IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

EDWARD J. KERBER, *et al.*,

Plaintiffs,

vs.

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

Defendants.

QWEST'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' FIRST, THIRD, FOURTH AND FIFTH CLAIMS FOR RELIEF

July 14, 2008

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

I. STATEMENT OF UNDISPUTED MATERIAL FACTS

The undisputed material facts supporting Qwest's Motion are identical to those set forth in the "Statement of Undisputed Facts" section of Qwest's Brief in Opposition to Plaintiffs' Amended Motion for a Summary Judgment filed contemporaneously herewith ("Opposition Brief," Doc. No. 91). Similarly, the exhibits supporting Qwest's Motion are those attached to Qwest's Opposition Brief. To avoid burdening this Court with duplicative briefs and exhibits, Qwest respectfully incorporates herein the "Statement of Undisputed Facts" section of its Opposition Brief, the definitions of terms contained therein, and the exhibits thereto. Qwest refers herein to Undisputed Facts as, *e.g.*, "UF ¶ 1," and to supporting exhibits as, *e.g.*, "Ex. A-1."

II. ARGUMENT

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is "material" if, under the substantive law of the case, it is outcome

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[1] Two of the four remaining claims in plaintiffs' Complaint (the Second and Seventh Claims) are the subject of Qwest's pending, and fully briefed, Second Motion To Dismiss. The two additional remaining claims (the Sixth and Eighth Claims) require further discovery.

determinative. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine" issue is one where a reasonable factfinder, based on the evidence presented, could hold in the nonmovant's favor with regard to that issue. *Id.*

Initially, the moving party has the burden of informing the court of the basis of its motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party satisfies its burden under Rule 56(c), the burden then shifts to the nonmoving party to come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The operative inquiry is whether, based on all evidence submitted, a reasonable factfinder could find by a preponderance of the evidence that the nonmoving party is entitled to a verdict. *Anderson*, 477 U.S. at 249-50. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

The claims as to which this Motion seeks summary judgment concern: (1) the Amended and Restated Group Life Insurance Plan dated June 12, 1998 (the "1998 Plan Document"); (2) a Plan amendment (the "2005 Amendment") reducing the life insurance benefit to $10,000 for post-1990 retirees who were occupational (*i.e.*, union) employees ("Post-1990 Occupational Retirees") effective January 1, 2006; and (3) a Plan amendment (the "2006 Amendment") reducing the life insurance benefit to $10,000 for management retirees and pre-1991 occupational retirees effective January 1, 2007.

A. <u>Qwest Is Entitled To Summary Judgment on Plaintiffs' First Claim</u>.

Plaintiffs' First Claim alleges that the Plan violates the requirement, set forth in ERISA Section 402(b)(3), 29 U.S.C. § 1102(b)(3), that every employee benefit plan "provide a procedure for amending such plan." Plaintiffs allege that the 1998 Plan Document

lacks such a procedure, and accordingly ask this Court to declare null and void the 2005 Amendment and all other amendments purporting to reduce life insurance benefits. (SAC ¶ 79.) Qwest is entitled to summary judgment on this claim because: (1) the Plan's amendment procedure fully complies with the requirements of Section 402(b)(3) as interpreted by the Supreme Court in *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 75 (1995); and (2) even assuming *arguendo* the Plan's amendment procedure violated Section 402(b)(3), plaintiffs have not proven, as they must to invalidate the 2005 Amendment based on any such violation, detrimental reliance by plaintiffs or bad faith or active concealment by Qwest.

1. **The Plan's Amendment Procedure Fully Complies with the Requirements of Section 402(b)(3) as Interpreted by the Supreme Court in *Curtiss-Wright*.**

The 1998 Plan Document's 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." (*See* UF ¶ 1.) Plaintiffs allege that this language fails to provide the "procedure" for amendment required by Section 402(b)(3). (SAC ¶ 77.) However, 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). The Supreme Court's rejection in *Curtiss-Wright* of the exact allegation supporting plaintiffs First Claim is fatal to that claim. For this and the additional reasons set forth in Qwest's Motion To Dismiss (Doc. No. 79), Qwest is entitled to summary judgment on plaintiffs' First Claim.

