IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

EDWARD J. KERBER,
NELSON B. PHELPS,
JOANNE WEST,
NANCY A. MEISTER,
THOMAS J. INGEMANN, JR.,
MARTHA A. LENSINK,
SAMUEL G. STRIZICH,
Individually, and as Representatives of plan participants and plan beneficiaries of the QWEST GROUP LIFE INSURANCE PLAN,

Plaintiffs,

v.

QWEST GROUP LIFE INSURANCE PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

MINUTE ORDER

ORDER ENTERED BY MAGISTRATE JUDGE KRISTEN L. MIX

This matter is before the Court on disputed deadlines for Defendants to respond to Plaintiffs' Second Amended Complaint [Docket No. 69; Filed April 3, 2008], Plaintiffs' Second Amended Motion for Class Certification [Docket No. 63; Filed April 1, 2008] and Plaintiffs' Amended Motion for Summary Judgment [Docket No. 65; Filed April 1, 2008]. The Court heard argument from counsel regarding the disputed deadlines at the scheduling conference held on April 29, 2008 and took the matter under advisement. The Court has now reviewed the case file, read the transcript of the status conference held by District Judge Walker D. Miller on March 20, 2008, and is otherwise fully advised in the premises.

Accordingly,

IT IS HEREBY **ORDERED** that Defendants shall file an Answer or other response to Plaintiffs' Second Amended Complaint [#69] on or before **May 16, 2008.** The Second Amended Complaint was effectively served on Defendants on March 31, 2008. Given the already ample history of this case, six weeks is sufficient time for Defendants to prepare an appropriate response to the Second Amended Complaint.

IT IS FURTHER **ORDERED** that Defendants shall respond to Plaintiff's Second Amended Motion for Class Certification [#63] on or before **June 30, 2008**. Approximately two months after entry of the Scheduling Order is sufficient time for Defendants to conduct any discovery necessary to "aid the Court in its class certification issue." *Proposed Scheduling Order* [#74], (Defendants' insertion) at 28.

IT IS FURTHER **ORDERED** that Defendants shall respond to Plaintiff's Amended Motion for Summary Judgment [#65] on or before **July 15, 2008.** The parties dispute whether discovery is needed for Defendants to respond to this motion; Plaintiffs assert that it "concerns straightforward legal issues," while Defendants contend that discovery is necessary at least as to the issue of Plaintiffs' alleged "detrimental reliance." *Proposed Scheduling Order* [#74], (Plaintiffs' insertion) at 23, (Defendants' insertion) at 25. Without deciding whether discovery is actually necessary on this motion, because doing so would involve expressing an opinion about the merits of the motion which is to be decided by the District Court, the Court is not inclined to set a deadline for responding to a dispositive motion that would necessarily preclude any meaningful opportunity for discovery.

IT IS FURTHER **ORDERED** that the Scheduling Order is deemed modified in accordance with the deadlines set forth above. **As to the Motions addressed herein, no**

further extensions of time will be permitted absent a showing of extraordinary circumstances or by stipulation of the parties.

BY THE COURT:

__s/ Kristen L. Mix__________________

United States Magistrate Judge

Dated: April 30, 2008

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **07-cv-00644-WDM-KLM**

EDWARD J. KERBER, *et al*, Individually,
and as Representatives of plan participants
and plan beneficiaries of the QWEST GROUP LIFE INSURANCE PLAN,

Plaintiffs,

vs.

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

Defendants.

SCHEDULING ORDER

I. DATE OF CONFERENCE AND APPEARANCE OF COUNSEL.

A scheduling conference in the above case was held on April 29, 2008, at 11:00 a.m. in Courtroom A-501 of the United States Courthouse, 901 19th Street, Denver, CO.

Appearing for the Parties were:

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Attorneys for Defendants

2. STATEMENT OF JURISDICTION and VENUE.

The Parties agree that the Court has subject matter jurisdiction over Plaintiffs' claims and that this is the proper venue.

The Court has jurisdiction of the claims for relief based upon the civil enforcement provisions of ERISA, 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), 1132(a)(3), 1132(e)(1), 1132(f), 1132(g) and upon 28 U.S.C. §§ 1331.

Venue of this action lies in the District of Colorado, pursuant to 28 U.S.C. § 1391(b) and 29 U.S.C. § 1132(e)(2), in that acts complained of herein occurred within this District and the subject employee benefit plan is administered in this District.

3. STATEMENT OF CLAIMS AND DEFENSES.

A. Plaintiffs' Statement of Their Claims.

This case involves legal challenges brought pursuant to the Employee Retirement Income Security Act ("ERISA") contesting decisions made and actions taken concerning the Qwest Group Life Insurance Plan ("Plan"), an employee welfare benefit plan provides "Basic Life Insurance Coverage" for "Eligible Retirees." The Plaintiffs include five Plan participants (Kerber, Phelps, Meister, West and Ingemann) and two persons (Lensink and Strizich) who are beneficiaries of deceased "Eligible Retirees," a group defined by the terms of the Governing Plan Document.[1] Collectively, Plaintiffs assert in the Second Amended Complaint eight claims for relief based upon ERISA. Plaintiffs have moved for class

[1] While Plaintiff Samuel G. Strizich is a beneficiary of Sharon Strizich, a deceased former U S WEST management worker, Mr. Strizich is a retired former U S WEST Executive Director and, he too, is a Plan participant.

certification, seeking to benefit a proposed class of at least 48,000 Eligible Retirees scattered all over the United States. (Doc. # 63 and #64).

The dispute concerns the Plan's "Basic Life Insurance Coverage" which benefit has long been a stable feature of retirement from Qwest and predecessors-in-interest (U S WEST, Mountain Bell, Northwestern Bell, Pacific Northwest Bell and AT&T) (Doc. # 69, Second Amended Complaint, ¶¶ 14 and 29). The Basic Life Insurance Coverage benefit is payable no matter what the underlying cause of the death of the Eligible Retiree. (*Id.* ¶ 31). For decades, this benefit has been the monetary equivalent of the Eligible Retiree's last annual salary before his or her retirement date. Starting at age 66 years and one month, the benefit is reduced by 10% each year until at age 70, when the benefit is decreased to the equivalent of one half the person's former last annual salary. (*Id.*).

