IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

EDWARD J. KERBER, *et al.*,

Plaintiffs,

vs.

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

Defendants.

QWEST DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)

June 20, 2007

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

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Defendants Qwest Group Life Insurance Plan (the "Plan"), Qwest Employees Benefit Committee, Qwest Plan Design Committee, and Qwest Communications International Inc. ("QCII") (collectively, "Defendants") hereby move under Fed. R. Civ. P. 12(b)(6) for dismissal of all claims in Plaintiffs' Amended Complaint ("Complaint") asserting that the Plan's language bars Defendants from reducing Plaintiffs' life insurance benefits to $10,000, on the ground that such claims fail to state a claim upon which relief can be granted.

I. INTRODUCTION

The question presented by Plaintiffs' Complaint is whether an ERISA welfare benefits plan document can be held to state in "clear and express language" that participants are entitled to a minimum level of benefits, when the plan document expressly states that the employer can reduce or eliminate those benefits. The answer, as every court to consider the question has held, is no.

Plaintiffs' three claims for relief all assert claims based on Plan language describing the manner in which life insurance benefits payable on a retiree's death shall be calculated (the "Benefit Formula"). In 1997, the Benefit Formula was revised to provide that when an eligible retiree reached age 70, the retiree's basic life insurance coverage shall equal 50 percent of the coverage in effect before his 66th birthday, but shall not be reduced below $20,000 for Pre-1997 Retirees or $30,000 for Post-1996 Retirees. In 2005 and 2006, Qwest reduced retirees' life insurance coverage to a flat $10,000. In this lawsuit, Plaintiffs allege that the Benefit Formula gave eligible retirees a "contractually vested" right to life insurance benefits in the amount of at least $20,000 for Pre-1997 Retirees or $30,000 for Post-1996 Retirees.

Unfortunately for Plaintiffs, the very Plan document that allegedly creates this "contractually vested" right includes a provision (the "Reservation of Rights Provision") stating that the company "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." Similar Reservation of Rights Provisions have appeared in summary plan descriptions ("SPDs") issued by QCII and its predecessors (collectively, "Qwest") for more than three decades.

In *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996), the Tenth Circuit held that the "contractual vesting" doctrine upon which Plaintiffs rely is a "narrow doctrine"; that contractual vesting "must be stated in clear and express language"; and that no contractual vesting occurred where (as here) the plan document contained both a general reservation of rights provision and a benefit provision allegedly promising specified welfare benefits. Moreover, *all seven* other circuits to address the issue have recognized that a reservation of rights provision unambiguously controls a promise to provide specified lifetime benefits to retirees. Qwest's 2005 and 2006 Plan amendments were thus proper.

Qwest provided a generous life insurance benefit plan for retirees in reliance on the well-established, statutory right to amend the plan in the future, and expressly notified retirees in numerous Plan documents that it was reserving this amendment right. The law does not, and should not, preclude companies like Qwest from exercising a power to amend welfare benefit plans when they have expressly reserved such power. It is in the long-term interests of employees that companies have the power to amend such plans, because knowledge that such plans may be changed encourages employers to offer more generous

welfare benefit packages. If companies were locked into providing a minimum level of welfare benefits even when they have expressly reserved the right to reduce or eliminate such benefits, they will be far less willing to offer such benefits, to the detriment of both employees and retirees. This Court should therefore decline Plaintiffs' invitation to write the Reservation of Rights Provision out of the Plan.

Plaintiffs assert that this case "involves one overarching question"–whether the Plan's Benefit Formula "circumscribed the PLAN sponsor's rights under the reservation of rights clause to reduce the life insurance coverage below the minimum thresholds." (Doc. # 12 ¶ 6.) Because the answer to this question is no, this Court should dismiss all claims alleging that the Plan's Benefit Formula contractually bars or equitably estops Defendants from reducing Plaintiffs' life insurance benefits to $10,000.

II. FACTS

Although no documents are attached to or incorporated by reference in Plaintiffs' Complaint, that Complaint quotes at length from 27 documents in this case, including all documents dispositive of this motion. (*See* Complaint ¶¶ 1, 23, 36, 40-56, 58, 62, 64-65, 75-76 & 81.) In *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384-85 (10th Cir. 1997), the Tenth Circuit stated:

> [I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss. * * * If the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied.

Qwest has attached to this motion true and correct copies of the pertinent portions of the 27 documents referred to above (*see* Attachment A, Exs. 1-27), which are referred to herein as "Ex."[1]

When a district court considers documents pertinent to a Rule 12(b)(6) motion, the documents' legal effect "'is to be determined by [the documents'] terms rather than by the allegations of the pleader.'" *Droppleman v. Horsley*, 372 F.2d 249, 250 (10th Cir. 1967), *quoting Zeligson v. Hartman-Blair, Inc.*, 126 F.2d 595, 597 (10th Cir. 1942); *accord Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991); *AMFAC Mortgage Corp. v. Arizona Mall of Tempe*, 583 F.2d 426, 429 (9th Cir. 1978) (documents attached to a complaint "are properly part of the review as to whether plaintiff can prove any set of facts in support of its claim," and "the court is not limited by the mere allegations in the complaint"). Virtually all of the facts set forth below are based on Plan documents that Plaintiffs quote at length in their Complaint, and as such are undisputed. The few remaining alleged facts set forth below (*e.g.*, regarding the parties) are based on allegations in Plaintiffs' Complaint, and are assumed to be true solely for purposes of this motion.