2. Even If the Plan's Amendment Procedure Were Inadequate, Plaintiffs Would Not Be Entitled to the Relief They Seek Because They Have Not Proven Detrimental Reliance by Plaintiffs or Bad Faith or Active Concealment by Qwest.

Plaintiffs allege, not only that the Plan lacks an amendment procedure that satisfies Section 402(b)(3), but that the proper remedy for this alleged deficiency is to declare null and void the 2005 Amendment and all other Plan amendments purporting to reduce retirees' life insurance benefits. (SAC ¶ 79.) Because the Supreme Court held that the ERISA plan in *Curtiss-Wright* satisfied Section 402(b)(3), it declined to "reach the question of the proper remedy for a § 402(b)(3) violation." *Curtiss-Wright*, 514 U.S. at 85. But every court that *has* reached this question—including the Sixth, Seventh, and Eleventh Circuits—has held that even if an ERISA plan violates Section 402(b)(3), a plan amendment may be

invalidated only if plaintiffs prove detrimental reliance by plaintiffs or bad faith or active concealment by the plan sponsor—circumstances plaintiffs have not alleged, and cannot prove.

In *Murphy v. Keystone Steel & Wire Co.,* 61 F.3d 560 (7th Cir. 1995), the Seventh Circuit stated:

> [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* § 1102(b)(3) [§ 402(b)(3)].

Id. at 569 (citation omitted; emphasis added). The Seventh Circuit then held that plaintiff "has not shown the bad faith, active concealment, or detrimental reliance that would justify granting him a substantive remedy for Keystone's violation of 29 U.S.C. § 1102(b)(3)." *Id. See also Adams v. Avondale Industries, Inc.*, 905 F.2d 943, 949 (6th Cir. 1990) (same; upholding plan amendment where plaintiffs failed to show detrimental reliance on defendant's failure to comply with Section 402(b)(3)); *Aldridge v. Lily-Tulip, Inc.*, 40 F.3d 1202, 1211-12 (11th Cir. 1994) (same; reversing district court's order invalidating plan amendments where plaintiffs failed to show detrimental reliance).

Plaintiffs bear the burden of proving detrimental reliance by plaintiffs or active concealment or bad faith by Qwest. *Murphy*, 61 F.3d at 569; *Adams*, 905 F.2d at 949; *Aldridge*, 40 F.3d at 1211-12. Plaintiffs present no evidence whatever of such circumstances, because no such evidence exists:

- Far from *detrimentally relying* on the allegedly inadequate amendment procedure in the 1998 Plan Document, plaintiffs had *never even seen* that document until shortly before (or, in the case of two plaintiffs, shortly after) this lawsuit was filed. (UF ¶ 43.)
- Far from *actively concealing* the allegedly inadequate amendment procedure in the

1998 Plan Document, Qwest made that document available for inspection and copying for nearly a decade before plaintiffs filed their Complaint alleging the procedure was inadequate. (UF ¶¶ 35-36.)

- Far from acting in *bad faith* when it reduced life insurance benefits pursuant to the Plan's amendment procedure, Qwest had every right to reduce those benefits, because (as this Court has already found) "the Plan unambiguously reserve[d] Qwest's right to amend the Plan including reducing the amount of life insurance benefits for retired employees." (Dismissal Order at 12.) What's more, Qwest reduced life insurance benefits for Post-1990 Occupational Retirees in a *good faith* effort to accommodate their desire for a three-year postponement of the implementation date for Health Plan benefit caps. (UF ¶¶ 21-23 & 25-26.)

For all these reasons, Qwest is entitled to summary judgment on plaintiffs' First Claim.

