IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

EDWARD J. KERBER, *et al.*,

Plaintiffs,

vs.

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

Defendants.

QWEST DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

July 16, 2007

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I. INTRODUCTION

In their Response to Qwest's Motion, Plaintiffs assert that "[t]he first and most important issue presented in this litigation" is whether the life insurance benefits described in the 1998 Plan Document's Benefit Formula are contractually vested, such that Qwest must forever provide those benefits to its retirees. (Response at 8.) But because the Tenth Circuit held in *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996), that contractual vesting "must be stated in clear and express language," and because the pertinent Plan Document states that Qwest can reduce or eliminate the benefits provided thereunder, the issue actually before the Court is accurately identified in Qwest's Motion: Can a plan document be held to state in "clear and express language" that welfare benefits cannot be reduced below a certain amount when *that very document* expressly states that such benefits *can be reduced or eliminated*? The answer is plainly no. It is thus not surprising that Plaintiffs' 26-page Response (1) fails to distinguish the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and (most importantly) Tenth Circuit cases cited by Qwest that answer this question in the negative, and (2) fails to cite a single case answering this question in the affirmative.

Although Plaintiffs assert that "[t]he Tenth Circuit's decision in *Chiles* is fully supportive of Plaintiffs' claim" (Response at 12), in *Chiles* the Tenth Circuit *expressly rejected* an argument substantially identical to Plaintiffs' argument here. Specifically, the court held *as a matter of law* that a plan document's reservation of rights provision controlled that same document's promise to provide disability benefits for so long as an employee was disabled, such that those benefits did not contractually vest once plaintiffs qualified for long-term disability. 95 F.3d at 1510-14.

Plaintiffs try to distinguish the "fully supportive" *Chiles* case on the ground that the promissory language in *Chiles* concerned the *duration* of benefits, whereas the alleged promissory language here concerned the *amount* of benefits. But this is a distinction without a difference. Implicit in a statement that welfare benefits will be provided for the duration of a person's life is a statement that such benefits will not be reduced, and implicit in a statement that welfare benefits will not be reduced is a statement that such benefits will continue for the duration of a person's life. The point of *Chiles*—and of the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuit cases cited by Qwest—is that regardless of how a plan document describes the amount or duration of welfare benefits, if the plan document contains a reservation of rights provision authorizing the employer to reduce or eliminate those benefits, the benefits are not contractually vested as a matter of law. Plaintiffs' contractual vesting claim therefore fails to state a claim upon which relief can be granted.

Plaintiffs' equitable estoppel theory likewise fails to state such a claim, for largely the same reasons. Even assuming *arguendo* that the Tenth Circuit would recognize an equitable estoppel claim in the ERISA context, estoppel would apply only if the 1998 Plan Document were ambiguous with respect to whether Qwest is authorized to reduce or eliminate life insurance benefits. Because the 1998 Plan Document expressly states that Qwest is so authorized, no such ambiguity exists. And although Plaintiffs assert that Qwest is also equitably estopped from reducing life insurance benefits by virtue of Confirmation Statements allegedly sent to some of them, the law is clear that where (as here) Plaintiffs received unambiguous Plan documents, they cannot assert an equitable estoppel claim based on allegedly contradictory informal communications.

Finally, this Court cannot grant *sua sponte* the motion for summary judgment on Plaintiffs' contractual vesting claim incorporated in Plaintiffs' Response. Defendants have not yet had an opportunity to assert affirmative defenses to that claim, to conduct discovery concerning it, or to present the Court with evidence relevant to the claim beyond that cited in Plaintiffs' own Complaint. Under these circumstances, Plaintiffs' request that this Court *sua sponte* grant them summary judgment on their contractual vesting claim invites reversible error, and must be denied.

II. ARGUMENT

A. Plaintiffs' Contractual Vesting Claim Fails To State a Claim Upon Which Relief Can Be Granted.

Plaintiffs dispute *none* of the following facts set forth in Qwest's Motion[1]:

- For at least the past three decades, Plan documents have included a reservation of rights provision authorizing Qwest to amend or terminate the Plan. (Motion ¶ 8.)
- Notwithstanding Plaintiffs' assertion that the Benefit Formula in the 1998 Plan Document includes an "Anti-Amendment" provision, that Benefit Formula makes no reference to amendment of the Plan. (*Id.* ¶ 13.)
- The 1998 Plan Document does contain an "Amendment" provision expressly stating that Qwest "reserves the right . . . to amend the Plan to reduce, change, eliminate, or modify the type or amount of Benefits provided to any class of Participants." (*Id.*)
- At the time all seven Participants retired and continuing through the present, the Plan's SPDs have stated, not only that Qwest "reserves the right to terminate or amend [the Plan] at any time," but also that if Qwest