Qwest leadership decided to *reduce* basic life insurance coverage to a mere $10,000 and apply that change to Post-1990 Occupational Retirees. The proposed change was announced by Qwest in October 2005 to current employees, as one "made with a great deal of thought and consideration." However, no Plan amendment was adopted until more than a year later, on December 13, 2006. (*Id.* ¶¶ 58-60). Plan Amendment 2006-1 adopted by members of the Qwest Plan Design Committee on December 13, 2006 states:

> Effective January 1, 2006, with respect to Occupational Employees upon their retirement, the Basic Life Coverage is a flat $10,000 Benefit. **Effective January 1, 2006, with respect to Post-1990 Occupational Retirees, the Basic Life Coverage is a flat $10,000 Benefit**. To the extent a Post-1990 Occupational Retiree has elected and maintained participation in Supplemental Life Coverage, the amount of such Benefit shall not be impacted due to this change in Basic Life Coverage.

(Defendants' Ex. 26, Doc. # 16-31 QL02127 [**emphasis added**]). The December 13, 2006 adopted Plan Amendment 2006-1 was illegally applied to benefits paid to beneficiaries of deceased Post-1990 Occupational Retirees *retroactive* to January 1, 2006. (Second Amended Complaint ¶ ¶ 67-68). Applying the December 13, 2006 Plan Amendment 2006-1 retroactive to reduce benefits for deaths occurring during the period January 1, 2006 through December 12, 2006 violated the Plan's "Prior Loss Proviso" rule stating "no amendment shall reduce the benefits of any Participant with respect to a loss incurred prior to the date such amendment is adopted." (*Id.* ¶ 35; Defendants' Ex. 19, Doc. # 16-24, "10.1 Amendment", QL00028). The very fact that Plan sponsor Qwest ignored the Prior Loss Proviso and worded the purported plan amendment to be retroactive is a showing of bad faith.

Before this litigation was commenced, there was a massive outcry in which Qwest leadership (officers and members of the Board of Directors) received countless written impassioned protestations from retirees. Qwest leadership did not respond to any of the thousands of letters and email messages and complaints received from the retirees and there is no effective internal claims process to address the Plaintiffs' claims. Hundreds of persons, perhaps a thousand beneficiaries and estates, received less than the proper amount of Basic Life Insurance benefits payable at the deaths of Eligible Retirees.

By Amended Order dated February 27, 2008 (Docket 47), the Court interpreted the 'Reservation of Rights' clause set forth within the Governing Plan Document and ruled that Plaintiffs' claims asserting that Qwest was contractually barred from reducing Plaintiffs'

Basic Life Insurance benefits to a flat $10,000 did not state a claim upon which relief could be granted. The Court also ruled that Plaintiffs' claims of equitable estoppel under ERISA failed to state a claim upon which relief could be granted. The Court ruled Plaintiffs' other asserted claims remain pending in this case. In view of the Court's February 27, 2008 Amended Order ruling that Plan language does not prohibit a reduction of Plan benefits below the promised minimum benefits, Plaintiffs contend Defendant Plan fiduciaries and administrators made false statements deceiving and assuring Eligible Retirees that their expected Plan benefits could not be reduced below the stated minimum levels.

Plaintiffs were granted leave to file a Second Amended Complaint which was deemed filed on April 3, 2008 (Docket #69), and the claims are merely *summarized* as follows:

a) a FIRST claim for declaratory relief under ERISA Section 502(a)(1)(B) and injunctive and equitable relief under ERISA Section 502(a)(3) ordering that since the Governing PLAN Document fails to specify a procedure for making PLAN amendments, and Qwest corporate by-laws and corporate resolutions do not specify a PLAN amendment procedure, the PLAN fails to comply with ERISA Section 403(b), and, therefore, all Eligible Retirees' rights to PLAN benefits remain governed by the unaltered terms of the Governing PLAN Document;

b) a SECOND claim for an order declaring PLAN fiduciaries and administrators breached their fiduciary duty under ERISA Section 404(a)(1) to act in the best interests of PLAN participants, since PLAN fiduciaries and administrators repeatedly sent Plaintiffs Kerber, Phelps and all other Pre-1991 retirees official written confirmation falsely representing that their basic life insurance benefits could not be amended, suspended or discontinued;

c) a THIRD claim for declaratory relief under ERISA Section 502(a)(1)(B) that no document created prior to December 13, 2006, including the October 14, 2005 dated recommendation and resolution executed by members of the Qwest Plan Design Committee, constitutes a bona fide PLAN amendment so as to reduce Eligible Retirees' basic life insurance benefits;

d) a FOURTH claim for declaratory relief under ERISA Section 502(a)(1)(B) that the document labeled as Amendment 2006-1 executed and adopted by the Qwest Plan Design Committee on December 13, 2006 left in place inconsistent terms within the Governing PLAN Document and, accordingly, due to the conflicting terms and ambiguity, the more favorable terms concerning Eligible Retirees' basic life insurance coverage continued to govern;

e) a FIFTH claim for declaratory relief under ERISA Section 502(a)(1)(B) that the document labeled as Amendment 2006-1 executed and adopted by the Qwest Plan Design Committee on December 13, 2006 was illegally applied retroactively to beneficiaries of retirees who deceased during January 1, 2006 through December 12, 2006, contrary to the "Prior Loss Proviso" set forth within the "reservation of rights" clause in the Governing PLAN Document;

f) a SIXTH claim for declaratory relief under ERISA Section 502(a)(1)(B) that any PLAN amendment executed and adopted by members of the Qwest Plan Design Committee and applied by PLAN administrators retroactively to beneficiaries of retirees who deceased prior to the adoption date violates the "Prior Loss Proviso" terms of the Governing PLAN Document;

g) a SEVENTH claim for an order declaring PLAN fiduciaries and administrators breached their fiduciary duty of loyalty under ERISA Section 404(a)(1) to act in the best interests of PLAN participants, since PLAN fiduciaries and administrators failed to investigate life insurance continuation and conversion options and impress upon the Company, under the circumstances, to institute rules allowing Eligible Retirees to exercise continuation or conversion of their drastic loss of life insurance coverage; and

h) an EIGHTH claim for relief under ERISA Section 502(c)(1)(B) for per diem civil penalty to be assessed against the PLAN Administrator for failure to produce requested instruments under which the PLAN was established or is operated.