B. <u>Qwest Is Entitled To Summary Judgment on Plaintiffs' Third, Fourth and Fifth Claims</u>.

Plaintiffs' Third Claim alleges that the Oct. 2005 Resolutions, which state that the Life Plan "be and hereby is" amended to reduce the life insurance benefit to $10,000 for Post-1990 Occupational Retirees effective January 1, 2006, did not amend the Plan, and seeks a declaration so stating. (SAC ¶¶ 89-90.) Plaintiffs' Fourth Claim alleges that the Dec. 2006 Resolutions likewise did not amend the Plan, and seek a declaration so stating. (*Id.* ¶¶ 91-93.) Plaintiffs' Fifth Claim alleges in the alternative that even if the Dec. 2006 Resolutions amended the Plan, that amendment did not become effective until December 13, 2006, and therefore did not reduce benefits for Post-1990 Occupational Retirees who died between January 1 and December 12, 2006. (*Id.* ¶¶ 94-96.)

Qwest is entitled to summary judgment on these claims for three independent reasons. First, as a matter of law plaintiffs cannot establish the principal allegation on which all three claims are based—that Qwest failed to "actually approve" the 2005 Amendment by means of the Oct. 2005 Resolutions. Second, even if the Oct. 2005 Resolutions suffered from the deficiencies alleged by plaintiffs, Qwest ratified the 2005 Amendment in multiple ways

before its January 1, 2006 effective date. Third, even if the Oct. 2005 and/or Dec. 2006 Resolutions suffered from the deficiencies alleged by plaintiffs, the undisputed facts show neither detrimental reliance by plaintiffs nor bad faith or active concealment by Qwest.

1. **Qwest Approved the 2005 Amendment By Means of the Oct. 2005 Resolutions.**

Plaintiffs' Third, Fourth and Fifth Claims are premised on plaintiffs' allegation that the 2005 Amendment is invalid because the Oct. 2005 Resolutions did not validly amend the Plan. Plaintiffs bear the burden of proof on this issue. *See Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 131 n. 5 (3d Cir. 1998).

In *Curtiss-Wright*, the Supreme Court stated that whether the plan sponsor effectuated a plan amendment turned on two issues: (1) "what persons or committees within [the plan sponsor] possessed plan amendment authority, either by express delegation or impliedly"; and (2) "whether those persons or committees actually approved the new plan provision." *Curtiss-Wright*, 514 U.S. at 85. Because plaintiffs have stipulated that the PDC possessed plan amendment authority (*see* UF ¶ 16), Qwest's Motion turns on whether the PDC "actually approved" the 2005 Amendment by means of the Oct. 2005 Resolutions.

Plaintiffs cannot dispute that the PDC *intended* to effectuate a Plan amendment by means of the Oct. 2005 Resolutions, because all three PDC members have submitted declarations stating this was precisely their intent. (UF ¶ 25.) Nor can plaintiffs dispute that Qwest *manifested its intent* to effectuate a Plan amendment by means of the Oct. 2005 Resolutions in light of the following undisputed facts:

- The PDC signed Oct. 2005 Resolutions stating that the Plan "be and hereby is amended" to reduce the life insurance benefit to $10,000 for Post-1990 Occupational Retirees effective January 1, 2006. (UF ¶ 24.)

- Qwest sent all affected retirees the Oct. 2005 Letter/SMM, the Oct. 2005 Guide/SMM, and the Oct. 2005 Statements, all of which stated that the life insurance benefit would be reduced to $10,000 for Post-1990 Occupational Retirees effective January 1, 2006. (UF ¶¶ 27-29.)

- Qwest provided this same information in a letter sent to the AUSWR and the Minnesota PUC in October 2005, and in a Form 10-K filed with the SEC in February 2006. (UF ¶¶ 26 & 33.)

- Qwest provided this same information to its life insurer in 2005, and the group life insurance policy was amended to reflect the terms of the 2005 Amendment. (UF ¶ 32.)