A. The Parties

1. Five of the seven named Plaintiffs in this putative class action are Plan participants who retired from QCII or its predecessor U S WEST Communications, Inc. ("US West") between 1990 and 2005. Edward Kerber ("Kerber") and Nelson Phelps ("Phelps") retired from US West in February 1990, Joanne West ("West") and Nancy Meister

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[1] By submitting these documents Defendants do not, nor do they intend to, convert this motion to dismiss into a motion for summary judgment. Because three of the documents (Exs. 15, 16 and 20) are very voluminous, Defendants have attached hereto only the portions of those documents relevant to this motion. Defendants will submit all three documents in their entirety if the Court so desires.

("Meister") retired from QCII in February 2004, and Thomas Ingemann, Jr. ("Ingemann") retired from QCII in March 2005. (Complaint ¶¶ 10-14.)

2. The two remaining named Plaintiffs are Plan beneficiaries. Martha Lensink is the surviving spouse of Plan participant Joseph Lensink ("Lensink"), who retired from US West in March 1997 and died in January 2006. (*Id.* ¶ 15.) Samuel Strizich is the surviving spouse of Plan participant Sharon Strizich ("Strizich"), who retired from US West in February 1990 and died in March 2007. (*Id.* ¶ 16.) The seven Plan participants identified above are referred to herein as the "Participants."

3. Defendant Qwest Plan is an ERISA welfare benefit plan. (*Id.* ¶ 21.)

4. Defendant Qwest Employees' Benefit Committee is a "fiduciary" and "administrator" of the Plan, and Defendant QCII is an "employer" and Plan "fiduciary," "administrator" and "sponsor" within the meaning of ERISA. (*Id.* ¶¶ 19 & 24.)

5. Defendant Qwest Plan Design Committee is the entity to which the QCII Board of Directors has delegated certain authority to make changes to the Plan. (*Id.* ¶ 27.)

B. Benefit Formula and Reservation of Rights Provisions[2]

6. For at least the past half century, QCII and its predecessors have offered a series of life insurance benefit plans to employees and retirees. QCII's Plan is the successor in interest to the AT&T Group Life Insurance Plan, the Mountain Bell Group Life Insurance Plan, the Northwestern Bell Group Life Insurance Plan, the Pacific Northwest Bell

[2] Although the following facts provide historical context regarding the manner in which Plan benefits have been calculated and regarding Qwest's consistent reservation of its right to reduce or eliminate those benefits, the current Plan documents control Plaintiffs' rights under the Plan.

Group Life Insurance Plan, and the U S West Group Life Insurance Plan (collectively, the "Plans"). (*Id.* ¶ 20.)

7. For at least three decades, Plan documents have included a Benefit Formula providing (in general) that: (a) the amount of basic life insurance available to eligible retirees would be subject to annual reductions beginning at age 65 or 66, from the amount available on retirees' normal retirement date to a lower amount available five years after such reductions began (the "Floor Amount"); and (b) the amount of life insurance would not be reduced below the Floor Amount. (*See* Complaint ¶ 23.)

8. For at least the past three decades, Plan documents have also included a Reservation of Rights Provision authorizing Qwest to amend or terminate the Plans. For example:

- Mountain Bell's August 1977 and October 1982 SPDs stated that although the company intended to continue the life insurance program indefinitely, it "reserves the right to end or amend it." (Ex. 2 p. QL02810 & Ex. 8 p. K00327.)

- Pacific Northwest Bell's January 1978, December 1978, January 1981 and May 1982 SPDs all contained language substantially identical to that quoted above. (Ex. 3 p. K00028, Ex. 4 p. QL03268, Ex. 5 p. K00100 & Ex. 7 p. K00118.)

- US West's March 1986 SPD likewise contained language substantially identical to that quoted above. (Ex. 11 p. K00414.)

9. All seven Participants retired in or after 1990. (Complaint ¶¶ 10-16.) US West's June 1987 SPD stated:

> The Company intends to continue your Group Life Insurance Program but reserves the right to terminate or amend it at any time, subject to applicable limitations of the law or any applicable collective bargaining agreements.

> If the Group Life Insurance Program is ended (or if there is a transfer of plan assets and liabilities or a Program split-up) you will not be vested in any Program benefits or have any further rights (other than payment of covered expenses you had before the Program ended or was changed).

(Ex. 12 p. QL04562.)

10. US West's July 1991 SPD stated in three separate places that the company reserved the right to amend or terminate the Plan. The SPD's introductory page stated: "The Company and all of its affiliates reserve the right to amend or terminate any of the plans—with respect to all participant classes, retired or otherwise—without prior notice to or consultation with any participants, subject to applicable collective bargaining agreements." (Ex. 15 p. QL01797.) The SPD also included the following Reservation of Rights Provision relating specifically to the life insurance Plan:

> U S WEST, Inc., as the plan administrator for all Companies, intends to continue your group life insurance plan but reserves the right to terminate or amend it at any time, with respect to any or all classes of current or future participants (including retired employees) subject to applicable limitations of the law or any applicable collective bargaining agreements.
>
> If the group life insurance plan is ended or changed . . . you will not be vested in any plan benefits or have any further rights (other than payment of benefits to which you or your beneficiaries had become entitled because of death or injury before the plan ended or was changed).

(*Id.* p. QL01954.) The final pages of the SPD likewise stated: "While the Company expects its plans to continue indefinitely, it reserves the right to end, suspend, or amend its plans at any time, in whole or in part, subject to any applicable collective bargaining agreements." (*Id.* p. QL02118.)