[1] Plaintiffs' Response discusses other facts that are irrelevant to Qwest's Motion. For example, it discusses Plaintiffs' claims that the 2005 Amendment did not become effective until December 13, 2006, and that the 2006 Amendment has still not become effective. (Response at 4-5.) As Qwest stated in its Motion (at 11 n. 3), Qwest's Motion did not address these claims because their resolution depends on documents not cited in Plaintiffs' Complaint.

> exercises that right retirees "will not be vested in any plan benefits." (*Id.* ¶¶ 9-11 & 14-15.)

In light of these facts, Plaintiffs' contractual vesting claim fails to state a claim under both (1) Tenth Circuit law, and (2) the law of every other circuit to address the issue.

1. Plaintiffs' Contractual Vesting Claim Fails Under Tenth Circuit Law.

Plaintiffs concede that their contractual vesting claim is based entirely on language in the 1998 Plan Document's Benefit Formula. (Response at 3-4 & 11.) That language makes clear that its purpose was not to "contractually vest" benefits, but instead to describe how a particular retiree's life insurance coverage was to be calculated. Before 1997, the Benefit Formula provided that a retiree's life insurance coverage upon reaching age 70 equaled 50% of the coverage in effect before his 66th birthday. The Benefit Formula in the 1998 Plan Document provides, in effect, that a retiree's life insurance coverage upon reaching age 70 equaled the greater of: (1) 50% of the coverage in effect before his 66th birthday; or (2) $20,000 for Pre-1997 Retirees and $30,000 for Post-1996 Retirees. As *Chiles* makes clear, Plaintiffs' contention that this Benefit Formula created "contractually vested" rights fails to state a claim, because the very document that contains this formula expressly authorized Qwest to reduce or eliminate the benefits specified in the formula.

Plaintiffs nevertheless assert that Qwest's interpretation of the 1998 Plan Document "belittle[s] the significance of" the Benefit Formula's language and renders it "superfluous." (Response at 12, 13, 14 & 20.) These assertions are baseless. For nearly a decade, Qwest provided thousands of retirees with additional life insurance coverage they would not have had but for this language. *See* Ex. 18 (stating that the amended Benefit Formula increased life insurance coverage for more than 80% of retirees). The language of

the amended Benefit Formula, far from being "superfluous," had precisely its intended effect: to provide additional life insurance benefits to beneficiaries of retirees who died while the formula was in effect.

Plaintiffs have the argument backwards. *Plaintiffs'* interpretation of the 1998 Plan Document belittles the significance of that document's *reservation of rights clause*, and indeed renders it superfluous. Plaintiffs make no bones about it: They argue that "the rules set forth on Appendix 7 of the 1998 Governing Plan Document *circumscribe or deny* the right of the Plan sponsor to reduce Basic Life Insurance Coverage" and "circumscribe Plan sponsor Qwest's rights under the reservation of rights clause to reduce the life insurance coverage." (Response at 12 & 11 (emphasis added).) If, as Plaintiffs themselves contend, their interpretation of the revised Benefit Formula nullifies Qwest's right under the reservation of rights clause to reduce life insurance coverage, then that interpretation must be rejected under *Chiles* and the numerous other cases cited in Qwest's Motion. *See Chiles*, 95 F.3d at 1513 (stating that its rejection of plaintiffs' interpretation of the plan made "particular sense in this case, where plaintiffs' reading of the plan would render the termination exception superfluous; under plaintiffs' interpretation, Control Data may not alter the benefits of disabled participants under any condition"); *see also In re Unisys Corp. Retiree Medical Benefit ERISA Litig.*, 58 F.3d 896, 902 (3d Cir. 1995) (rejecting as a matter of law retirees' interpretation that plan language promising specified lifetime benefits limited the scope of the plans' reservation of rights provision, and holding that "[a]n employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to

exist") (emphasis in original); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 410 (6th Cir. 1998) (same); *UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698, 703 (7th Cir. 2003) (same).