- Qwest and its insurer administered the Plan in accordance with the 2005 Amendment by providing beneficiaries of Post-1990 Occupational Retirees who died on and after January 1, 2006 with a life insurance benefit at the reduced $10,000 level. (UF ¶ 33.)

- Qwest treated the Oct. 2005 Resolutions as part of the Plan's governing documents by making them available for inspection and copying, and by producing them to plaintiffs' counsel upon request, as required by ERISA Section 104(b). (UF ¶¶ 35-37.)

Any one of these actions would have sufficed to manifest Qwest's intent to approve the 2005 Amendment. For example, in *Haran v. Dow Jones & Co.*, 216 F.3d 1072, 2000 WL 777982 (2d Cir. 2000) (Ex. A-2, Exhibit 4 thereto), the Second Circuit summarily rejected plaintiffs' argument that a resolution did not amend a plan, on the ground that the resolution "explicitly states that the 'Dow Jones Severance Pay Plan . . . *is hereby amended.*'" *Id.* *3 (emphasis in original).

Similarly, the Seventh Circuit held in *Murphy* that the plan sponsor had sufficiently manifested its intent to amend an ERISA plan by notifying plan participants of the amendment: "Keystone put Murphy on notice concerning the amendments at issue in February of 1993. Keystone's notice *clearly manifested its intent to amend the Plan*; it also came over four months before the amendments became effective and much earlier than required by ERISA." 61 F.3d at 569 (emphasis added). So too here, Qwest clearly manifested

its intent to amend the Plan by notifying Post-1990 Occupational Retirees of their reduced life insurance benefits in October 2005, three months before the 2005 Amendment became effective, and much earlier than required by ERISA. *See* 29 U.S.C. § 1024(b)(1)(B) (SMMs must be issued not later than *210 days after* the end of the plan year in which the change is adopted).

In summary, it is undisputed that the PDC had the *authority* to amend the Plan, *intended* to amend the Plan by means of the Oct. 2005 Resolutions, and *manifested its intent* to amend the Plan in multiple ways. The last of these facts dooms plaintiffs' claims. In *Curtiss-Wright*, the Supreme Court equated a company's "decision to amend" with whether the company "sufficiently manifest[ed] its intention" to amend: "there must be some way of determining what it means for '[t]he Company' *to make a decision to amend or, in the language of trust law, to 'sufficiently manifest [its] intention' to amend*." *Curtiss-Wright*, 514 U.S. at 80, *quoting Restatement (Second) of Trusts* § 331, Comment *c* (1957) (emphasis added). *See also* M. Radford, G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 993, at 172-74 (rev. 3d ed. 2006) (power to amend may be exercised "in any reasonable manner"). Against all of the undisputed facts described above, plaintiffs cannot set forth the slightest quantum of evidence to support a finding that Qwest did not "sufficiently manifest its intention" to amend the Plan.

Ignoring their inability to dispute the facts set forth above, plaintiffs allege that the Oct. 2005 and Dec. 2006 Resolutions suffer from a variety of infirmities.

First, plaintiffs allege in their Complaint that the Oct. 2005 Resolutions were not "labeled . . . as a PLAN amendment." (SAC ¶ 47.) Plaintiffs have since conceded, however, that they "are not arguing that Exhibit 3 [the Oct. 2005 Resolutions] does not pass

the test for an employee benefit plan amendment simply because it is missing the label 'Plan Amendment.'" (Doc. No. 66 at 11.) Any such argument would be foreclosed by the holdings of numerous courts that ERISA plans can be amended by means of "resolutions" rather than "amendments."[2]