11. US West's January 1994 SPD included provisions identical to the three provisions quoted in paragraph 10 above. (Ex. 16 pp. QL03273, QL03743 & QL03875.) US West's January 1996 SPD likewise included a Reservation of Rights Provision relating to life insurance benefits identical to that quoted in paragraph 10 above. (Ex. 17 p. QL00114.)

12. In June 1998 US West created an Amended and Restated Group Life Insurance Plan document (the "1998 Plan Document"). The 1998 Plan Document, which is the principal document on which Plaintiffs' claims are based, amended the Benefit Formula to include an alternative Floor Amount. It stated:

> On the first day of the month coinciding with or next following the date upon which an Eligible Retiree attains age 66, the amount of Basic Life Coverage in effect at retirement shall be reduced annually by 10 percent until the last day of the month in which an Eligible Retiree attains age 70, at which time, such Eligible Retiree's Basic Life Coverage shall remain at 50 percent of the Basic Life Coverage amount in effect prior to his 66th birthday. Notwithstanding the foregoing, for certain Eligible Retirees, such Basic Life Coverage shall not be reduced below certain minimum amounts set forth in Appendix 7 . . . .

(Ex. 19 p. QL00014.) Appendix 7 stated that the amount of basic life insurance "shall not be reduced below $20,000" for eligible Pre-1997 Retirees and "shall not be reduced below $30,000" for eligible Post-1996 Retirees. (*Id.* p. QL00037.) Thus, under the revised Benefit Formula, the Floor Amount was the greater of: (a) the previous Floor Amount, *i.e.*, 50% of the amount of basic coverage as of the participant's normal retirement date; or (b) a specific dollar amount ($20,000 for Pre-1997 Retirees and $30,000 for Post-1996 Retirees).

13. Plaintiffs characterize the language in the 1998 Plan Document creating the alternative Floor Amounts of $20,000 and $30,000 as "an anti-amendment provision limiting the plan sponsor's right to reduce coverage." (Complaint ¶ 23.) However, that

language makes no reference to amendment of the Plan. Instead, the 1998 Plan Document includes a provision, entitled "Amendment," that addresses this very issue, that reserves Qwest's right to amend the Plan at any time, and that reserves in particular Qwest's right to reduce or eliminate participants' life insurance benefits. The provision states:

> Amendment. Except to the extent limited by any applicable collective bargaining agreement, the Company 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. * * * Any . . . amendment of the Plan shall be effective on such date as the Plan Sponsor may determine; provided, however, that no amendment shall reduce the benefits of any Participant with respect to a loss incurred prior to the date such amendment is adopted.

(*Id.* p. QL00028.) The 1998 Plan Document defines "Benefits" to mean "coverage or payments provided in accordance with the terms of this Plan" (*id.* p. QL00004), defines "Plan" to mean "the U S WEST Group Life Insurance Plan . . . *as amended from time to time*" (*id.* p. QL00008 (emphasis added)), and provides that "[b]y becoming a Participant, each . . . Eligible Retiree shall for all purposes be deemed conclusively to have assented to the provisions of the Plan *and all amendments thereto*" (*id.* p. QL00016) (emphasis added).

14. Qwest and US West merged in July 2000. (Complaint ¶ 18.) Qwest's January 2001 SPD for Post-1990 Retirees and Occupational Employees set forth the 1998 Plan Document's revised Benefit Formula. (Ex. 20 pp. QL04109-10.) It also included Reservation of Rights Provisions identical to the first and second provisions quoted in paragraph 10 above. (*Id.* pp. QL03911 & QL04113.) Qwest's January 2001 SPD for Pre-1991 Retirees included the same Benefit Formula and Reservation of Rights Provisions as

the January 2001 SPD for Post-1990 Retirees and Occupational Employees. (Ex. 21 pp. QL01784, QL01786-87 & L01790.)

15. In summary, at the time the Participants retired, the Plan's SPDs stated, not only that Qwest "reserves the right to terminate or amend [the Plan] at any time," but also that if the Plan "is ended or changed . . . you will not be vested in any plan benefits." And at the time the four Pre-1997 Retiree Participants (Kerber, Phelps, Strizich and Lensink) retired, the alternative Floor Amount of $20,000 for Pre-1997 Retirees as to which they claim a "contractually vested" right did not even exist.

C. <u>2005 and 2006 Amendments</u>

16. In October 2005, Qwest announced that it was amending the Plan to reduce the amount of life insurance coverage for occupational retirees to $10,000 effective January 1, 2006. (Complaint ¶ 2; *see also* Ex. 26 p. QL02127.)

17. In October 2006, Qwest announced that it was amending the Plan to reduce the amount of life insurance coverage for management retirees to $10,000 effective January 1, 2007. (Complaint ¶¶ 3 & 96.)

D. <u>Claims for Relief</u>

18. Plaintiffs assert three claims for relief based on the Plan documents and facts set forth above. All three claims are premised on Plaintiffs' assertion that the 1998 Plan Document's revised Benefit Formula set forth "an ironclad rule that the life insurance coverage could not be reduced below a certain level"—namely, $20,000 for Pre-1996 Retirees and $30,000 for Post-1997 Retirees. (Complaint ¶ 1.)

