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'S MOTION TO DISMISS THE FIRST, SECOND AND SEVENTH CLAIMS FOR RELIEF IN PLAINTIFFS' SECOND AMENDED COMPLAINT

May 16, 2008

Christopher J. Koenigs
Michael B. Carroll
SHERMAN & HOWARD L.L.C.
633 Seventeenth Street, Suite 3000
Denver, CO 80202
Telephone: 303-297-2900
Facsimile: 303-298-0940
Email: ckoenigs@sah.com
mcarroll@sah.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Defendants Qwest Group Life Insurance Plan (the "Plan"), Qwest Employees Benefit Committee ("EBC"), Qwest Plan Design Committee, and Qwest Communications International Inc. ("QCII") (collectively, "Qwest") hereby move under Fed. R. Civ. P. 12(b)(6) for dismissal of the First, Second, and Seventh Claims for Relief in Plaintiffs' Second Amended Complaint (Doc. No. 62-2), on the ground that such claims fail to state a claim upon which relief can be granted.

I. SUMMARY

Plaintiffs' First, Second, and Seventh Claims all concern: (1) the Amended and Restated Group Life Insurance Plan dated June 12, 1998 (the "1998 Plan Document"); and (2) what Qwest contends are two Plan amendments reducing life insurance benefits to $10,000 for two different groups of retirees effective January 1, 2006 and January 1, 2007 (the "Disputed Amendments").

Plaintiffs' First Claim—which plaintiffs never asserted in their two prior complaints in this case—alleges that the Disputed 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), 29 U.S.C. § 1102(b)(3). But the U.S. Supreme Court expressly held in *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 75 (1995), 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). 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 ("Comp.") ¶ 87. This claim is simply a repackaging of the estoppel claim alleged in plaintiffs' First Amended Complaint, and is based on no facts beyond those alleged in support of that claim. But this Court *dismissed* plaintiffs' estoppel claim on the ground, *inter alia*, that plaintiffs had "not identified any 'lies, fraud, or an intent to deceive.'" *See* Doc. No. 47 ("Dismissal Order") at 14. Plaintiffs' Second Claim should be dismissed for the same reason that plaintiffs' estoppel claim was dismissed—because plaintiffs have not identified any actionable misrepresentations. Plaintiffs' Second Claim should also be dismissed because it includes no adequate allegations either that any misrepresentations were material or that plaintiffs detrimentally relied on any misrepresentations.

Plaintiffs' Seventh Claim accurately alleges that the Disputed Amendments 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. Supreme Court precedent bars plaintiffs from contending that Qwest breached its fiduciary duties under ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1), by adopting Plan amendments that omitted these provisions. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 442-445 (1999). Undaunted, plaintiffs allege in their Seventh Claim that the EBC breached its Section 404(a)(1) fiduciary duties by failing to "advocate" for the inclusion of these provisions in the Disputed Amendments. Plaintiffs thus claim that the EBC breached its fiduciary duties by failing to seek the inclusion of language in Plan amendments

that Qwest indisputably had no duty to include. But because there was no fiduciary duty to *include* such language in the Disputed Amendments, there could not possibly be a fiduciary duty to *advocate* for its inclusion. Plaintiffs' Seventh Claim therefore fails to state a claim upon which relief can be granted.

II. FACTUAL BACKGROUND

Although no documents are attached to or incorporated by reference in Plaintiffs' Second Amended Complaint, that complaint quotes at length from a number of documents that are central to plaintiffs' First, Second and Seventh Claims, including documents pertinent to this motion. (*See* Comp. ¶¶ 30-32, 34-35, 37, 46, 59-66, 83 & 85.) Under these circumstances, Qwest can, and does, submit herewith indisputably authentic copies of these documents. *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384-85 (10th Cir. 1997); Dismissal Order at 2 n. 2. Most of the facts set forth below are based on these documents. *See* Attachment A, Exs. 1-9 (referred to herein as "Ex.").[1] The remaining alleged facts set forth below are based on allegations in plaintiffs' Second Amended Complaint, and are assumed to be true solely for purposes of this motion.

