Resp. pp. 13 & 15), the Supreme Court has held that, unlike fiduciaries under the common law of trusts, ERISA fiduciaries "may have financial interests adverse to beneficiaries. Employers, for example, can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries . . . (*e.g.*, modifying the terms of a plan

as allowed by ERISA to provide less generous benefits)." *Pegram*, 530 U.S. at 225. Plaintiffs also rely on a case which has nothing to do with plan amendments, and which provides them no support on any issue. *See Holdeman v. Devine*, 474 F.3d 770, 780-782 (10th Cir. 2007) (expressing no opinion on, and merely remanding, certain breach of fiduciary allegations not addressed by the district court).

The Supreme Court has repeatedly held that actions relating to the amendment of an ERISA plan are not fiduciary actions and cannot support a claim for breach of fiduciary duty. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 442-445 (1999) ("[i]n general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties"); *Lockheed*, 517 U.S. at 890 ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."); *Curtiss-Wright*, 514 U.S. at 78 ("plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans"). Because the omissions by EBC members alleged in Plaintiffs' Seventh Claim all relate to Qwest's amendment of the Life Plan, they do not give rise to a cognizable claim for fiduciary breach. Qwest is therefore entitled to summary judgment on Plaintiffs' Seventh Claim.

C. Qwest Is Entitled To Summary Judgment on Phelps' Eighth Claim.

Phelps does not dispute that the EBC timely disclosed more than 40 documents, comprising more than 869 pages, in response to his 2006 Life Plan Request. *See* Resp. p. 20 (admitting UF ¶¶ 64-65). Instead, Phelps argues only that the EBC did not disclose four other purported documents that it was allegedly required to disclose under ERISA Section 104(b)(4). *See id.* pp. 21-22. Unfortunately for Phelps, two of those documents do not exist, another simply duplicates the actual Plan "instrument" that the EBC

did produce, and another has nothing whatever to do with Phelps or this lawsuit, such that Phelps could not possibly have been prejudiced by its delayed disclosure.

1. Phelps argues that the EBC did not timely disclose the Sept. 2000 Resolutions, a copy of which is attached to Qwest's Motion as Ex. A-18. But Qwest's Motion is supported by uncontroverted testimony that: (a) the Sept. 2000 Resolutions include only three short paragraphs concerning the Life Plan; (b) those resolutions amended the Life Plan solely with regard to certain *employees*, as opposed to the retirees who are the sole subject of this lawsuit; and (c) the EBC's untimely disclosure of the Sept. 2000 Resolutions was due to mere oversight. *See* Ex. A-9 ¶¶ 21–23. Although Phelps argues that the EBC redacted information from the Sept. 2000 Resolutions in bad faith, the redacted information indisputably related to benefit plans other than the Life Plan, and hence was not responsive to Phelps' 2006 Life Plan Request. *See id.* ¶ 15. Moreover, Phelps does not even argue that he was prejudiced by Qwest's delay in disclosing the Sept. 2000 Resolutions. Nor could he be: Those resolutions are so irrelevant to this lawsuit that even though Plaintiffs and/or Qwest have moved for summary judgment on all claims in this lawsuit, neither Plaintiffs nor Qwest have referred to the Sept. 2000 Resolutions in connection with any claims except Phelps' Section 104(b)(4) "untimely disclosure" claim. In any event, Phelps received a copy of those resolutions in May 2008, *i.e.*, more than three months before the fact discovery cutoff date in this lawsuit. *See* Resp. p. 21 & DN 87.

2. Phelps argues that the EBC did not produce any attachments to Plan Amendment 2004-1. But as Phelps knows, there *are* no attachments to Amendment 2004-1. Qwest's Motion is supported by uncontroverted testimony that "Amendment 2004-1 had no attachments." *See* Motion, Ex. A-9 ¶ 18. The EBC cannot produce what does not exist.

3. Phelps argues that the EBC did not timely disclose a portion of the PDC minutes and resolutions dated December 13, 2006 (the "Dec. 2006 Minutes and Resolutions"). The Dec. 2006 Minutes and Resolutions, a copy of which is attached to Plaintiffs' Response as Exhibit 4, consists of three initial pages and an attached copy of Life Plan Amendment 2006-1 ("Amendment 2006-1"). Qwest's motion is supported by uncontroverted evidence that the EBC timely disclosed Amendment 2006-1. *See* Ex. A-9 ¶ 20. Accordingly, Phelps can argue only that the EBC failed timely to disclose the *first three pages* of the Dec. 2006 Minutes and Resolutions. Unfortunately for Phelps, the first two pages *did not yet exist* at the time of the EBC's 2006 Life Plan Response. *See* Ex. A-29 attached hereto, Declaration of Judith Osse, at ¶ 3. The third page simply discuss the same subject as Amendment 2006-1, except in far less detail. *See* Ex. 4 at pp. QL07003. And although Phelps claims these pages "conclusively show[] the PDC's adoption date of Plan Amendment 206-1 [sic] on December 13, 2006" (*id.*), he does not explain how any delay in his receipt of that information prejudiced him. In fact, no such prejudice occurred because Amendment 2006-1 itself clearly states that it was executed and approved by all three PDC members on December 13, 2006. *See id.* Ex. 4, p. QL07007. Finally, Qwest produced all these pages to Plaintiffs eight months before the discovery cutoff in this lawsuit. *See* DN 87 & Resp. p. 22.

4. Phelps argues that the EBC failed to produce an amendment to the Restated Group Contract executed by both Qwest and Prudential. The EBC timely produced the Restated Group Contract itself, and the February 7, 2007 Amendment/Rider obviously did not exist at the time of the EBC's 2006 Life Plan Response. *See* Ex. A-9 ¶ 24 & UF ¶ 65. Although Qwest timely produced the two-page Amendment/Rider signed by Prudential (*see*

Resp. Ex. 2 ¶ 22), there *is* no version of that document signed by both Qwest and Prudential. Once again, the EBC cannot produce a document that does not exist.

In summary, Phelps asks this Court to impose a statutory penalty because the EBC allegedly failed timely to produce two (out of 42) documents comprising approximately three (out of 874) pages. But the two documents in question are irrelevant to retiree Phelps and to this lawsuit, and/or are duplicative of the timely-disclosed instruments under which the Plan is actually established or operated.

In exercising its discretion regarding whether to impose the statutory penalties sought by Phelps, this Court can, and should, consider the following undisputed facts:

- The EBC's response to Phelps' 2006 Life Plan Request substantially complied with Section 104(b)(4). *See 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).

- The EBC responded to Phelps' request in good faith. *See DeBoard v. Sunshine Mining & Refining Co.*, 208 F.3d 1228, 1243-44 (10th Cir. 2000).

- Phelps was not prejudiced by the EBC's *de minimus* noncompliance with his request. *See id.*

In light of these undisputed facts, this Court should, in the exercise of its discretion, decline to impose a statutory penalty on the EBC, and enter summary judgment for the EBC on Phelps' Eighth Claim.

II. 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: November 20, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2008, I electronically filed the foregoing **Reply Brief in Support of Qwest's Motion for Summary Judgment on Plaintiffs' Sixth, Seventh, and Eighth Claims** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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s/Patricia Eckman
Patricia Eckman