19. Plaintiffs' First Claim, captioned "Breach of Fiduciary Duty and Equitable Estoppel," comprises two distinct claims. In their breach of fiduciary duty claim,

Plaintiffs allege that by reducing life insurance benefits to $10,000, Defendants failed to discharge their duty to act solely in Plaintiffs' interests and in accordance with the rule of the 1998 Plan Document. In their equitable estoppel claim, Plaintiffs ask this Court to apply the principles of equitable estoppel to bar Defendants from reducing life insurance benefits to $10,000. (Complaint ¶¶ 99-109.)

20. Plaintiffs' Second Claim, captioned "Claim to Nullify Illegal Reduction of Plan Coverage and for Reformation of Plan Documents," asks this Court to direct Defendants pursuant to ERISA § 502(a)(2) to issue corrected Plan documents with language disclosing that the Plan provides minimum coverage not subject to further reduction, and to issue an injunction under ERISA § 502(a)(3) 1132(a)(3) requiring Defendants to reform the Plan and issue Plan documents containing this same language. (Complaint ¶¶ 110-118.)

21. Plaintiffs' Third Claim, captioned "ERISA Section 502(a)(1)(B) Claim to Clarify Future Rights to Plan Benefits," asks this Court to declare pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) that (*inter alia*) Pre-1996 and Post-1997 Retirees are entitled to irreducible life insurance coverage of at least $20,000 and $30,000, respectively. (Complaint ¶¶ 119-121.)[3]

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[3] Four of the Plaintiffs assert ancillary claims against Defendants. For example, Kerber, Phelps and Strizich assert claims alleging that they (or in the case of Strizich, his now-deceased spouse) retired from US West before January 1, 1991 and periodically received "Confirmation Statements" stating that US West was not reserving its right to amend or terminate the Plan as to pre-1991 retirees. (Complaint ¶¶ 76-78.) Lensink asserts a claim alleging that although Qwest deems the 2005 Amendment to have become effective January 1, 2006, it did not actually become effective until December 13, 2006, such that she became entitled upon the January 2006 death of her spouse to receive all life insurance benefits payable before that amendment became effective. (*Id.* ¶¶ 79-87.) And Strizich asserts a claim alleging that although Qwest deems the 2006 Amendment to have become effective January 1, 2007, it has not yet become effective, such that Strizich became entitled upon the March 2007 death of his spouse

III. ARGUMENT

Under Fed. R. Civ. P. 12(b)(6), a claim may be dismissed because of plaintiffs' "failure to state a claim upon which relief can be granted." 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). The Court's function on a Rule 12(b)(6) motion is "to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller*, 948 F.2d at 1565. Dismissal is appropriate if, as a matter of law, "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). 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." *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S. Ct. 1955, 1966 (2007) (quotation marks, citation and ellipsis omitted).

Plaintiffs claim that Defendants are barred from reducing life insurance benefits to $10,000 by virtue of (1) the Benefit Formula in the 1998 Plan Document, and (2) Qwest's conduct (estoppel). Both claims fail to state a claim upon which relief can be granted.

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to receive all life insurance benefits payable before that amendment became effective. (*Id.* ¶¶ 88-93.) Although Defendants dispute all of these claims, Defendants do not address them here because their resolution depends on documents not cited in Plaintiffs' Complaint.

A. Plaintiffs' Claim that Qwest Is Contractually Barred by Virtue of the Plan's Benefit Formula from Reducing Life Insurance Benefits to $10,000 Fails To State a Claim Upon Which Relief Can Be Granted Because the Plan Unambiguously Authorizes Qwest to Reduce or Eliminate Such Benefits.

In their memorandum in support of motion for class certification, Plaintiffs assert that this case "involves one overarching question"—whether the "minimum benefits" language in the Plan's Benefit Formula "circumscribed the PLAN sponsor's rights under the reservation of rights clause to reduce the life insurance coverage below the minimum thresholds." (Doc. # 12 ¶ 6.) The answer to this question must be determined by the Plan's terms, rather than by Plaintiffs' characterization of those terms. *Droppleman*, 372 F.2d at 250. And in interpreting the Plan's terms this Court must "examine the plan documents as a whole and, if unambiguous . . . construe them as a matter of law." *Chiles*, 95 F.2d at 1511.

By way of background, "ERISA regulates two types of benefit plans, pension benefit plans that create vested rights and welfare benefit plans that need not create vested rights." *Member Services Life Ins. Co. v. American Nat. Bank and Trust Co. of Sapulpa*, 130 F.3d 950, 954 (10th Cir. 1997). Life insurance benefits are "welfare benefits" under ERISA, *see* 29 U.S.C. § 1002(1), and Plaintiffs acknowledge that the Plan is a welfare benefit plan, *see* Complaint ¶ 21. Welfare benefit plans are specifically exempted from vesting requirements to which pension plans are subject. 29 U.S.C. § 1051(1). As a result, employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 78 (1995).

It is true that "an employer and employee may contract for vested post-employment welfare benefits." *Deboard v. Sunshine Min. and Refining Co.*, 208 F.3d 1228, 1240 (10th Cir. 2000). However, the Tenth Circuit has held that "[c]ontractual vesting

of a welfare benefit is an extra-ERISA commitment that *must be stated in clear and express language*. . . . [It] is a narrow doctrine." *Chiles*, 95 F.3d at 1513 (emphasis added; internal quotation marks omitted). Moreover, "[b]ecause welfare benefits do not statutorily vest under the terms of ERISA, plaintiffs carry the burden of showing an agreement or other demonstration of employer intent to have [such benefits] vest under the plan." *Id.* at 1511.