The Plan is an ERISA welfare benefit plan, the EBC is a "fiduciary" and "administrator" of the Plan, and QCII is an "employer" and a "fiduciary," "administrator" and "sponsor" of the Plan within the meaning of ERISA. (Comp. ¶¶ 13, 15 & 17.) The 1998 Plan Document contained a Benefit Formula stating that when an eligible retiree reached age 70, the retiree's basic life insurance coverage would equal 50 percent of the coverage in

[1] Plaintiffs previously filed with the Court a Stipulation that the documents identified as Exhibits 1-8 hereto are authentic under Federal Rule of Evidence ("FRE") 901 and are non-hearsay under FRE 801 to 805. *See* Doc. No. 17-2 ¶¶ 13, 19 & 21-26. By submitting the documents attached to this motion, Qwest does not, nor does it intend to, convert this motion to dismiss into a motion for summary judgment.

effect before his 66th birthday, but would not be reduced below $20,000 for pre-1997 retirees or $30,000 for post-1996 retirees. (Ex. 1 p. QL00014-15 & QL00037.) It also contained a provision stating that Qwest "reserves the right, in its sole discretion, to amend the Plan at any time, in any manner, including, without limitation, the right to amend the Plan to reduce, change, eliminate, or modify the type or amount of Benefits provided to any class of Participants" (the "Amendment Provision"). (*Id.* p. QL00028.)

In October 2005, Defendant Qwest Plan Design Committee adopted Minutes and Resolutions stating that the Plan "be and hereby is amended and restated" to incorporate a reduction of Plan benefits to $10,000 for post-1990 occupational retirees effective January 1, 2006. (Comp. ¶ 46.) One year later, in October 2006, Qwest announced that it was amending the Plan to reduce the amount of life insurance coverage for all other relevant retirees to $10,000 effective January 1, 2007. (First Amended Complaint (Doc. No. 10) ¶¶ 3 & 96.)[2]

Plaintiffs' original and first amended complaints, filed in March 2007 and May 2007 respectively, sought to undo the two Disputed Amendments on the ground that the 1998 Plan Document's Benefit Formula effectively nullified that document's Amendment Provision. (Doc. Nos. 1 & 10.) In June 2007, Qwest filed a motion seeking dismissal of all of plaintiffs' claims asserting that Qwest was contractually barred or equitably estopped by virtue of the Plan's Benefit Formula from reducing the life insurance benefit to $10,000.

---

[2] This Court may take judicial notice of court filings and other public records, including papers previously filed with the Court by plaintiffs, in deciding this motion to dismiss without converting the motion into a motion for summary judgment. *See, e.g., Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n. 1 (10th Cir. 2004); *City of Philadelphia v. Fleming Companies., Inc.*, 264 F.3d 1245, 1251 n. 4 (10th Cir. 2001).

(Doc. No. 16.) In February 2008, the Court entered an order granting Qwest's motion to dismiss in its entirety. (Doc. No. 47.)

Before the Court granted Qwest's motion, plaintiffs stated that Qwest's motion addressed the "overarching legal issue" in this case, and that the claims of nearly all of the 48,000 Qwest retirees who were putative class members would be eliminated if Qwest's motion were granted. *See* Doc. No. 27 ¶ 3. But after the Court granted Qwest's motion, plaintiffs reversed their position: They filed, on behalf of the same putative class of 48,000 Qwest retirees, a Second Amended Complaint that tries to resurrect the issue addressed in the Court's Dismissal Order, *i.e.*, whether Qwest is barred by virtue of the Plan's language from reducing the life insurance benefit to $10,000. Specifically, plaintiffs allege in their First Claim that Qwest is barred by virtue of alleged deficiencies in the Plan's Amendment Provision from reducing the life insurance benefit to $10,000. Two other claims are also addressed in this motion—one alleging that Qwest breached its fiduciary duties by giving pre-1991 retirees non-plan documents that allegedly contained misrepresentations (Second Claim), and one alleging that the EBC breach its fiduciary duty of loyalty by failing to "advocate" for the inclusion of provisions in the Disputed Amendments even though Qwest indisputably had no duty to include those provisions in the Disputed Amendments (Seventh Claim).