Second, plaintiffs allege that the Oct. 2005 and Dec. 2006 Resolutions are ambiguous. *See* SAC ¶¶ 53 (alleging the Oct. 2005 Resolutions are "confusingly worded") & 12 (alleging the Dec. 2006 Resolutions "create[] an ambiguity"). But even assuming *arguendo* that these resolutions were ambiguous, "[n]othing in ERISA . . . requires an amendment to be unambiguous in order to be effective." *Allison v. Bank One-Denver*, 289 F.3d 1223, 1252 (10th Cir. 2002) (Hartz, J., dissenting). Instead, under established principles of trust law, even if "portions of the amendment are ambiguous, it has no bearing upon whether the amendment was valid and effective." *In re Florance,* 343 N.W.2d 297, 301 (Minn. Ct. App. 1984), *aff'd in part, rev'd in part on other grounds*, 360 N.W.2d 626 (Minn. 1985). Moreover, plaintiffs' assertion that the Oct. 2005 Resolutions were ambiguous is irrelevant, because *all* interested parties, including the Plan sponsor (QCII), the Plan administrator (EBC), the Plan fiduciary (PDC), the affected Plan participants (including Joseph Lensink), the union that had previously represented those retirees (CWA), the retiree organization of which a number of those retirees were members (AUSWR), and the company

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[2] *See, e.g., Horn v. Berdon, Inc. Defined Ben. Pension Plan,* 938 F.2d 125, 127 (9th Cir. 1991) (holding that adoption of a resolution by a corporation's board of directors can amend a plan); *Aldridge v. Lily-Tulip, Inc.*, 40 F.3d 1202, 1210 (11th Cir. 1994) (finding that adoption of a resolution by a corporation's board of directors can terminate a plan); *Krumme v. Westpoint Stevens, Inc.*, 143 F.3d 71, 85 (2d Cir. 1998) (meeting minutes which recorded changes to an employee benefit plan's discount rate were enforceable as a plan document notwithstanding the absence of a formal plan amendment reflecting the changes).

providing the insurance in question (Prudential) were advised and/or understood in October 2005 that the Plan had been amended effective January 1, 2006 to reduce life insurance benefits for Post-1990 Occupational Retirees. (*See* UF ¶¶ 22-23 & 26-34.)

Third, plaintiffs allege that the Oct. 2005 Resolutions were defective because they were not formally incorporated into the 1998 Plan Document. *See* Doc. No. 66 (alleging the Oct. 2005 Resolutions weren't "formally incorporated into the Governing PLAN Document"). In *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), *rev'd, Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 75 (1995), the Third Circuit adopted this very position, holding that "*[u]nless and until the written plan is altered* . . . neither the plan administrator nor a court is free to deviate from the terms of the original plan." *Id.* at 1040 (emphasis added). But the Supreme Court *reversed* the Third Circuit, holding that instead of requiring amendments to be incorporated into the written plan document, ERISA "follows standard trust law principles in dictating only that whatever level of specificity a company ultimately chooses, in an amendment procedure or elsewhere, it is bound to that level." *Curtiss-Wright*, 514 U.S. at 85. Because the amendment procedure in the 1998 Plan Document nowhere requires that amendments be incorporated into that document, neither does ERISA.[3]

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[3] *See, e.g., Huber v. Casablanca Industries, Inc.*, 916 F.2d 85, 106 (3rd Cir. 1990) (holding enforceable an amendment made by resolution of the plan's board of trustees but not added to the plan documents); *Rinard v. Eastern Co.*, 978 F.2d 265, 268 n. 2 (6th Cir. 1992) (noting that there is no requirement in the ERISA regulations or statute "that the terms of an ERISA plan be contained in a single document"); *Franklin v. First Union Corp.*, 84 F. Supp. 2d 720, 728 (E.D. Va. 2000) (stating that "the Court disagrees with the plaintiffs' argument that the 1995 Resolution was not part of the Signet Plan because it was not incorporated or 'folded into' it").