As set forth above, the 1998 Plan Document stated that retirees' life insurance benefits would be determined by means of a Benefit Formula that included a Floor Amount equal to the greater of 50% of the amount of coverage at the time of retirement or a specified dollar amount ($20,000 for Pre-1997 Retirees and $30,000 for Post-1996 Retirees). To prevail on their claims, Plaintiffs must prove that this Benefit Formula constituted an "extra-ERISA commitment . . . stated in clear and express language" (*Chiles*, 95 F.3d at 1513) that life insurance benefits would not be reduced below the minimum levels stated in the formula. But the 1998 Plan Document expressly states that Qwest reserves the right "to amend the Plan at any time," including "to reduce, change, eliminate, or modify" benefits. As set forth below, Plaintiffs' contractual vesting claim fails under both Tenth Circuit law and the law of every other circuit to address the issue, because the 1998 Plan Document cannot be held to state in "clear and express language" that retirees are entitled to a minimum level of life insurance benefits when it expressly authorized Qwest to reduce or eliminate those benefits.

1. <u>Plaintiffs' Contractual Vesting Claim Fails Under Tenth Circuit Law.</u>

The Tenth Circuit's decision in *Chiles* is dispositive of Plaintiffs' claims. The plaintiffs in *Chiles* contended, as do Plaintiffs here, that a plan document's explicit promise to provide a particular welfare benefit (health benefit premium payments) for so long as an employee was disabled was inconsistent with the document's reservation of rights provision,

and that the former provision trumped the latter. *Id.* at 1511. The Tenth Circuit rejected this claim as a matter of law, holding that by virtue of the document's reservation of rights provision—which was substantially identical to the provision in the 1998 Plan Document (*see id.* at 1509), and which the court said "retained almost unlimited discretion in [the employer] to change the plan" (*id.* at 1513)—plaintiffs' health benefit premium payments did not vest once plaintiffs qualified for long-term disability.

The Tenth Circuit began its analysis in *Chiles* by noting that under "the weight of case authority," a "reservation of rights clause allows the employer to retroactively change the medical benefits of retired participants, *even in the face of clear language promising company-paid lifetime benefits*." *Id.* at 1512 n. 2 (emphasis added). The court stated that it didn't need to decide whether to adopt this majority rule in *Chiles*, because three factors present in that case—*all* of which are present here—compelled rejection of plaintiffs' claim that their right to receive benefits contractually vested while the plan was in operation.

First, the Tenth Circuit noted that the plan's reservation of rights provision included a phrase making it clear that the employer retained the right to change the benefits of all plan participants, including those who had already qualified for long-term disability:

> [T]he LTD plan's reservation of rights clause contains a proviso. Described in the plan's SPD, it states: "If the group Long-Term Disability Plan terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claim for such benefits will continue as long as you remain totally disabled as defined by the plan." Here, the LTD plan specifically contemplates a situation in which Control Data's discretion to change the plan is circumscribed. We find that the interpretive maxim of *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—properly applies to this case. By explicitly listing a qualification to Control Data's ability to change the LTD plan, it

> is proper to infer that the right to make other changes to disabled participants' benefits was reserved.

Id. at 1512 (citation omitted). Here as in *Chiles*, the 1998 Plan Document specifically contemplates a situation in which Qwest's discretion to change the Plan is circumscribed: It states that "no amendment shall reduce the benefits of any Participant with respect to a loss incurred prior to the date such amendment is adopted." (Ex. 19 p. QL00028). And here as in *Chiles*, "the interpretive maxim of *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—properly applies to this case. By explicitly listing a qualification to [Qwest's] ability to change the . . . plan, it is proper to infer that the right to make other changes to . . . participants' benefits was reserved." 95 F.3d at 1512.

Second, the Tenth Circuit stated that its holding in *Chiles* was supported by "language in the LTD master plan stating that all 'participants' are bound by amendments" and defining "participants" to include disabled employees. *Id.* at 1512-13. Here too, the 1998 Plan Document defines "participants" to include "Eligible Retirees" (Ex. 19 pp. QL00008 & QL00005), and states that "[b]y becoming a Participant, each . . . Eligible Retiree shall for all purposes be deemed conclusively to have assented to the provisions of the Plan *and all amendments thereto*" (*id.* p. QL00016 (emphasis added)). As the Tenth Circuit stated in *Chiles*, this language supports a holding that Qwest retirees are bound by the 2005 and 2006 Amendments to the Plan.

Finally, the Tenth Circuit stated that its holding in *Chiles* made "particular sense in this case, where plaintiffs' reading of the plan would render the termination exception superfluous; under plaintiffs' interpretation, Control Data may not alter the benefits of disabled participants under any condition." 95 F.3d at 1513. Here too, Plaintiffs'

reading of the 1998 Plan Document would render its amendment provision superfluous: Under Plaintiffs' interpretation, Qwest would be powerless to reduce life insurance benefits below the minimum amounts described in the Benefit Formula even though the Plan expressly empowered it to reduce, and indeed eliminate, those benefits.