III. ARGUMENT

A claim is subject to dismissal for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) if it does not contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955, 1969, 1974 (2007). "Thus, the mere metaphysical possibility that *some* plaintiff

could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims." *The Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original).

For purposes of a Rule 12(b)(6) motion, all well-pleaded factual allegations in the complaint are accepted as true, but the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Instead, the court must accept as true only "well-pled"—"that is, plausible, non-conclusory, and non-speculative"—allegations. *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1070 (10th Cir. 2008). And "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." *Twombly*, 127 S. Ct. at 1966 (quotation marks, citation and ellipsis omitted). Under these standards, plaintiffs' First, Second and Seventh Claims all fail to state a claim upon which relief can be granted.

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

Plaintiffs' First Claim alleges that the Plan violates the requirement, set forth in ERISA Section 402(b)(3), that every employee benefit plan "provide a procedure for amending such plan." *See* Comp. ¶ 79. Plaintiffs allege that the 1998 Plan Document lacks such a procedure, and accordingly ask this Court to declare that the Disputed Amendments, and all other amendments post-dating the 1998 Plan Document, are null and void. *Id.*

As noted above, the Amendment Provision states that "the Company reserves the right, in its sole discretion, to amend the Plan at any time, in any manner, . . . to reduce,

change, eliminate, or modify the type or amount of Benefits provided to any class of Participants." (Comp. ¶ 35.) Although plaintiffs allege that this language fails to provide the "procedure" for amendment required by Section 402(b)(3), the U.S. Supreme Court held precisely to the contrary in *Curtiss-Wright*. Like the Amendment Provision in this case, the amendment provision in *Curtiss-Wright* stated that "[t]he Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan." 514 U.S. at 76. The Supreme Court held that this provision set forth an amendment procedure that satisfies Section 402(b)(3):

> [T]he reservation clause says in effect that the plan may be amended "by the Company." Curtiss-Wright is correct, we think, that this states an amendment procedure . . . . It says the plan may be amended by a unilateral company decision to amend, and only by such a decision—and not, for example, by the unilateral decision of a third-party trustee or upon the approval of the union.
>
> * * *
>
> In any event, the literal terms of § 402(b)(3) are ultimately indifferent to the level of detail in an amendment procedure . . . . The provision requires only that there *be* an amendment procedure, which here there is.

Id. at 79-80 (emphasis in original).

Here as in *Curtiss-Wright*, the Amendment Provision states that "the Company reserves the right . . . to amend the Plan at any time." And here as in *Curtiss-Wright*, such language complies with Section 402(b)(3). *See also Halliburton Co. Benefits Committee v. Graves*, 463 F.3d 360, 372-73 (5th Cir. 2006) (amendment provision stating that "the Company may amend, modify, change, revise, discontinue or terminate the Plan or any Benefit Agreement at any time by written instrument signed by the Vice President, Human

Resources" set forth a valid amendment procedure under Section 402(b)(3) as interpreted in *Curtiss-Wright*).

The Supreme Court's rejection in *Curtiss-Wright* of the exact argument plaintiffs make to support their First Claim is obviously fatal to that claim. But other facts confirm just how frivolous plaintiffs' First Claim is.

- Plaintiffs cannot contend that they were ignorant of *Curtiss-Wright* before they filed their Second Amended Complaint, because they cited *Curtiss-Wright* in support of a summary judgment motion they filed just one month before filing the Second Amended Complaint. (*See* Doc. No. 50 at 6-7.)