Fourth, plaintiffs allege that the Oct. 2005 and Dec. 2006 Resolutions are defective because they did not expressly strike, and therefore left intact, Plan provisions stating that retirees would receive a minimum life insurance benefit of $20,000 or $30,000 depending on their retirement date. (SAC ¶¶ 52 & 62.) This is nonsensical. When the PDC approved a resolution reducing certain retirees' life insurance benefit to $10,000, it plainly did not intend to leave intact Plan provisions affording these same retirees a minimum life insurance benefit of $20,000 or $30,000. The obvious, and indeed sole, purpose of the resolutions was to *replace* the inconsistent Plan provisions with respect to these retirees. *See, e.g., In re Wendland-Reiner Trust*, 267 Neb. 696, 677 N.W.2d 117, 124 (Neb. 2004) (where testator who had executed trust agreement later signed a letter increasing the amount one beneficiary received at the expense of remainder beneficiaries' interests, court held it was clear the testator intended to amend the trust agreement *precisely because* his letter was "inherently inconsistent with the original terms of the trust agreement").

Finally, plaintiffs allege that the 2005 Amendment was not "adopted." (SAC ¶ 54.) But plaintiffs concede the term "adopt" "generally means 'to accept[] formally and to put into effect" (*See* Ex. A-2, Ex. 3 thereto, p. 2), and this definition echoes those found in both legal and ordinary dictionaries. *See Black's Law Dictionary* (5th ed. 1979) (defining "adopt" to mean "[t]o accept, consent to, and put into effective operation"); *Random House Webster's Unabridged Dictionary* (2d ed. 2001) (defining "adopt" in this context to mean "to vote to accept"); *Webster's Ninth New Collegiate Dictionary* (1986) (defining "adopt" in this context to mean "to accept formally and put into effect"). The undisputed facts set forth above show that by means of the Oct. 2005 Resolutions, the PDC voted to accept a Plan

change reducing the life insurance benefit for Post-1990 Occupational Retirees to $10,000 that was put into effect January 1, 2006. (UF ¶¶ 24-25.)

Even if the Oct. 2005 Resolutions did not fully comply with the Plan's amendment procedures due to one or more of the alleged deficiencies described above, the resolutions substantially complied with those procedures, which is all the Tenth Circuit requires. In *Allison*, the Tenth Circuit stated that it "recognized that the doctrine of substantial compliance may have application in ERISA cases," and that its conclusion that the ERISA plan in that case was not amended "does not end our analysis." 289 F.3d at 1236. Instead, the Court stated: "The possibility remains that, despite not having complied in full with the requirements of § 8.10 of the Plan, Bank One met its obligation . . . by performing substantially equivalent procedures." *Id.* Although the Tenth Circuit declined to apply the substantial performance doctrine in *Allison* because Bank One "did not in fact substantially comply with the terms of" the plan (*id.* at 1237), the PDC *did* substantially comply with the Plan's terms by executing written resolutions stating that the Plan "be and hereby is amended" to reduce the life insurance benefit for Post-1990 Occupational Retirees. (UF ¶ 24.) Under both Tenth Circuit law and applicable trust law, no more is required. *Allison*, 289 F.3d at 1236; *Peckham v. Gem State Mut. of Omaha*, 964 F.2d 1043, 1052-53 (10th Cir. 1992); *Restatement (Third) of Trusts* (2003) comment *i* (2003) (a settlor can exercise a power to amend the trust via a particular method "by substantial compliance with the method prescribed"); *Unif. Trust Code* § 602(c)(1), 7C U.L.A. 546 (2006) (a settlor "may revoke or amend a revocable trust . . . by substantial compliance with a method provided in the terms of the trust").

2. Even If Qwest Failed To Approve the 2005 Amendment by Means of the Oct. 2005 Resolutions, Qwest Subsequently Ratified that Amendment Before Its Effective Date.