Plaintiffs seek for themselves and a proposed class of all other Eligible Retirees-Plan Participants and their beneficiaries a panoply of declaratory, injunctive and other equitable relief and, for that reason, they incorporate their claims and requested relief as more fully set forth and detailed in the Second Amended Complaint. Plaintiffs do not agree with

Defendants' mischaracterization of Plaintiffs' claims as set forth in "Defendants' Statement of Defenses."

B. **Defendants' Statement of Defenses**

In June 2007, Defendants (jointly, "Qwest") moved for dismissal of all claims in Plaintiffs' (First) Amended Complaint asserting that the Plan's language bars Qwest from reducing Plaintiffs' life insurance benefits to $10,000, on the ground that such claims failed to state a claim upon which relief can be granted. (Doc. No. 16.) On February 27, 2008, the Court entered an Amended Order granting Qwest's Motion To Dismiss in its entirety ("Dismissal Order"). (Doc. No. 47.)

Plaintiffs subsequently filed a Second Amended Complaint that asserts eight claims for relief. Qwest describes below its principal defenses to these claims.

Plaintiffs' **First Claim** alleges that all amendments to the Plan since 1998, including two amendments in 2005 and 2006 that reduced life insurance benefits to $10,000 (the "Amendments"), are null and void because the 1998 Plan Document does not specify a procedure for amending the Plan that complies with ERISA Section 402(b)(3). But the U.S. Supreme Court has expressly held that an ERISA plan document containing language *identical* in all material respects to the amendment language in the 1998 Plan Document *does* specify a procedure for amending an ERISA plan that complies with Section 402(b)(3). *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 75 (1995). Moreover, plaintiffs' current position that the Plan *cannot* be amended flatly contradicts plaintiffs' repeated statements earlier in this case that the Plan *has been* amended.

Plaintiffs' **Second Claim**, entitled "Breach of Fiduciary Duty—Material Misrepresentations," alleges that Qwest deceived pre-1991 retirees by failing to "truthfully represent and explain the risk that their PLAN benefits might be reduced pursuant to the [Plan's] 'reservation of rights' clause." (Second Amended Complaint ¶ 87.) To prevail on this claim, plaintiffs must prove, *inter alia*, that Qwest made a material misrepresentation upon which plaintiffs detrimentally relied. *See, e.g., Owen v. Regence BlueCross BlueShield of Utah*, 388 F. Supp. 2d 1335 (D. Utah 2005). This claim is simply a repackaging of plaintiffs' prior estoppel claim, and is based on no facts beyond those alleged in support of that prior claim. But the Court *dismissed* plaintiffs' estoppel claim on the ground, *inter alia*, that plaintiffs had "not identified any 'lies, fraud, or an intent to deceive.'" *See* Dismissal Order at 14. Moreover, in light of the Court's holding that the Plan documents' reservation of rights provisions unambiguously reserved Qwest's right to amend the Plan (*see id.* at 14-15), plaintiffs could not reasonably have relied on Qwest's alleged failure to explain that it might amend the Plan.

Plaintiffs' **Third and Fourth Claims** allege that documents dated October 14, 2005 and December 13, 2006, which Qwest contends effectuated and confirmed a Plan Amendment reducing life insurance benefits to $10,000 for post-1990 occupational retirees, were in fact ineffective to amend the Plan, so that the more favorable terms of the 1998 Plan Document continue to govern those retirees' benefit rights. But the October 14, 2005 Minutes and Resolutions to which plaintiffs refer expressly stated that "the Qwest Group Life Insurance Plan *be and hereby is amended and restated* to incorporate" a reduction in life

insurance benefits for such retirees to $10,000 effective January 1, 2006 (emphasis added). And the December 13, 2006 Minutes and Resolutions likewise state that the Plan "*was amended* to incorporate changes to retiree coverage which are effective January 1, 2006" (emphasis added). Plaintiffs are not entitled to a declaration that these documents failed to do what they said they did, *i.e.*, effectuate and confirm a Plan Amendment reducing life insurance benefits for post-1990 occupational retirees effective January 1, 2006.

Plaintiffs' **Fifth Claim** alleges that although the October 14, 2005 Minutes and Resolutions stated that the Plan was amended to reduce life insurance benefits for post-1990 occupational retirees to $10,000 effective January 1, 2006, that amendment did not actually become effective until December 13, 2006, and is therefore null and void as applied to the estates and beneficiaries of post-1990 occupational retirees who died between January 1 and December 12, 2006. This claim is a variant of plaintiffs' Third and Fourth Claims, and fails for the same reasons those claims fail.

Plaintiffs' **Sixth Claim** alleges that although the September 14, 2006 Minutes and Resolutions stated that the Plan was amended to reduce life insurance benefits for all retirees other than post-1990 occupational retirees to $10,000 effective January 1, 2007, that document did not suffice to amend the Plan, and is therefore null and void as applied to the estates and beneficiaries of such retirees who died after January 1, 2007. Those Minutes and Resolutions stated that "the Qwest Group Life Insurance Plan *be and hereby is amended and restated* to incorporate" a reduction in life insurance benefits for such retirees to $10,000 effective January 1, 2007 (emphasis added). June 7, 2007 Minutes and Resolutions likewise

stated that the Plan was "previously amended" to incorporate a reduction in life insurance benefits effective January 1, 2007. Plaintiffs are not entitled to a declaration that these documents failed to do what they said they did, *i.e.*, effectuate and confirm a Plan Amendment reducing life insurance benefits for the specified retirees effective January 1, 2007.