- The assertion on which plaintiffs' First Claim is premised—that the Plan *cannot be amended* because it fails to comply with Section 402(b)(3)—is contrary to plaintiffs' own repeated assertions earlier in this lawsuit that the Plan *has been amended*. *See, e.g.,* Plaintiffs' Response in Opposition to Qwest Defendants' June 20, 2007 Motion To Dismiss (Doc. No. 17) at 8 ("it was illegal for Qwest to . . . implement Plan Amendment 2006-1 which was adopted on December 13, 2006"); First Amended Complaint (Doc. No. 10) ¶ 83 ("Amendment 2006-1 was adopted on December 13, 2006."); *id.* ¶ 79 ("The governing PLAN document contemplates an adoption process of any written amendment.").

- Qwest's first Motion To Dismiss sought "dismissal of all claims in Plaintiffs' Amended Complaint . . . asserting that the Plan's language bars Defendants from reducing Plaintiffs' life insurance benefits to $10,000." (Doc. No. 16 at 1.) This Court *granted* that motion, holding that "the 1998 Plan Document's Reservation of Rights Clause *is unambiguous in reserving Qwest's authority to alter or amend Plan benefits at any time for*

all Plan participants." Dismissal Order at 15 (emphasis added); *see also id.* at 6 & 12 (same). Plaintiffs nevertheless again allege in their First Claim that Qwest does not have the authority to alter or amend Plan benefits at any time for any Plan participants (because the Plan allegedly lacks procedures sufficient to authorize such amendments).

- To illustrate the absurdity of plaintiffs' (rejected) interpretation of the Plan, this Court noted in its Dismissal Order that "under Plaintiffs' reading of the Plan, Qwest may not reduce life insurance benefits under any circumstances." (*Id.* at 10.) Yet this is *precisely* the reading of the Plan espoused in plaintiffs' First Claim—that Qwest may not reduce life insurance benefits under any circumstances due to the Plan's allegedly defective Amendment Provision. A further illustration of the absurdity of plaintiffs' interpretation of the Plan is this: Under that interpretation, the Plan could not be amended *even to add what plaintiffs allege would be a proper amendment procedure*.

Where, as here, plaintiffs' First Claim is based on (1) an argument that the Supreme Court has expressly rejected, (2) factual assertions that are contradicted by plaintiffs' own prior factual assertions, and (3) a Plan interpretation that this Court has already rejected, plaintiffs' First Claim does not merely fail to state a claim upon which relief can be granted; it is frivolous. Plaintiffs' First Claim should therefore be dismissed.

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

Plaintiffs' Second Claim, asserted solely by pre-1991 retirees Edward Kerber and Nelson Phelps, is labeled "Breach of Fiduciary Duty—Material Misrepresentation." (*See* Comp. p. 22 & ¶ 88.) "To allege and prove a breach of fiduciary duty for misrepresentations, a plaintiff must establish each of the following elements: (1) the defendant's status as an

ERISA fiduciary acting as a fiduciary; (2) a misrepresentation on the part of the defendant; (3) the materiality of that misrepresentation; and (4) detrimental reliance by the plaintiff on the misrepresentation." *Burstein v. Retirement Acct. Plan.*, 334 F.3d 365, 387 (3rd Cir. 2003) (citation omitted); *accord Owen v. Regence BlueCross BlueShield of Utah*, 388 F. Supp. 2d 1335, 1338 (D. Utah 2005).

The elements of plaintiffs' breach of fiduciary duty claim closely resemble the elements of an ERISA equitable estoppel claim in those circuits that have recognized such a claim. *See, e.g., Burstein*, 334 F.3d at 383 ("to state a cause of action for equitable estoppel under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), an ERISA plaintiff must establish (1) a material representation, (2) reasonable and detrimental reliance upon the representation, and (3) extraordinary circumstances"). This is significant because, as discussed below, this Court previously dismissed the equitable estoppel claim in plaintiffs' First Amended Complaint, which was based on the same factual allegations as plaintiffs' current claim for breach of fiduciary duty.