In *Curtiss-Wright*, the Supreme Court pointed out that even if an attempted plan amendment is defective, the plan sponsor can render the amendment effective through ratification. In remanding the case for further factual development regarding whether an attempted plan amendment was effective, the Court stated: "If the new plan provision is found not to have been properly authorized when issued, *the question would then arise whether any subsequent actions, such as the executive vice president's letters informing [participants] of the termination, served to ratify the provision ex post.*" *Curtiss-Wright*, 514 U.S. at 85 (emphasis added). On remand, the district court granted the plan sponsor's motion for summary judgment on the ground that the amendment had been ratified as a matter of law, stating:

> The November, 1983 letters, written by Sprigle on his personal Curtiss-Wright letterhead, unquestionably constituted the official notification to affected individuals of the termination of their post retirement health care coverage. * * * *The court agrees with Curtiss-Wright's argument that its enforcement of the amendment by terminating plaintiffs' benefits removes any possible doubt that it was an act of Curtiss-Wright.*

Schoonejongen v. Curtiss-Wright, 1997 WL 34486781 (D.N.J. June 25, 1997) (Ex. A-2, Ex. 5 thereto; emphasis added), *aff'd on other grounds*, *Schoonejongen v. Curtiss-Wright*, 143 F.3d 120 (3d Cir. 1998). *Accord Halliburton Co. Benefits Comm. v. Graves,* 463 F.3d 360, 374 (5th Cir. 2006) ("even if the Vice President's signature had been required . . . to amend the retiree program, Halliburton's subsequent actions served to ratify the provision *ex post*").

Overwhelming and undisputed evidence in this case shows Qwest ratified the 2005 Amendment prior to January 1, 2006. *See supra* pp. 7-8 and UF ¶¶ 22 & 26-36. Indeed, the situation here presents a far stronger case for ratification than *Curtiss-Wright,* because Qwest ratified its allegedly defective Plan amendment in multiple ways, whereas the defective plan amendment in *Curtiss-Wright* was deemed ratified as a matter of law by virtue of a single communication to plan participants. *Curtiss-Wright*, 1997 WL 34486781 *5. In summary, Qwest ratified the 2005 Amendment as a matter of law.

3. Even If the Oct. 2005 and Dec. 2006 Resolutions Were Defective, Plaintiffs Have Not Proven Detrimental Reliance by Plaintiffs or Bad Faith or Active Concealment by Qwest.

Finally, even assuming that the Oct. 2005 and Dec. 2006 Resolutions suffered from the infirmities alleged by plaintiffs, plaintiffs are not entitled to the relief they seek—nullification of the 2005 Amendment—unless they prove detrimental reliance by plaintiffs or bad faith or active concealment by Qwest.

In *Loskill v. Barnett Banks, Inc. Severance Pay Plan*, 289 F.3d 734 (11th Cir. 2002), plaintiffs alleged, as do plaintiffs here, that a plan amendment was ineffective because it was not adopted in accordance with the plan's amendment procedures. The Eleventh Circuit held, consistent with the holdings of *Murphy*, *Adams*, and *Aldridge*, *supra*, that the amendment would be invalidated only if plaintiffs established "bad faith or active concealment on the part of the sponsor or detrimental reliance on the part of the beneficiaries." *Id.* at 738-739 & n. 5. *See also Alford v. Kimberly-Clark Tissue Co.*, 14 F. Supp. 2d 1290, 1299 (S.D. Ala. 1998) (same); *Whitfield v. Torch Operating Co.*, 935 F. Supp. 822, 831 (E.D. La. 1996) (same; upholding amendment because plaintiffs failed to prove active concealment or detrimental reliance); *Franklin*, 84 F. Supp. 2d at 729 (same;

holding that the remedy of retroactive invalidation of amendment allegedly adopted in violation of plan amendment procedures was unavailable when "the employer clearly manifested its intent to amend the plan and at least attempted to disclose the amendment to the affected employees"). *See also Sage v. Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 895 (10th Cir. 1988) (holding administrators not liable for minor variances from claims provisions because claimants had suffered no prejudice).