Based on the analysis set forth above, the Tenth Circuit held that the plan documents in *Chiles* were not ambiguous with respect to the employer's entitlement to modify plaintiffs' benefits while the plan was in operation, and that the benefits did not contractually vest during such time. *Id.* at 1514. This analysis compels a holding here that the 1998 Plan Document is not ambiguous with respect to Qwest's entitlement to modify retirees' life insurance benefits while the Plan is in operation, and that those benefits have not contractually vested. *See also Welch v. Unum Life Ins. Co. of America*, 382 F.3d 1078, 1086 (10th Cir. 2004) (holding that disability benefits did not vest upon plaintiff's attaining disability where the language on which plaintiff relied did not state that benefits vested and the plan reserved defendant's right to change the plan).

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

Because the Tenth Circuit was able to decide *Chiles* based on the analysis described above, it declined to decide whether a general reservation of rights provision is itself sufficient to allow an employer to reduce retiree benefits even in the face of clear language promising specified "lifetime" benefits (benefits not promised here). However, *all seven* other circuits to address this question—the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits—have answered this question in the affirmative.

For example, in *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90 (2d Cir. 2001), a 1987 SPD stated that the employer would provide life insurance coverage to retirees throughout their lives in a specified amount—"the amount of their annual salary at retirement"—but also stated that the employer could amend or terminate the plan at any time. *Id.* at 98. Thus, the 1987 SPD (like the 1998 Plan Document in this case) included "language that *both* appears to promise lifetime life insurance coverage at a particular level *and* clearly reserves [employer's] right to amend or terminate such coverage." *Id.* at 99 (emphasis in original). The Second Circuit affirmed the district court's entry of summary judgment against plaintiffs on their claim that this SPD created a contractual vested right to lifetime life insurance benefits, stating: "Because the same document that potentially provided the 'lifetime' benefits also clearly informed employees that these benefits were subject to modification, we conclude that the language contained in the 1987 SPD is not susceptible to an interpretation that promises vested lifetime life insurance benefits." *Id.* So too here, because the same document that potentially provided lifetime insurance benefits in the minimum amounts claimed by Plaintiffs also clearly informed retirees that these benefits were subject to modification, that document is not susceptible to an interpretation that promises vested lifetime life insurance benefits.

Similarly, in *In re Unisys Corp. Retiree Medical Benefit ERISA Litig.,* 58 F.3d 896 (3d Cir. 1995), the retirees asserted that medical benefit plans were ambiguous because they were susceptible to either of two interpretations: (1) the *retirees'* interpretation that plan language promising specified "lifetime" benefits limited the scope of the plans' reservation of rights provisions (*i.e.*, Plaintiffs' interpretation here); or (2) the *company's* interpretation that the plans' reservation of rights provisions limited this promissory language (*i.e.*, Qwest's

interpretation here). *Id.* at 904. In affirming summary judgment for the company, the Third Circuit adopted the second of these interpretations as a matter of law, holding that the plans' reservation of rights provisions unambiguously controlled the promise of lifetime medical benefits to retirees:

> [T]he fact that the Sperry plans used terms such as 'lifetime' or 'for life' to describe the duration of retiree medical benefits, while at the same time expressly reserving the company's right to terminate the plans under which those benefits were provided, did not render the plans 'internally inconsistent' and therefore ambiguous here. An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were provided, has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist.

Id. at 903-04 (emphasis in original). So too here, when Qwest provided life insurance benefits in specified minimum amounts while at the same time reserving its right to amend the Plan establishing those benefits, it informed Plan participants of the minimum amount of such benefits *provided* the Plan was not amended or terminated.

In *Sprague v. Gen. Motors Corp.,* 133 F.3d 388 (6th Cir. 1998) (en banc), the SPD similarly provided *both* that lifetime health coverage would be provided to retirees *and* that the employer reserved the right to amend or terminate the plans. *Id.* at 401. The Sixth Circuit affirmed the district court's entry of judgment for the employer, stating: "We see no ambiguity in a summary plan description that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that the terms of the current plan are subject to change." *Id.* at 410. So too here, there is no ambiguity in the provisions of the 1998 Plan Document stating *both* that the terms of the current Plan

entitle them to life insurance benefits in a specified minimum amount *and* that the terms of the current Plan are subject to change.

The Seventh Circuit reached the same conclusion in *UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698 (7th Cir. 2003), stating:

> We must resolve the tension between the lifetime benefits clause, and the plan termination and reservation of rights clauses, by giving meaning to all of them. Reading the document in its entirety, the clauses explain that although the plan in its current iteration entitles retirees to health coverage for the duration of their lives and the lives of their eligible surviving spouses, the terms of the plan . . . are subject to change at the will of [the employer].

Id. at 703 (citation omitted); *accord Barnett v. Ameren Corp.*, 436 F.3d 830, 833 (7th Cir. 2006) ("when 'lifetime' benefits are granted by the same contract that reserves the right to change or terminate the benefits, the 'lifetime' benefits are not vested") (internal quotation marks and citation omitted).

The Fourth, Fifth and Eighth Circuits have also recognized that a general reservation of rights provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually. *See Gable v. Sweetheart Cup Co.,* 35 F.3d 851, 856 (4th Cir. 1994) (holding that the "express reservation of the company's right to modify or terminate the participants' benefits is plainly inconsistent with any alleged intent to vest those benefits," and that "the modification clause, standing alone, is more than sufficient to defeat plaintiffs' claim that the company provided vested benefits and thus waived its statutory right to modify or terminate the health benefit plan"); *Spacek v. Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998), *abrogated on other grounds, Central Laborers-Pension Fund v. Heinz,* 541 U.S. 739

(2004) (stating that "[t]he strong weight of authority throughout the circuits indicates that, in the area of welfare benefits . . . a general amendment provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually"); *Howe v. Variety Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990) (stating that "the burden of proving vested welfare benefits" is "not met by the employer's promise to provide welfare benefits 'until death of retiree' where the employer had expressly reserved the right to terminate or amend the plan").