1. Plaintiffs Have Failed To Allege Actionable Misrepresentations.

The gravamen of plaintiffs' Second Claim, for breach of fiduciary duty, is that Qwest sent Confirmation Notices, Summary Plan Descriptions ("SPDs"), and other documents to certain Plan participants who retired before 1991 ("Pre-1991 Retirees") that allegedly contained "material misrepresentations that the formula for their promised life insurance coverage was not subject to amendment, suspension or discontinuance at any time." (Comp. ¶ 86; *see* Exs. 2-7.) In a variant of this allegation, plaintiffs assert 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 'reservation of rights' clause." (Comp. ¶

87.) Plaintiffs bring this claim on behalf of a putative class consisting of "Eligible Retirees to whom Qwest sent the Confirmation Notices concerning the rights of Pre-1991 Retirees." (*Id.* ¶ 88; *see also* Doc. No. 63 p. 2.)

Plaintiffs' Second Claim is simply a repackaging of the estoppel claim in their First Amended Complaint, and is based on no facts beyond those alleged in support of that prior claim. For example, plaintiffs based both their First Amended Complaint's estoppel claim and their Second Amended Complaint's breach of fiduciary duty claim on Qwest's statements in: (1) a March 26, 1990 letter that "[y]ou are entitled to the benefits paid under the Group Life Insurance Program," and (2) Confirmation 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*." (*Cf.* First Amended Complaint ¶¶ 69 & 76 *with* Second Amended Complaint ¶¶ 32 & 34.) Further, the First Amended Complaint's estoppel claim was based on allegations that: (1) Qwest sent out "SPDs" and "'Confirmation Statements' telling all Pre-1991 Retirees that the company did *not* reserve the right to make changes to their expected life insurance benefits;" and (2) those notices represented that Qwest did not have "the right to make reductions in coverage below the stated minimums." (Doc. No. 17 at 17 & 19-21 (emphasis added).) These are precisely the facts on which plaintiffs now base their breach of fiduciary duty claim. (*See* Comp. ¶¶ 84-86.)

Because plaintiffs' estoppel and breach of fiduciary duty claims are based on the same facts, the arguments Qwest made in support of its first Motion To Dismiss apply equally here. Qwest must therefore burden this Court with the following argument it made in

support of its motion to dismiss plaintiffs' estoppel claim (the words "equitable estoppel" have been replaced with the bracketed words "breach of fiduciary duty"):

> To buttress their [breach of fiduciary duty] 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' [breach of fiduciary duty] claim. * * * [A]lthough 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," 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 [breached its fiduciary duties with respect] to *pre-1991* retirees by virtue of language in the Confirmation Statement must fail.

(Doc. No. 24 at 11-12.)

Far more important than Qwest's argument regarding plaintiffs' estoppel claim is this Court's ruling with respect to that claim: It *dismissed* the claim on the ground, *inter alia*, that plaintiffs' First Amended Complaint had "not identified any 'lies, fraud, or an intent to deceive.'" (Dismissal Order at 14.) The Court stated:

> The confirmation statements sent out to pre-1991 retirees contained the following language: "The Company intends to continue these Plans indefinitely; however, it reserves the right

> to amend, suspend, or discontinue them at any time, except for those who retired before 1991 and where prohibited by collective bargaining agreements."
>
> * * *
>
> I have already held that the 1998 Plan Documents' Reservation of Rights Clause is unambiguous in reserving Qwest's authority to alter or amend Plan benefits at any time for all Plan participants. * * * [T]he inclusion of an express statement that the Plan documents control over the confirmation statement, appearing directly above the pre-1991 retiree limitation negates any claim of Qwest's intent to deceive. Therefore, I conclude that Plaintiffs have failed to state a claim upon which relief may be granted.

Id. at 15-16.