There are compelling reasons for the rule set forth above. Under the contrary rule proposed by plaintiffs, a deficient resolution amending a plan must be stricken regardless of whether the deficiencies have caused any harm. Such a penalty would be irreconcilable with the careful balance that underlies ERISA as a whole and, particularly, its remedial scheme. In ERISA, Congress sought and achieved a balance between the rights of employees and the burdens on employers, recognizing that misguided regulation could easily go overboard and, ironically, lead to the elimination of employee benefit plans. *See Ingersoll-Rand v. McClendon,* 498 U.S. 133, 144 (1990); *Mertens v. Hewitt Associates*, 508 U.S. 248, 262-63 (1993) ("There is a 'tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs.'") (citation omitted).

In this case, the harm to plaintiffs—reduction in life insurance benefits—was caused by the *substance* of the 2005 Amendment, not by the manner in which that amendment was approved. The resolutions approving the 2005 Amendment caused no harm to Plan participants because the resulting amendment (1) conformed to the Plan's express reservation of the right to amend and (2) was timely communicated to all affected Plan participants as well as many others (the insurer, AUSWR, CWA, Minnesota PUC and SEC).

The only plaintiff affected by the 2005 Amendment was Martha Lensink. (*See* UF ¶¶ 18-19.) Mrs. Lensink cannot present evidence of detrimental reliance, bad faith or active concealment:

- Mrs. Lensink could not have relied to her detriment on the alleged deficiencies in the Oct. 2005 and Dec. 2006 Resolutions, because she did not see those resolutions until after the death of her husband and the filing of this lawsuit. (UF ¶¶ 19 & 43.) And long before Mrs. Lensink saw those resolutions, Qwest had sent Mr. Lensink SMMs and other documents clearly stating that his life insurance benefit would be reduced to $10,000 effective January 1, 2006. (UF ¶¶ 27-29.)

- Far from actively concealing the 2005 Amendment, Qwest promptly told anyone even remotely interested in the amendment, including the CWA, the AUSWR, the SEC, the Minnesota PUC, and (most importantly) Mr. Lensink and all affected Plan participants, that the Plan's terms had been revised in accordance with the terms of that amendment. (UF ¶¶ 22-23 & 26-34.)

- Rather than acting in bad faith, Qwest acted in utmost *good faith*, because it was taking an action it had every right to take (*see* Dismissal Order p. 12), it was taking that action in order to accommodate the desire of the affected retirees and the CWA for a three-year postponement of the implementation date for Health Plan benefit caps (*see* UF ¶¶ 21-23 & 25-26), and it promptly notified all interested parties of the change (*see* UF ¶¶ 22-23 & 26-34).

The sole evidence of alleged bad faith or concealment plaintiffs offer is the fact that PDC member Teresa Taylor did not attend an October 14, 2005 PDC meeting. (*See* UF ¶ 44.) This fact hardly constitutes bad faith or concealment by Qwest, since (1) the Oct. 2005 Resolutions nowhere state that Teresa Taylor attended the meeting, (2) there is no requirement that Plan amendments be approved solely at PDC meetings, and (3) Ms. Taylor reviewed, approved, and executed the Oct. 2005 Resolutions shortly after the date of this meeting. (*See id.* & Ex. A-1, Ex. 3 thereto.) Because plaintiffs cannot set forth a reasonable factual inference to support a finding of detrimental reliance, active concealment or bad faith, Qwest is entitled to summary judgment on plaintiffs' Third, Fourth, and Fifth Claims.

III. CONCLUSION

For the reasons set forth above, Qwest respectfully requests that this Court enter summary judgment for Qwest on plaintiffs' First, Third, Fourth, and Fifth Claims.

DATED: July 14, 2008.

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2008, I electronically filed the foregoing **Qwest's Motion for Summary Judgment on Plaintiffs' First, Third, Fourth, and Fifth Claims for Relief** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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

s/Patricia Eckman
Patricia Eckman