Even though *Chiles* rejected the very argument Plaintiffs make here—that language in a plan document promising welfare benefits trumped that same document's reservation of rights provision—Plaintiffs soldier on, arguing that the language of Appendix 7 constituted a second "exception" to the 1998 Plan Document's reservation of rights provision, albeit one not found anywhere in that provision. (*See* Response at 10-11.) Far from supporting this argument, *Chiles* refutes it. In holding as a matter of law that the employer in *Chiles* was entitled to reduce benefits while the plan was in operation, the Tenth Circuit relied in part on the fact that the "*reservation of rights clause* contains a proviso" stating that, notwithstanding the employer's reservation of rights, benefits for the "totally disabled" would continue even if the plan terminated. 95 F.3d at 1512 (emphasis added). The Tenth Circuit held that this express statement of a limitation *within the reservation of rights clause itself* was evidence that no other limitation arose from language found elsewhere in the Plan. *Id.* Here as in *Chiles*, the 1998 Plan Document's reservation of rights clause contains a "proviso" stating that, notwithstanding Qwest's reservation of rights, a plan amendment shall not reduce benefits for a loss incurred prior to its adoption. (Ex. 19 at QL00028.) This Court should hold, as did the Tenth Circuit in *Chiles*, that this express statement of a limitation *within the reservation of rights clause itself* is evidence that no other limitation arises from language found elsewhere in the 1998 Plan Document, including Appendix 7.

2. Plaintiffs' Contractual Vesting Claim Fails Under the Law of Every Other Circuit To Address the Issue.

Qwest's Motion discussed in detail (at 17-23) cases decided by seven other courts of appeal, all of which concluded that a reservation of rights provision like that contained in the 1998 Plan Document suffices to allow an employer to reduce retiree benefits even in the face of clear language promising specified "lifetime" benefits. Plaintiffs respond to this argument in a single paragraph that mentions none of the cases cited by Qwest, fails to dispute Qwest's characterization of those cases, and cites no cases contradicting, or even questioning, the holdings of those cases. (*See* Response at 14-15.)

Plaintiffs' one-paragraph response to Qwest's argument makes two points, neither of which has merit. First, Plaintiffs attempt to distinguish the decisions by the seven other circuits on the ground that this case involves "precise language serving to deny the Plan sponsor's right to *reduce* coverage affecting Eligible Retirees." (*Id.* at 14 (emphasis in original).) According to Plaintiffs, the promissory language in the seven circuit cases cited by Qwest concerned the *duration* of benefits, whereas the alleged promissory language in this case concerns the *amount* of benefits.

This assertion cannot be squared with the facts. For example, in *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90 (2d Cir. 2001), a 1987 SPD stated that the employer would provide life insurance coverage to retirees throughout their lives *in a specified amount*—"the amount of their annual salary at retirement"—while also stating that the employer could amend or terminate the plan at any time. *Id.* at 98. In the Second Circuit's words, this SPD (like the 1998 Plan Document in this case) included "language that *both* appears to promise lifetime life insurance coverage at a particular level *and* clearly reserves

[employer's] right to amend or terminate such coverage." *Id.* at 99 (emphasis in original). The Second Circuit upheld entry of summary judgment *against* plaintiffs on their claim that the SPD created a contractually vested right to lifetime life insurance benefits.

There is, in any event, no material difference between plan language describing the duration of welfare benefits and language describing the amount of such benefits. Implicit in a statement that benefits will be provided for the duration of a person's life is a statement that such benefits will not be reduced, and implicit in a statement that benefits will not be reduced is a statement that such benefits will continue for the duration of a person's life. The point of the cases cited in Qwest's Motion is that *regardless* of how a plan document describes the amount or duration of welfare benefits, if the document contains a reservation of rights provision authorizing the employer to reduce or eliminate those benefits, the benefits are not contractually vested as a matter of law.

Plaintiffs next point out that "[w]elfare benefits may be changed or eliminated by a plan sponsor *unless* it imposed a contractual limitation on itself in its welfare benefit plan." (Response at 15 (emphasis in original).) The decisions cited by Qwest all recognized that a plan sponsor can contractually limit its ability to change or eliminate plan benefits—and then held that the benefit language relied on by plaintiffs did not create such a limitation, in light of reservation of rights language in the same "contract" authorizing the plan sponsor to change or eliminate benefits. Here too, the very "contract" that allegedly limits Qwest's ability to change or eliminate life insurance benefits expressly states that Qwest can "reduce, change, eliminate or modify" those benefits. (Ex. 19 p. QL00028.) Under these circumstances, an allegation that Qwest has "imposed a contractual limitation on itself" fails to state a claim.