Plaintiffs' **Seventh Claim** alleges that Defendant Qwest Employee Benefits Committee (the "Committee") breached its fiduciary duties under ERISA Section 404(a)(1). Plaintiffs allege, correctly, that the Amendments reducing life insurance benefits to $10,000 contain no provisions allowing participants to convert their pre-amendment life insurance benefits into individual policies or to pay premiums sufficient to continue their pre-amendment benefit levels (the "Desired Provisions"). Plaintiffs indisputably cannot contend that the Committee breached its fiduciary duties under Section 404(a)(1) by adopting Plan amendments that omitted the Desired Provisions. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 442-445 (1999) (holding that amendment of an ERISA benefits plan is a non-fiduciary "settlor function" which does not give rise to any claim for breach of fiduciary duty under section 404(a)(1)). Plaintiffs nevertheless allege that the Committee breached its fiduciary duties, not by adopting Amendments that omitted the Desired Provisions, but by failing to "advocate" for the inclusion of those provisions in the Amendments. Plaintiffs thus claim that the Committee breached its fiduciary duties by failing to seek the inclusion of language in Plan Amendments that the Committee indisputably had no duty to include. But

because there was no fiduciary duty to *include* the Desired Provisions in the Amendments, there could not possibly be a fiduciary duty to *advocate* for their inclusion.

Plaintiffs' **Eighth Claim** alleges that Qwest failed to respond properly to requests Plaintiff Nelson Phelps made under ERISA Section 104(b)(4) for copies of Plan documents. This claim fails for numerous reasons, including because copies of Qwest's written responses to the relevant requests conclusively establish that Qwest timely provided the very documents that Mr. Phelps alleges Qwest failed to provide.

Five of plaintiffs' eight claims seek to invalidate the Plan Amendments reducing life insurance benefits to $10,000 based on alleged technical deficiencies in the language of either the 1998 Plan Document (First Claim) or the documents by which Qwest sought to amend the Plan (Third, Fourth, Fifth and Sixth Claims). Even assuming *arguendo* the existence of such deficiencies, they would invalidate the Amendments only upon a showing of detrimental reliance by plaintiffs or bad faith or active concealment by Qwest. *See, e.g., Murphy v. Keystone Steel & Wire Co.,* 61 F.3d 560, 569 (7th Cir.1995) ("[T]echnical violations of ERISA requirements do not justify relief absent a showing of bad faith, active concealment, or detrimental reliance. . . . And, like other circuits, we agree that this principle should apply in cases where a plan fails to comply with § [402(b)(3)]."); *Loskill v. Barnett Banks, Inc. Severance Pay Plan*, 289 F.3d 734, 738-739 & n. 5 (11th Cir. 2002) (explaining that courts typically will not invalidate a Plan amendment for technical deficiencies "absent a showing of bad faith or active concealment on the part of the sponsor

or detrimental reliance on the part of the beneficiaries"). Plaintiffs can make no such showing.

Moreover, even assuming *arguendo* that the Amendments were not adopted in accordance with valid amendment procedures, the Amendments are nevertheless valid if subsequent actions demonstrate they were ratified. *Curtiss-Wright*, 514 U.S. at 85. Qwest's subsequent actions, including numerous actions preceding the Amendments' effective dates, overwhelmingly demonstrate ratification of the Amendments. For example, Qwest ratified the 2005 Amendment by, *inter alia*, sending all retirees affected by that Amendment two separate documents in October 2005—a letter and a benefits guide with incorporated Summary of Material Modifications—stating that their life insurance benefits would be reduced to $10,000 effective January 1, 2006. Qwest likewise ratified the 2006 Amendment by, *inter alia*, sending all retirees affected by that Amendment two separate documents in October 2006—a Summary of Material Modifications and a benefits guide—stating that their life insurance benefits would be reduced to $10,000 effective January 1, 2007.

Qwest asserts additional defenses in this case beyond those described above, including that: (1) one or more of plaintiffs' claims are barred by statute of limitations, waiver, estoppel and/or laches; (2) certain named defendants are not proper defendants in this case; and (3) this action should not be certified or maintained as a class action because the requirements for a class action have not been and cannot be satisfied. Qwest reserves the right to assert additional affirmative defenses in its answer to the Second Amended Complaint.

4. **UNDISPUTED FACTS**

The Parties agree that the following facts are undisputed:

1. U S West, Inc. was a corporation qualified to do business in Colorado. U S West, Inc.'s principle place of business was within this district.

2. QCII is a Delaware corporation qualified to do business in Colorado. QCII's principle place of business is in this district.

3. Qwest Group Life Insurance Plan (the "Plan") is an "employee welfare benefit plan," pursuant to ERISA § 3(1), 29 U.S.C. § 1002(1).

4. The Plan provides a life insurance benefit payable to the estate or beneficiaries of Plan participants who retired from QCII or predecessor companies after becoming eligible for a service or disability pension.

5. Defendant Qwest Plan Design Committee is the entity to which the QCII's Board of Directors has delegated certain authority to make changes to the Plan. This entity is comprised of QCII officers and/or director-level management employees.

6. U S WEST, Inc. was the plan sponsor of the Plan prior to the Merger. QCII has been the plan sponsor of the Plan since approximately the time of the Merger.

7. The Parties have entered into and filed a Stipulation Regarding Authenticity and Admissibility of Certain Documents Produced by the Parties (the "Stipulation"), in which they have stipulated that certain documents are authentic under Federal Rule of Evidence ("FRE") 901 and are non-hearsay under FRE 801 to 805.

5. COMPUTATION OF DAMAGES.

A. Plaintiffs do not seek *damages*; they seek injunctive, declaratory and other equitable relief, as allowed by ERISA, which relief will result in Qwest Defendants' obligation to provide additional Plan Benefits/ Basic Life Insurance Coverage to those Eligible Retirees whose beneficiaries received a flat $10,000 payment contrary to controlling more favorable Plan terms and in violation of the Plan's "Prior Loss Provio." For example, Named Plaintiff Martha Lensink, the sole beneficiary of her husband Joseph M. Lensink who died on January 5, 2006, should have received about $42,000 in Plan benefits, whereas she received only $10,000 because Plan administrators applied the less favorable terms of Plan Amendment 2006-1 which document was executed and adopted by members of the Qwest Plan Design Committee on December 13, 2006. The retroactive application of Plan Amendment 2006-1 violated the Prior Loss Proviso of the Governing Plan Document. Presently, the total amount of additional Plan benefits to be paid to beneficiaries of deceased Eligible Retirees is unknown.