As noted above, plaintiffs must allege an actionable misrepresentation to state a claim for either estoppel or breach of fiduciary duty. Plaintiffs failed to allege a misrepresentation adequate to support their estoppel claim, and have likewise failed to allege a misrepresentation sufficient to support their breach of fiduciary duty claim. That claim should therefore be dismissed.

2. <u>Plaintiffs Have Failed To Allege that Any Actionable Misrepresentations Were Material.</u>

To state a claim for breach of fiduciary duty based on misrepresentations, plaintiffs' complaint must include "well pled" allegations—*i.e.*, allegations that are "plausible, non-conclusory, and non-speculative" (*Dudnikov*, 514 F.3d at 1070)—that any actionable misrepresentations by Qwest were "material." Plaintiffs here allege that certain documents (*e.g.*, the Confirmation Statements and SPDs referred to above) failed to specify that Qwest "reserved the right to reduce coverage below the promised minimum levels" in language "easily understood by a reasonable person." (Comp. ¶ 83.) But this Court has

already found that these documents state that plaintiffs' rights under the Plan are controlled by the 1998 Plan Documents, which are "unambiguous in reserving Qwest's authority to alter or amend Plan benefits at any time for all Plan participants." (Dismissal Order at 15.) Under these circumstances, plaintiffs have not, and cannot, allege that any alleged misrepresentations are material. *See, e.g., Robinson v. Sheet Metal Workers' Nat. Pension Fund, Plan A*, 441 F. Supp. 2d 405, 433-434 (D. Conn. 2006).

3. Plaintiffs Have Failed To Allege Detrimental Reliance by Plaintiffs on Any Material Misrepresentations.

"Detrimental reliance on a material misrepresentation made by the defendant is a necessary element of an ERISA breach of fiduciary duty claim." *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 578 (3rd Cir. 2006). Plaintiffs' Second Amended Complaint does not allege even in general terms that plaintiffs detrimentally relied on Qwest's alleged misrepresentations, much less set forth "plausible, non-conclusory, and non-speculative" allegations that they so relied. (*See* Comp. ¶¶ 32-34 & 81-88.) For this additional reason, plaintiffs' Second Claim should be dismissed.

C. Plaintiffs' Seventh Claim Fails To State a Claim Upon Which Relief Can Be Granted.

In their Seventh Claim, for "Breach of Fiduciary Duty of Loyalty" under ERISA Section 404(a)(1), plaintiffs correctly allege that the Disputed Amendments did not incorporate additional provisions allowing Plan participants the option to convert their pre-amendment life insurance benefits into individual policies or to pay premiums sufficient to continue their pre-amendment benefit levels. *See* Comp. ¶¶ 105–106. Plaintiffs do not allege—nor could they, in light of the case law described below—that Qwest breached its fiduciary duties by making a plan design decision not to include these options. Instead,

plaintiffs allege that the EBC breached its fiduciary duties by choosing "not to exercise their influence within Qwest" to "lobby" or "investigate" or "advocate" on behalf of participants for inclusion of such options within the Disputed Amendments. *Id.* ¶¶ 104-105.

It is beyond dispute that the EBC and other Plan fiduciaries did not breach any fiduciary duties by deciding not to include these options within the Disputed Amendments. The U.S. Supreme Court has repeatedly held that a decision to amend an ERISA benefits plan concerns a non-fiduciary "settlor function" which neither implicates any fiduciary duties under ERISA nor gives rise to any claim for breach of fiduciary duty under Section 404(a)(1). *See, e.g., Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("the act of amending a pension plan does not trigger ERISA's fiduciary provisions."); *Curtiss-Wright*, 514 U.S. at 78 ("Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."). The Supreme Court has explained this "settlor function" rule as follows:

> ERISA provides an employer with broad authority to amend a plan. . . . In 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 which consist of such actions as the administration of the plan's assets. ERISA's fiduciary duty requirement simply is not implicated where Hughes, acting as the Plan's settlor, makes a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated. . . . Respondents' three fiduciary duty claims are directly foreclosed by *Spink*'s holding that, without exception, plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.