Finally, Plaintiffs did not even try to rebut a central point made in Qwest's Motion (and that courts have repeatedly made): The rule Plaintiffs urge this Court to adopt would harm the long-term interests of employees and retirees. If, as Plaintiffs urge, an employer that elects to enhance welfare benefits (as Qwest did in 1998) can thereafter be forever barred from reducing those benefits even though the plan document expressly authorizes such reduction, employers everywhere will be loath to increase benefits, and employees and retirees will suffer as a result. For all these reasons, Plaintiffs' contractual vesting claim fails to state a claim on which relief can be granted.

B. Plaintiffs' Equitable Estoppel Claim Fails To State a Claim Upon Which Relief Can Be Granted.

Plaintiffs summarize their argument in support of their equitable estoppel claim in a heading which states: "Plaintiffs' claim that Qwest is equitably estopped by virtue of the Plan's rules from reducing eligible retirees' life insurance benefits to $10,000 states a claim upon which relief can be granted *because the Plan unambiguously denies Qwest the right to reduce eligible retirees' benefits.*" (Response at 15 (emphasis added).) But a Plan document cannot *unambiguously deny* Qwest the right to reduce retirees' benefits when it *expressly grants* Qwest the right to reduce those benefits. Plaintiffs' argument in support of their equitable estoppel claim is thus utterly without merit.

Plaintiffs' contention that the pertinent terms of the 1998 Plan Document are "unambiguous" dooms their equitable estoppel claim. As Qwest pointed out in its Motion, even assuming *arguendo* that the Tenth Circuit would recognize an equitable estoppel claim in the ERISA context, that court has declared, consistent with every other circuit to address the question, that estoppel can apply only "where the terms of a plan are *ambiguous* and the

employer's communications constituted an interpretation of that ambiguity." *Averhart v. U.S. West Management Pension Plan*, 46 F.3d 1480, 1486 (10th Cir. 1994) (emphasis added; quotation marks, brackets and citation omitted); *see also* cases cited in Qwest's Motion at 24. If Plaintiffs are correct that the Plan documents are *unambiguous*, then their equitable estoppel claim is barred.

To buttress their claim that "the Plan unambiguously denies Qwest the right to reduce eligible retirees' benefits," Plaintiffs quote in their entirety the descriptions of the Plan's life insurance benefits in three different SPDs. (Response at 17-19.) Each of the quoted SPDs includes a lengthy reservation of rights provision, to which Plaintiffs make no reference, stating that Qwest can reduce or eliminate the described benefits. (*See* Ex. 27 p. K00400; Ex. 20 p. QL04113; Ex. 21 p. QL01790.) Plaintiffs thus try to show that Plan language "unambiguously denies Qwest the right to reduce eligible retirees' benefits" by the simple expedient of ignoring Plan language unambiguously *granting* Qwest the right to reduce such benefits.

Plaintiffs next cite *Salterelli v. Bob Baker Group Med. Trust*, 35 F.3d 382, 386-87 (9th Cir. 1994), for the proposition that the "doctrine of reasonable expectations" is part of the "federal common law governing ERISA cases." (Response at 19.) Although the Ninth Circuit has adopted the doctrine of reasonable expectations to interpret "ERISA-governed *insurance contracts*" (*id.* at 387 (emphasis added)), the Tenth Circuit has held that this doctrine applies *only* to ambiguous insurance policy provisions. *Pirkheim v. First Unum Life Ins.*, 229 F.3d 1008, 1011 (10th Cir. 2000). Because the 1998 Plan Document is not ambiguous (and is not an insurance policy), the reasonable expectations doctrine does not apply here. It would in any event be unreasonable for a retiree to expect that the welfare

benefits described in 1998 Plan Document cannot be reduced when that document states that such benefits *can* be reduced.