B. **Pre-judgment and post-judgment interest.** Named Plaintiffs contend that to the extent Qwest Defendants and the Claims Administrator (Prudential and others) violated the more favorable controlling terms and the Prior Loss Proviso of the Governing Plan Document and made a limited $10,000 basic life insurance payment to beneficiaries and estates of deceased Eligible Retirees, those persons and estates are entitled to seek and be paid the additional coverage payment, plus pre- and post-judgment interest, in an amount to be agreed upon by the Parties to this litigation or as determined by this Court.

C. <u>Costs, Expenses of Class Action and Attorney's Fees</u>. Pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), Named Plaintiffs seek an award of reasonable interim and final attorney's fees for services performed, expert witness fees, accounting fees, necessary expenses of litigation, and costs of this action, including the costs of class notice and corrected plan documents, which expense should be borne exclusively by Qwest Defendants.

D. <u>Civil Penalty under ERISA</u>. In the Eighth Claim for Relief - which is not a class claim, Plaintiff Phelps contends that despite his written requests of November 15, 2006 and February 28, 2007, the defendant Plan Administrator failed to timely provide Phelps the documents providing for an amendment and adoption procedure, instruments under which the Plan is established or is operated. ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4), requires defendant Plan Administrator, to honor within 30 days a written request of any participant or beneficiary for a copy of "instruments under which the plan is established or is operated." To the extent Qwest's corporate resolutions are documents under which the Plan is established or is operated, corporate resolutions were not provided to Phelps until many months past the due date. On March 18, 2008, Qwest legal counsel, provided Phelps's counsel certain corporate resolutions which documents, upon information and belief, Defendants contend identify persons at Qwest with authority to make Plan amendments. To date, defendant Plan Administrator has not provided Phelps documents providing for or establishing an adoption procedure for Plan amendments. Therefore, pursuant to ERISA Section 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), Phelps asks this Court to assess civil

penalties up to $110 a day against defendant Plan Administrator for the failure or refusal to timely provide Phelps all instruments under which the Plan is established or is operated.

E. **Defendants' Damages.** Qwest does not claim damages in this action.

6. REPORT OF PRECONFERENCE DISCOVERY AND MEETING UNDER FED. R. CIV. P. Rule 26(f).

A. Counsel communicated via numerous emails and held a series of Rule 26(f) telephone conferences during May through July, 2007 and during April 2008.

B. In attendance at the Rule 26(f) conferences were Plaintiffs' counsel Curtis L. Kennedy and Defendants' counsel Chris Koenigs.

C. The Parties exchanged initial disclosures and have already produced non-confidential documents under Fed.R.Civ.P. 26(a)(1) Disclosures regarding class certification issues will be made within 30 days after the Scheduling Conference.

D. The Parties have informally exchanged numerous Plan documents material to the overarching legal dispute in this action and submitted those documents to the Court with briefs concerning Defendants' Motion To Dismiss which motion is the subject of the Court's Amended Order of February 27, 2008. The Parties have also entered into a Stipulation regarding the authenticity of such documents. The Parties have to date reached no other agreements concerning informal discovery.

E. The Parties do not anticipate that their claims or defenses will involve extensive electronically stored information, or that a substantial amount of disclosure or discovery will involve information or records maintained in electronic format. Plaintiffs have no electronically stored information that is subject to disclosure or production. Qwest

believes it has no electronically stored information subject to initial disclosure, and whether it has any such information subject to production will depend upon this Court's ruling on the Second Amended Motion for Class Certification and/or upon Plaintiffs' subsequent discovery requests.

The Parties hereby agree that the inadvertent production of any document or other material during the disclosure or discovery process shall of itself be without prejudice to any claim that such material is subject to the attorney-client privilege, or is protected from discovery as work product within the meaning of Fed. R. Civ. P. 26, if the disclosing or producing party gives written notice to the receiving party within ten (10) days of learning of the error in failing to assert privilege or work product, identifying the material in question and the claim to privilege or work product.

The Court expects the parties to adhere to the Sedona principles with respect to electronic discovery.

7. **CONSENT REGARDING MAGISTRATE JUDGE.**

At this time, the Parties do **not** consent to the exercise of jurisdiction by a Magistrate Judge.

8. **CASE PLAN AND SCHEDULE.**

A. **Deadline for Joinder of Parties and Amendment of Pleadings.**

The Parties agree that motions to amend the pleadings and motions for joinder of additional parties shall be filed not later than 30 days after Defendants' responses to Plaintiffs' first written discovery requests. (This portion of the Scheduling Order applies to timing only. It does not eliminate the necessity for filing an appropriate motion or otherwise complying with Fed.R.Civ.P., Rule 15).

B. Discovery Cut-off.

The discovery cutoff for serving written discovery, and for depositions of fact witnesses, shall be August 15, 2008. The discovery cutoff for depositions of expert witnesses, if any, shall be September 15, 2008.

C. Dispositive Motion Deadline.

The deadline for dispositive motions shall be September 15, 2008.

D. Expert Witness Disclosure.

1. **Plaintiffs' Anticipated Fields of Expert Testimony.** At this time, Plaintiffs anticipate calling an expert witness with respect to ERISA Section 404(a)(1) duties in support of their claims that Plan fiduciaries and administrators breached their statutory and Plan duties.

2. **Defendants' Anticipated Fields of Expert Testimony.** Defendants anticipate that the sole expert testimony they might require would relate to class certification issues and/or the propriety of the relief sought by Plaintiffs.

3. **Limitations on Proposed Use or Number of Expert Witnesses.** The Parties agree that each party shall be limited to no more than two (2) expert witnesses.

4. **Designation and Providing Expert Reports.** The Parties shall designate all initial experts and provide opposing counsel with all information specified in Fed.R.Civ.P. 26(a)(2) for such experts on or before July 15, 2008.