To allow Plaintiffs to pursue their contractual vesting claim notwithstanding the Plan's Reservation of Rights Provision, this Court would need to ignore the holdings of the Tenth Circuit in *Chiles* as well as those of the seven other circuits cited above. The Court would also need to adopt Plaintiffs' interpretation of the 1998 Plan Document as a contract at war with itself. According to Plaintiffs, what the document's Reservation of Rights Provision gives Qwest with one hand (the right to reduce or eliminate benefits), the document's Benefit Formula takes away with the other. But "[i]n deciding whether an ERISA employee welfare benefit plan provides for vested benefits, we apply general principles of contract construction," *Deboard*, 208 F.3d at 1240, and a "cardinal principle of contract construction [is] that a document should be read to give effect to all its provisions and to render them consistent with each other." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). Construing the Benefit Formula in a way that renders the Reservation of Rights Provision ineffective, as Plaintiffs ask this Court to do, violates this cardinal principle of contract construction. It is also unnecessary, because as the cases cited above recognize, there is no inconsistency in Plan provisions stating both that the terms of the current Plan provide specified life insurance coverage and that the Plan's terms are subject to change.

Although Plaintiffs repeatedly characterize the Benefit Formula as an "anti-amendment provision" (*see* Complaint ¶¶ 1, 23, 57, 61, 68 & 109), it is no such thing. The Benefit Formula simply describes the varying amounts of life insurance payable on a retiree's death depending on when the retiree dies—100% of the retiree's last annual salary if death occurs in the first year after retirement, 90% of such salary if death occurs in the second year, 80% of such salary if death occurs in the second year, and so on, down to an amount equal to the greater of 50% of such salary or either $20,000 or $30,000 depending on whether the person retired before or after January 1, 1997. The Benefit Formula does not even remotely constitute an "anti-amendment provision," because (1) its says nothing about Plan amendments, (2) the document containing this formula includes a separate provision addressing Plan amendments, and (3) that provision expressly authorizes Qwest to amend the Plan to reduce or eliminate benefits, which necessarily include those described in the Benefits Formula.

Similarly, although Plaintiffs repeatedly characterize the minimum coverage levels in the Plan's Benefit Formula as "vested" (*see id.* ¶¶ 73, 77 & 78), this characterization cannot be squared with either the language of the Plan documents or the law establishing that welfare benefits are not vested. For at least two decades, the Plan SPDs have stated that participants will *not* be vested in any Plan benefits if Qwest amends the Plan. *See* Ex. 15 p. QL01954 ("[i]f the group life insurance plan is ended or changed . . . *you will not be vested* in any plan benefits"); (emphasis added); *accord* Ex. 12 p. QL04562, Ex. 16 p. QL03743, Ex. 17 QL00114, Ex. 20 p. QL04113 & Ex. 21 p. QL01790. This anti-vesting language negates Plaintiffs' claim that they have a vested right to life insurance coverage of at least $20,000 or $30,000.

Finally, there is nothing improper about Qwest's exercising a power to amend that it has expressly reserved. *See Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133, 136 (6th Cir. 1993) ("[i]t is well established that an employer who reserves the right to alter a plan may exercise that right"). Indeed, it is in the long-term interests of employees and retirees that companies have the power to change the welfare benefits they offer. As Judge Easterbrook stated in *Frahm v. Equitable Life Assurance Society of the U.S.*, 137 F.3d 955, 962 (7th Cir. 1998):

> In the short run use of this power may injure retirees; but in the longer run, knowledge that plans may be changed encourages employers to make better offers to their labor force. If employers knew that they were locked in, they would be more conservative in making promises, to the potential detriment of the workers.

Here, for example, Qwest elected in 1998 to revise the Floor Amount in the Benefit Formula in a way that increased the amount of life insurance coverage for 80% of eligible retirees. (*See* Ex. 18.) This is precisely the kind of "better offer" employers would decline to make if this Court were to hold a company is barred from exercising a right to amend it has expressly reserved. For all these reasons, Plaintiffs' claim that Qwest is contractually barred by virtue of the Plan's Benefit Formula from reducing life insurance benefits to $10,000 fails to state a claim upon which relief can be granted.

B. Plaintiffs' Claim that Qwest Is Equitably Estopped by Virtue of the Plan's Benefit Formula from Reducing Life Insurance Benefits to $10,000 Fails To State a Claim Upon Which Relief Can Be Granted Because the Plan Unambiguously Authorizes Qwest to Reduce or Eliminate Such Benefits.

Plaintiffs also claim that Qwest is equitably estopped by virtue of the Plan's Benefit Formula from reducing life insurance benefits to $10,000. This claim fails for the same reason that Plaintiffs' "contractual vesting" claim fails—because the 1998 Plan

Document unambiguously authorizes Qwest to reduce or eliminate the very benefits that Plaintiffs claim Qwest is equitably estopped from reducing.