Hughes Aircraft, 525 U.S. at 442-445 (internal quotation marks and brackets omitted). This "settlor function" rule applies to both ERISA welfare plans (such as the Plan at issue here) and ERISA pension plans. *See Lockheed*, 517 U.S. at 891 ("Given ERISA's definition of

fiduciary and the applicability of the duties that attend that status, we think that the rules regarding fiduciary capacity-including the settlor-fiduciary distinction-should apply to pension and welfare plans alike").

An employer's "broad authority" to amend an ERISA benefit plan without implicating any fiduciary duties (*Hughes Aircraft*, 525 U.S. at 442) includes the authority to alter Plan terms as it sees fit. *See, e.g., Jones v. Kodak Medical Assistance Plan*, 169 F.3d 1287, 1292 (10th Cir. 1999) ("an employer may draft a benefits plan any way it wishes; it does not act as a fiduciary when it sets the terms of the plan"). For example, in *Averhart v. U S West Management Pension Plan*, 46 F.3d 1480 (10th Cir. 1994), the defendant EBC had adopted a so-called "5+5" amendment to the U S West pension plan that increased pension benefits solely for certain "active employees" who chose to retire early. The EBC in *Averhart* later denied such benefits to employees on leaves of absence on the ground that such employees were not eligible "active employees." *Id.* at 1483. Those employees brought suit, alleging that the EBC violated its fiduciary duties under Section 404(a)(1) by denying them the increased benefits while granting the increased benefits to certain upper-management employees who were likewise not "active employees." *Id.* at 1488. The Tenth Circuit affirmed the district court's entry of summary judgment against plaintiffs on this issue, stating:

> The district court held, and we agree, that the selective provision of benefits under the 5 + 5 amendment was a matter of plan design not subject to ERISA's fiduciary standards and judicial review. . . . An employer is free to develop an employee benefit plan as it wishes because when it does so it makes a corporate management decision, unrestricted by ERISA's fiduciary duties.

Id. Here as in *Averhart*, Qwest's decision to omit from the Disputed Amendments provisions that would have allowed Plan participants to convert their pre-amendment benefits into individual policies or to pay premiums sufficient to continue their pre-amendment benefit levels was "a matter of plan design not subject to ERISA's fiduciary standards and judicial review."

Implicitly acknowledging the import of the case law described above, plaintiffs do not allege that the EBC or any other Plan fiduciary violated their fiduciary duties by omitting these provisions from the Disputed Amendments. Instead, plaintiffs allege that the EBC breached its Section 404(a)(1) fiduciary duties by failing to "advocate" for the inclusion of such provisions in those amendments. Plaintiffs thus claim that the EBC breached its fiduciary duties by failing to seek the inclusion of language in Plan amendments that Qwest indisputably had no duty to include. But because there was no fiduciary duty to *include* such language in the Disputed Amendments, there could not possibly be a fiduciary duty to *advocate* for its inclusion.

In *Sprague v. General Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998), the court stated: "It would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed." So too here, it would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to advocate for inclusion of provisions in plan amendments that ERISA's detailed provisions do not require be included in those amendments. Because ERISA's fiduciary standards impose no such duty, plaintiffs' Seventh Claim should be dismissed.

IV. CONCLUSION

For the reasons set forth above, Qwest respectfully requests that this Court dismiss Plaintiffs' First, Second, and Seventh Claims for failure to state a claim upon which relief can be granted.

DATED: May 16, 2008.

s/ Christopher J. Koenigs
Christopher J. Koenigs
Michael B. Carroll
SHERMAN & HOWARD L.L.C.
633 Seventeenth Street, Suite 3000
Denver, CO 80202
Telephone: 303-297-2900
Facsimile: 303-298-0940
Email: ckoenigs@sah.com
mcarroll@sah.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2008, I electronically filed the foregoing **Qwest's Motion To Dismiss the First, Second and Seventh Claims for Relief in Plaintiffs' Second Amended Complaint** 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