5. **Designation and Providing Expert Rebuttal Reports.** The Parties shall designate all rebuttal experts and provide opposing counsel with all information

specified in Fed.R.Civ.P. 26(a)(2) for such rebuttal experts on or before 30 days after any initial expert reports are provided.

6. Notwithstanding the provisions of Fed. R. Civ. 26(a)(2)(B), no exception to the requirements of the rule will be allowed by stipulation of the Parties unless the stipulation is approved by the Court.

E. Deposition Schedule:

The Parties anticipate they will schedule depositions as follows:

1. Plaintiffs' Conducted Depositions.

Name of Deponent:	Date of Deposition:	Time of Deposition:	Expected Length of Deposition:
Erik Ammidown	July _, 2008	9:30 a.m.	1 full day
Felicity O'Herron	July __, 2008	9:30 a.m.	1 full day
Theresa Taylor	July __, 2008	9:30 a.m.	1 full day
Judy Osse	July __, 2008	9:30 a.m.	1 full day
Rule 30(b)(6) of Defendant Plan Denver, CO	_____day	9:30 a.m.	1 full day
Rule 30(b)(6) of Prudential Denver, CO	_____day	9:30 a.m.	1/2 day
Rule 30(b)(6) of Defendant Qwest Denver, CO	_____day	9:30 a.m.	1 full day

2. Defendants' Conducted Depositions.

Name of Deponent:	Date of Deposition:	Time of Deposition:	Expected Length of Deposition:
Edward Kerber Denver, CO	July __, 2008	9:30 a.m.	1/2 day
Nelson Phelps Denver, CO	July __, 2008	9:30 a.m.	1/2 day
Joanne West Denver, CO	July __, 2008	9:30 a.m.	1/2 day
Nancy Meister Denver, CO	July __, 2008	9:30 a.m.	1/2 day
Thomas Ingemman, Jr. Denver, CO	July __, 2008	9:30 a.m.	1/2 day
Martha Lensink Denver, CO	July __, 2008	9:30 a.m.	1/2 day
Samuel Strizich Denver, CO	July __, 2008	9:30 a.m.	1/2 day

F. **Interrogatory Schedule.** The first set of interrogatories shall be served within 30 days after the Scheduling Conference.

G. **Schedule for Request for Production of Documents.** The first document requests shall be served within 30 days after the Scheduling Conference.

H. **Discovery Limitations.**

Parties shall be limited to 40 interrogatories per side.

1. ~~Since this is a proposed class action, Plaintiffs propose each side be allowed two sets of interrogatories (limited to 25 separate interrogatories, each set). Defendants propose each side be limited to the presumptive number under the federal rules (*i.e.* a total of 25 separate interrogatories served upon the opposing party).~~

2. There are no proposals to deviate from the presumptive number of depositions contained in the federal rules (*i.e.*, no more than 10 depositions taken by either side), including experts.

3. The Parties agree that each side shall be limited to two sets of requests for production of documents (limited to 25 separate requests, each set) and two sets of requests for admissions.

4. **Other Planning or Discovery Orders:**

a. The Parties agree that Defendants' documents selected by Plaintiffs will be delivered to Anaconda Printing, Denver, CO for photocopying at Plaintiffs' expense.

b. The Parties agree that, in addition to a court reporter, any depositions permitted by the Court may be recorded by the use of audio and video cassettes upon proper notice under the Federal Rules of Civil Procedure. The original of any audio/videotapes of any deposition will be promptly provided to the other Party, upon written request or request stated on the record during deposition, for copying.

9. **SETTLEMENT.**

The Parties certify that, as required by Fed.R.Civ.P., Rule 26(f), they have discussed the possibilities for a prompt settlement or resolution of the case by alternate dispute resolution. The Parties believe that settlement is unlikely before the Court rules on Plaintiffs' pending motion for a summary judgment and Qwest's forthcoming motion to dismiss.

10. OTHER SCHEDULING ISSUES.

A. Disagreements on Discovery or Scheduling Issues. Counsel, after a good-faith effort, have been unable to reach an agreement on what to propose to the Court regarding four scheduling/discovery issues: (1) the deadline for Qwest's response to Plaintiffs' Second Amended Complaint; (2) the deadline for Qwest's response to Plaintiffs Amended Motion for Summary Judgment; (3) the deadline for Qwest's response to Plaintiffs' Second Amended Motion for Class Certification; and (4) the number of interrogatories each side should be allowed.

1. Deadline for Qwest's Response to Plaintiffs' Second Amended Complaint May 16, 2008

Plaintiffs' Position. Plaintiffs propose that Qwest's response to the Second Amended Complaint which was delivered to defense counsel on March 31, 2008 and deemed filed as of April 3, 2008 shall be due **May 16, 2008**, a good six weeks after service. Unlike Defendants' contention a reading of the Second Amended Complaint proves the issues are directed at voiding two purported Plan amendments which were directed at Eligible Retiree's benefits. It is unfair and prejudicial for Plaintiffs to be required to serve written discovery on the same date that Defendants propose to respond to the Second Amended Complaint. Defendants' response deadline date should be earlier than May 29, the proposed date for serving initial written discovery requests.

Qwest's Position. Qwest proposes that its response to the Second Amended Complaint shall be due May 29, 2008. In support of this proposal, Qwest states that although plaintiffs' original and first amended complaints asserted only three claims for

relief, plaintiffs' 38 page Second Amended Complaint asserts eight mostly-new claims covering very diverse matters (*see* Section 3 above). Those claims, which seek to bind not only Qwest but 48,000 retirees, would undo every Plan amendment over the past decade and render Qwest impotent to amend the Plan in the future. Qwest requires the time set forth above to prepare a motion to dismiss many of those claims.

2. Deadline for Qwest's Response to Amended Motion for Summary Judgment. July 15, 2008

Plaintiffs' Position. Plaintiffs propose that Qwest's response to Plaintiffs' Amended Motion for Summary Judgment filed on April 1, 2008 be due on or before **May 30, 2008**. That's a full two months! Just like the previous motion to dismiss filed by Defendants, this motion for summary judgment filed by Plaintiffs concerns straightforward legal issues, not requiring a review of extensive evidence, and not requiring contentious discovery proceedings. The key Plan documents are already in the Court's record. Judge Walker Miller stated emphatically during the "Status Hearing" on March 20, 2008 that he wanted to avoid having to relearn the issues in this case every 3 or 4 months.