Plaintiffs next cite the Tenth Circuit's statement in *Chiles*, 95 F.3d at 1518, that the drafter of an SPD must bear the burden of any uncertainty created by "careless or inaccurate drafting." (Response at 19.) This statement is irrelevant here, because Qwest's SPDs were neither careless nor inaccurate. Those SPDs typically stated, *not once but three times*, that Qwest reserved the right to amend or terminate the Plans:

- The SPDs' *very first page* stated that Qwest "reserve[s] the right to amend or terminate any of the plans," with respect to "all participant classes, retired or otherwise." (Ex. 10 p. QL01797 & Ex. 11 pp. QL03273.)
- The SPDs *life insurance benefit section* stated that Qwest "reserves the right to terminate or amend it at any time, with respect to any or all classes of current or future participants (including retired employees)," in which event Plan participants "will not be vested in any plan benefits." (Ex. 10 p. QL01954 & Ex. 11 p. QL03743.)
- The SPDs' *final pages* reiterated that Qwest "reserves the right to end, suspend, or amend its plans at any time, in whole or in part." (Ex. 10 p. QL02118 & Ex. 11 p. QL03875.)

As *Chiles* and the seven other circuit court cases cited by Qwest all held, reservation of rights provisions like these do not reflect "careless or inaccurate drafting," but are instead clear and unambiguous.

To buttress their equitable estoppel claim, Plaintiffs look beyond the Plan documents to "Confirmation Statements" that summarized the amount of benefits available to certain individual pre-1991 retirees under two distinct welfare plans—a health care plan and the group life insurance plan at issue here. These Confirmation Statements offer no support for Plaintiffs' equitable estoppel claim. First, the statements have no bearing on the claims of four of the seven Participants in this case, because they retired after 1990. Second,

although Plaintiffs quote language in the statements that Qwest "reserves the right to amend, suspend, or discontinue [the Plans] at any time, except for those who retired before 1991 and where prohibited by collective bargaining agreements" (*see* Response at 20), Plaintiffs fail to quote the following statement that appears *immediately above* this language:

> This Statement contains only a general description of Company-sponsored benefit plans. The exact details of these plans are included in the legal plan documents that govern them. *If there's a discrepancy between this worksheet and the plan documents, the plan documents will govern.*

(Ex. 22 p. K00369; Ex. 23 p. K00422; Ex. 24 p. K00371; Ex. 25 p. K00374 (emphasis added).) Because the Plan documents reserved Qwest's right to amend, suspend, or discontinue the Plan as to *all* eligible retirees, any claim that Qwest is estopped from amending the Plan as to *pre-1991* retirees by virtue of language in the Confirmation Statement must fail.

Finally, the Tenth Circuit has made it clear that where (as here) the Plan documents are unambiguous, Plaintiffs cannot assert estoppel based on allegedly contradictory informal communications. *See Miller v. Coastal Corp.*, 978 F.2d 622, 624 (10th Cir. 1992) ("An employee benefit plan cannot be modified . . . by informal communications, regardless of whether those communications are oral or written."). Every other circuit to address the issue is in accord. *See, e.g., Crosby v. Rohm & Hass Co.*, 480 F.3d 423, 431 (6th Cir. 2007) (plaintiff's equitable estoppel claim based on language in an enrollment worksheet failed as a matter of law where the plan documents were unambiguous; "[o]therwise, we would be permitting estoppel to override the clear terms of plan documents and in the end would be permitting the party to enforce something other than the plan documents themselves, which ERISA prohibits") (internal quotations and citation omitted); *Alday v.*

Container Corp. of America, 906 F.2d 660, 665-66 (11th Cir. 1990) (plaintiffs' equitable estoppel claim based on language contained in, *inter alia*, a "Summary of Personal Benefits" failed as a matter of law where the plan documents were unambiguous); *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 491-92 (2d Cir. 1988) (rejecting plaintiffs' theory that employer was liable under ERISA by virtue of various "representations" it made and "actions of the employees in accepting those representations by remaining with the Company," on the ground that "plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans"). Where, as here, every iteration of the Plan documents unambiguously reserved Qwest's right to amend the Plan, Plaintiffs' claim that Qwest is estopped from amending the Plan based on language contained in non-plan documents fails as a matter of law. For all these reasons, Plaintiffs' equitable estoppel claim fails to state a claim upon which relief can be granted.