As an initial matter, the Tenth Circuit has never recognized an ERISA claim for equitable estoppel. *See Cannon v. Group Health Service of Oklahoma*, 77 F.3d 1270, 1277 (10th Cir. 1996); *see also Fisher v. U.S. Steel, Inc. Employee Health Plan*, 2003 WL 21488711 *6 (copy attached as Attachment B) (D. Kan. 2003) (stating that because of "the extremely limited scope of remedies provided under ERISA, the court does not believe that the Tenth Circuit will ever recognize" an equitable estoppel claim). Based on this fact alone, the Court should dismiss Plaintiffs' equitable estoppel claim.

Even if this Court were to assume that the Tenth Circuit would recognize an equitable estoppel claim in the ERISA context, Plaintiffs' estoppel claim must be dismissed. The Tenth Circuit has made it clear that ERISA estoppel would apply only "where the terms of a plan are ambiguous and the employer's communications constituted an interpretation of that ambiguity." *Averhart v. U.S. West Management Pension Plan*, 46 F.3d 1480, 1486 (10th Cir. 1994) (quotation marks, brackets and citation omitted). This is consistent with the views of no less than seven other circuits. *See In re Unisys Corp.*, 58 F.3d at 902 (3d Cir.); *High v. E-Systems Inc.*, 459 F.3d 573, 580 (5th Cir. 2006); *Moore v. LaFayette Life Ins. Co.*, 458 F.3d 416, 427-28 (6th Cir. 2006); *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 639-40 (7th Cir. 2004); *Slice v. Sons of Norway*, 34 F.3d 630, 634 (8th Cir. 1994); *Pisciotta v. Teledyne Industries, Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996); *Novak v. Irwin Yacht & Marine Corp.*, 986 F.2d 468, 472 (11th Cir. 1993).

As these cases make clear, Plaintiffs' equitable estoppel claim fails for the same reason that their contractual vesting claim fails: because the Plan's Reservation of

Rights Provision unambiguously authorizes Qwest to reduce or eliminate life insurance benefits. *Robinson v. Sheet Metal Workers' Nat. Pension Fund, Plan A*, 441 F. Supp. 2d 405, 432 (D. Conn. 2006), is a case in point:

> [To support their estoppel claim] Plaintiffs point to precisely the same evidence they marshaled in support of their contractual vesting claim: Plan provisions indicating that payments would be made "for life." The Court has already found that these statements, when read in conjunction with other provisions expressly reserving the Trustees' right to amend the Plan, did not constitute a contractual promise that benefits would never be reduced. *A fortiori,* then, these same provisions cannot satisfy the first element of Plaintiffs' promissory estoppel claim.

Similarly, the Third Circuit in *In re Unisys Corp.* affirmed the district court's ruling that the retirees' estoppel claim failed as a matter of law:

> While we acknowledge that many retirees may have relied to their detriment on their interpretation of the summary plan descriptions as promising vested or lifetime benefits, we nonetheless must reject their estoppel claim. * * * The retirees' interpretation of the plans as providing lifetime benefits is not reasonable as a matter of law because it cannot be reconciled with the unqualified reservation of rights clauses in the plans.

58 F.3d at 907. And the Sixth Circuit in *Sprague* likewise held that plaintiffs' estoppel claims failed as a matter of law:

> [E]stoppel can only be invoked in the context of ambiguous plan provisions. There are at least two reasons for this. First, . . . estoppel requires reasonable or justifiable reliance by the party asserting the estoppel. That party's reliance can seldom, if ever, be reasonable or justifiable if it is inconsistent with the clear and unambiguous terms of plan documents available to or furnished to the party. Second, to allow estoppel to override the clear terms of plan documents would be to enforce something other than the plan documents themselves. That would not be consistent with ERISA.

133 F.3d at 404. Because the Plan documents here unambiguously allow Qwest to reduce or eliminate Plan benefits, Plaintiffs' equitable estoppel claim fails. Finally, because Plaintiffs have failed to state a contractual vesting or equitable estoppel claim on their own behalf, these same class action claims must also be dismissed. *See Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1213 (10th Cir. 2006) ("Because we conclude the district court correctly determined that Robey failed to state a claim on his own behalf under the FDCPA, we also conclude that Robey's class-action allegations were properly dismissed.").

IV. CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court dismiss Plaintiffs' claims asserting that Qwest is contractually barred or equitably estopped by virtue of the Plan's Benefit Formula from reducing life insurance benefits to $10,000.[4]

DATED: June 20, 2007.

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

[4] Although a few ancillary claims are not addressed in this motion (*see* n. 2 *supra*), a motion to dismiss fewer than all claims in a complaint suspends the deadline to answer the remaining claims until ten days after the Court rules on the "partial" motion to dismiss. *See, e.g., Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 434 F. Supp. 2d 598, 637-40 (N.D. Iowa 2006); *Godlewski v. Affiliated Computer Servs., Inc.*, 210 F.R.D. 571, 572-73 (E.D. Va. 2002); *Tingley Sys. Inc. v. CSC Consulting Inc.*, 152 F. Supp. 2d 95, 121-22 (D. Mass. 2001); *Finnegan v. University of Rochester Medical Center*, 180 F.R.D. 247, 249-50 (W.D.N.Y. 1998); *Oil Express National, Inc. v. D'Alessandro*, 173 F.R.D. 219, 220-21 (N.D. Ill. 1997); *Brocksopp Eng'g Inc. v. Bach-Simpson Ltd.*, 136 F.R.D. 485, 486-87 (E.D. Wis. 1991).

mcarroll@sah.com

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2007, I electronically filed the foregoing **Qwest Defendants' Motion To Dismiss Under Fed. R. Civ. P. 12(b)(6)** 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