The pivotal issues now teed up for Judge Miller's decision pick up exactly where he left off in his February 27, 2008 Amended Order. In that phase of this case, Plaintiffs contended there were *two* restraints on the right of Qwest to make Plan changes, to-wit: 1) the "Minimum Benefit Rules" providing that Qwest shall not reduce coverage below stated levels; and 2) the "Prior Loss Proviso" which prohibits a plan amendment made retroactive to affect beneficiaries of persons who died before the plan amendment was adopted. But,

Judge Miller ruled the Prior Loss Proviso is the only restraint on the right of Qwest to make Plan changes pursuant to the 'reservation of rights' provision.

Plaintiffs' motion for summary judgment proves unequivocally that the Prior Loss Proviso was violated. The Qwest Plan Design Committee members executed and adopted a Plan amendment on December 13, 2006. Yet, in violation of the Prior Loss Proviso, they made that Plan amendment apply retroactively to January 1, 2006 so as to short change beneficiaries of hundreds of deceased Plan participants. There is no need for any testimony or discovery of Plaintiffs to discern whether or not they relied upon or knew that the Prior Loss Proviso was being violated. Judge Miller will rule the Prior Loss Proviso controls as a matter of law, regardless of any reliance or knowledge on the part of Plan beneficiaries.

Knowing that Judge Miller's inevitable partial summary judgment ruling in favor of Plaintiffs will have a decisive domino affect on the remainder of this case, Qwest simply wants to prolong the matter. This is not your ordinary commercial or securities litigation to which Qwest is accustomed to prolonging the proceedings. It is not in the interests of very **elderly** beneficiaries deprived of the balance of their rightful life insurance payments to have this case unnecessarily drawn out for the convenience of Qwest's litigation schedule. Two months is plenty of time for Defendants' team of attorneys to respond to a most succinct dispositive motion that will be decided as a matter of law. Therefore, Defendants should respond by May 30, 2008.

Qwest's Position. Qwest proposes that its response to Plaintiffs' Amended Motion for Summary Judgment, as well as Qwest's own cross-motions for

summary judgment, be filed on or before September 15, 2008. In support of this proposal, Qwest states that: (1) no discovery has yet occurred in this case due to the Court's stay of discovery pending resolution of Qwest's prior motion to dismiss (*see* Doc. No. 40); and (2) Qwest requires, and is entitled to obtain, discovery relevant to plaintiffs' summary judgment motion before responding to that motion. As noted above, even assuming *arguendo* that the Plan lacked an adequate amendment procedure as alleged in plaintiffs' First Claim, that alleged deficiency would render the Plan Amendment ineffective only if, *inter alia*, plaintiffs can show detrimental reliance on the inadequate amendment procedure. *See, e.g., Loskill,* 289 F.3d at 738-739 & n. 5 (reversing district court's summary judgment ruling that plan amendment was invalid, remanding for factual findings on the issues of bad faith, active concealment and detrimental reliance, and stating that courts typically will not invalidate plan amendments for technical deficiencies "absent a showing of bad faith or active concealment on the part of the sponsor or detrimental reliance on the part of the beneficiaries").

Moreover, plaintiffs presently seek summary judgment on their Fifth Claim but not their Sixth Claim, even though those claims are closely related. Plaintiffs' Fifth Claim alleges that Qwest improperly applied one Amendment retroactively for post-1990 occupational retirees, while the Sixth Claim alleges that Qwest improperly applied a subsequent Amendment retroactively for all other retirees. Upon completion of discovery, Qwest plans not only to file a response to plaintiffs' motion for summary judgment based on, *inter alia*, information obtained in discovery, but also to file cross-motions for summary

judgment on both the Fifth and Sixth Claims. Plaintiffs will undoubtedly respond to Qwest's motion seeking summary judgment on plaintiffs' Sixth Claim by filing a cross motion seeking summary judgment on that claim. Qwest would then file a response to that motion, and plaintiffs would file a reply brief. The Court would thus be burdened by a series of motions, cross-motions, cross-cross motions, and supporting and opposing briefs all addressing the same fundamental issue: whether Qwest improperly applied Plan Amendments before their actual adoption date. To avoid this morass of motions and briefs, Qwest believes the Court should require plaintiffs to file, after completion of any necessary discovery, a single motion seeking summary judgment on both their Fifth and Sixth Claims.

Finally, there is no urgency in briefing Plaintiffs' Amended Motion for Summary Judgment, because the Court cannot decide that motion until it decides Plaintiffs' Second Amended Motion for Class Certification. *See Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) ("courts generally do not grant summary judgment on the merits of a class action until the class has been properly certified and notified' in order "to prevent 'one-way intervention'—that is, the intervention of a plaintiff in a class action after an adjudication favoring the class had taken place"); *Adair v. Johnston*, 221 F.R.D. 573, 576-77 (M.D. Ala. 2004) ("courts should address motions for class certification before ruling on dispositive motions," in part because "if a defendant wins on the liability issue before a class is certified, it is denied the binding effect of that ruling on the other potential class members; while if it loses on the liability issue, that holding will be binding on a class whose size is not yet known").

For all these reasons, Qwest proposes that its response to plaintiffs' Amended Motion for Summary Judgment be due approximately five months from now, *i.e.*, on September 15, 2008.

3. **Deadline for Qwest's Response to Plaintiffs' Second Amended Motion for Class Certification** June 30, 2008

Plaintiffs' Position: Plaintiffs propose that Qwest's response to Plaintiffs' Second Amended Motion for Class Certification filed on April 1, 2008 should be due **May 30, 2008**. That is two months since the filing and service of the motion and supporting brief. Since 'Eligible Retirees' is defined by the Governing PLAN Document executed in June 1998, the class is easily and objectively determinable. The case concerns claims to be determined as a matter of law, with no jury, to nullify two purported plan amendments that were directed at Eligible Retirees. The claims are straightforward, namely that the purported plan amendments are either void in total or at least void in so far as there were applied retroactively. There is no need for convoluted discovery to prove there is a class of 48,000 persons. Qwest can respond and make the needless argument about doing discovery. But, as the pending motion makes clear, there are no individualized issues that predominate in this case. During the March 20, 2008 "Status Hearing," Defendants insisted the class issues soon be addressed by the Court. Now, before the Magistrate Judge, they argue to the contrary. They can't have it both ways. Defendants have known for over a full year that Plaintiffs were seeking class certification for the Eligible Retirees. Defendants should be required to respond by May 30, 2008.