C. This Court Cannot *Sua Sponte* Enter Partial Summary Judgment for Plaintiffs on Their Contractual Vesting Claim.

Qwest's Motion To Dismiss challenges the sufficiency of, *inter alia*, Plaintiffs' contractual vesting claim. That motion can, and indeed must, be decided based solely on the allegations in Plaintiffs' Complaint and the contents of the Plan documents cited in that Complaint. The issue raised by Qwest's motion is wholly separate from whether, once Qwest has developed and presented to the Court relevant evidence beyond that cited in Plaintiffs' Complaint, Plaintiffs would be entitled to summary judgment on that claim. Qwest has not yet had an opportunity to assert affirmative defenses to that claim, to conduct discovery concerning it, or to present the Court with relevant evidence beyond that cited in Plaintiffs' Complaint. Under these circumstances, Plaintiffs' request that this Court *sua*

sponte enter partial summary judgment in their favor on this claim invites reversible error, and must be denied.

The Tenth Circuit has held that before granting summary judgment *sua sponte*, a district court must provide notice to the defending party, allow that party an adequate opportunity to develop any facts in opposition, and give that party an opportunity to present such facts to the Court. *See, e.g., Quinlan v. Koch Oil Company*, 25 F.3d 936, 942 (10th Cir. 1994); *North Texas Production Credit Association v. McCurtain County Nat'l Bank*, 222 F.3d 800, 816 (10th Cir. 2000). Indeed, Plaintiffs themselves concede that the Tenth Circuit authorizes entry of summary judgment *sua sponte* only "under limited conditions," one of which is that the defending party has had "adequate time to develop any facts necessary to oppose a partial summary judgment." (Response at 22, *citing David v. City and County of Denver*, 101 F.3d 1344, 1358-59 (10th Cir. 1996).)

The Tenth Circuit has held that a district court commits reversible error if it fails to follow the procedural safeguards identified above. *See Quinlan*, 25 F.3d at 942 (district court erred in granting summary judgment *sua sponte* when it "failed to notify Koch of its intention" to potentially do so, "thereby denying Koch of the opportunity to come forward with evidence"); *McCurtain*, 222 F.3d at 816 (same). None of the prerequisites for granting summary judgment *sua sponte* have been satisfied here.

- **Proper Notice.** Plaintiffs' motion for partial summary judgment is incorporated in their Response. *See* Response at 22 (asking the Court to "*sua sponte* grant[] Plaintiffs a motion for partial summary judgment"). This violates the local rules of this Court. *See* D.C.COLO.LCivR 7.1(C) ("A motion shall not be included in a response or reply to the original motion. A motion shall be made in a separate paper.") Qwest accordingly has

no obligation to, and does not, address the substance of Plaintiffs' motion for partial summary judgment.

- **Opportunity To Develop Facts.** Although Plaintiffs, by moving for summary judgment on their contractual vesting claim, have conceded that they need no discovery before the Court decides that motion, Qwest has made no such concession. Qwest has not had adequate time or opportunity to develop facts bearing on whether summary judgment should be entered on that claim. If the Court denies Qwest's motion to dismiss, Qwest believes that once it has had a chance to develop such additional facts, it will be clear both that Plaintiffs *are not* entitled to summary judgment on that claim and that Qwest *is* entitled to such judgment. Plaintiffs' motion for partial summary judgment cannot be decided until Qwest has had an opportunity to develop such facts.

- **Opportunity to Present Facts.** Qwest has had no opportunity to present evidence to the Court relating to Plaintiffs' contractual vesting claim beyond that cited in Plaintiffs' Complaint. It stands to reason, and is in fact the case, that numerous documents *not* cited in Plaintiffs' Complaint demonstrate conclusively, if the cited documents do not, that Qwest is entitled to judgment in its favor on that claim as a matter of law. Plaintiffs' summary judgment motion cannot be decided until Qwest has had an opportunity to present such additional evidence to the Court. For all these reasons, Plaintiffs' motion for partial summary judgment *sua sponte* should be denied.

III. CONCLUSION

Less than two months ago, the United States Supreme Court emphasized that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time

and money by the parties and the court." *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955, 1966 (2007) (quotation marks, citation and ellipsis omitted). Because the allegations in Plaintiffs' Complaint supporting their contractual vesting and equitable estoppel claims would not raise a claim of entitlement to relief, those claims should be dismissed.[2] Plaintiffs' motion for partial summary judgment *sua sponte* on their contractual vesting claim should be denied.

DATED: July 16, 2007.

s/ Christopher J. Koenigs

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[2] Plaintiffs do not dispute that if they have failed to state contractual vesting or equitable estoppel claims on their own behalf, these same class action claims must also be dismissed.

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2007, I electronically filed the foregoing **Qwest Defendants' Reply Brief in Support of Motion To Dismiss** 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