Qwest's Position. Qwest proposes that its response to Plaintiffs' Second Amended Motion for Class Certification be due on or before September 15, 2008, *i.e.*, after (1) Qwest has had an opportunity to depose the putative class representatives and to conduct other discovery bearing on the propriety of certifying the four classes/subclasses that plaintiffs seek to certify; and (2) the Court has had an opportunity to decide Qwest's forthcoming motion to dismiss.

As the Federal Judicial Center's *Manual for Complex Litigation* (4th ed. 2004) ("*Manual*") states, "[p]arties need sufficient time to develop an adequate record" regarding class certification. *Manual* § 21.133 at 254. Time is needed here in part because discovery may be needed to aid the Court in its certification decision. *See id.* § 21.142 at 262 ("Precertification discovery may be needed to assist the judge in distinguishing the individual from the common elements of the claims, issues, and defenses, and in deciding the extent to which the need for individual proof outweighs the economy of receiving common proof.") There certainly is reason to question the propriety of class certification here, given the important role that putative class members' detrimental reliance plays in plaintiffs' First, Second, Third, Fourth, Fifth, and Sixth Claims.

Moreover, as the parties previously acknowledged, it makes no sense for the parties to brief, or for the Court to decide, a motion seeking class certification while a motion is pending to dismiss many of the claims as to which certification is sought. *See* Doc. No. 27 ¶ 5 (stating that "[b]ecause any class to be certified in this case depends heavily on whether the Court grants Qwest's Motion To Dismiss, the Moving Parties agree that further briefing

on Plaintiffs' Amended Motion will be premature until that Motion To Dismiss is decided"). Here as before, Qwest should not be forced to brief plaintiffs' class certification motion at this time, and then submit an updated brief reflecting the impact of the Court's ruling on Qwest's motion to dismiss on class certification issues. Still less should the Court be forced to read serial revised briefs regarding class certification issues.

4. **Number of Interrogatories**

Plaintiffs' Position. Plaintiffs propose that because this is a proposed class action, each side be allowed two sets of interrogatories (limited to 25 separate interrogatories, each set).

Qwest's Position. Qwest proposes that each side be limited to the presumptive number of interrogatories under the federal rules (*i.e.* a total of 25 separate interrogatories served upon the opposing party).

B. **Anticipated Length of Trial.** Plaintiffs anticipate that this matter can be tried to the Court in two full days or less. Qwest believes the length of trial will depend upon the Court's rulings on the parties' dispositive motions, but that absent a narrowing of the case through such rulings the matter can be tried to the Court in three days. All of the named plaintiffs' claims and Qwest's affirmative defenses will be tried to the Court.

11. DATES FOR FURTHER CONFERENCES.

[The magistrate judge will complete this section at the scheduling conference if he or she has not already set deadlines by an order filed before the conference.]

A. A settlement conference will be held on August 11, 2008 at 9:00 o'clock a .m.

It is hereby ordered that all settlement conferences that take place before the magistrate judge shall be confidential.

( ) *Pro se* parties and attorneys only need be present.

(✓) *Pro se* parties, attorneys, and client representatives with authority to settle must be present. (NOTE: This requirement is not fulfilled by the presence of counsel. If an insurance company is involved, an adjustor authorized to enter into settlement must also be present.)

(✓) Each party shall submit a Confidential Settlement to the magistrate judge on or before July 28, 2008 outlining the facts and issues in the case and the party's settlement position.

B. Status conferences will be held in this case at the following dates and times.

As needed.

C. A final pretrial conference will be held in this case on January 20, 2009 at 1:30 o'clock p.m. A Final Pretrial Order shall be prepared by the parties and submitted to the court no later than five days before the final pretrial conference.

12. OTHER MATTERS

In addition to filing an appropriate notice with the clerk's office, counsel must file a copy of any notice of withdrawal, notice of substitution of counsel, or notice of change of counsel's address or telephone number with the clerk of the magistrate judge assigned to this case.

In addition to filing an appropriate notice with the clerk's office, a *pro se* party must file a copy of a notice of change of his or her address or telephone number with the clerk of the magistrate judge assigned to this case.

With respect to discovery disputes, parties must comply with D.C.COLO.LCivR. 7.1A.

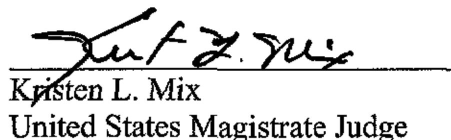
The Parties filing motions for extension of time or continuances must comply with D.C.COLO.LCivR 6.1D by submitting proof that a copy of the motion has been served upon the moving attorney's client, all attorneys of record, and all *pro se* parties.

13. AMENDMENTS TO SCHEDULING ORDER

This Scheduling and Discovery Order may be altered or amended only upon a showing of good cause.

DATED this ~~29th~~ 30th day of April, 2008.

BY THE COURT:



Kristen L. Mix
United States Magistrate Judge

APPROVED:

s/Curtis L. Kennedy Curtis L. Kennedy, Esq. 8405 E. Princeton Avenue Denver, Colorado 80237-1741 Telephone: (303) 770-0440 Fax: (303) 843-0360 CurtisLKennedy@aol.com *Attorney for Plaintiffs*	s/Christopher J. Koenigs Christopher J. Koenigs, Esq. Michael B. Carroll, Esq. SHERMAN & HOWARD, L.L.C. 633 17th Street, Suite 3000 Denver, CO 80202 Tele: 303-299-8458 Fax: 303-298-0940 ckoenigs@sah.com mcarroll@sah.com *Attorneys for Defendants*