Subj: **Kerber v. Qwest / Additional documents per Rule 26. . .**
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February 23, 2006

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Beth:

Yesterday, you told me you had about 100 more pages to send to me, including emails to or from Qwest CEO Notebaert concerning the issues in the *Kerber v. Qwest* (Pension Death Benefits) case. Please email those papers to me.

Pursuant to Fed.R.Civ.Proc., Rule 26, attached hereto is a copy of the standardized information given to U S WEST management employees during year 1996. The seven (7) page document dated November 13, 1996 is entitled "U S WEST PENSION PLAN INFORMATION FOR MANAGEMENT EMPLOYEES", and

discusses the Pension Death Benefit as follows:

"B.1. Lump Sum: This option provides immediate payment of the entire present value of your pension benefit under the U S WEST Pension Plan. In the event of your death, no benefits are payable to anyone else.

G. <u>DEATH BENEFITS</u>

If you elect any of the monthly annuity options and are eligible, a death benefit equal to one year's pay (based on eligible pay for the 12-month period prior to 3/1/93) may be paid under the U S WEST Pension Plan to any "qualified" beneficiary(ies) you may have at the time of your death. This death benefit is a Pension Plan benefit and is in addition to benefits paid under the Group Life Insurance Program. If you have a Term of Employment (TOE) date of 2/28/93 or earlier, you will always remain eligible to a death benefit to the extent an eligible beneficiary under the plan is living.

If you elect to receive all or a portion of your pension benefit as a lump sum and are eligible, the present value of the death benefit equal to one year's pay (based on eligible pay for the 12-month period prior to 3/1/93) will be included in your lump sum payment. In the event of your death after such payment, no further death benefit will be payable from the U S WEST Pension Plan. To be eligible for the death benefit, you must have a term of employment (TOE) date of February 28, 2003 or earlier and meet the following age and service criteria." **[See the chart appearing on page 6 of the attachment hereto].**

Notably, within this official informational document, there was nothing said to suggest or inform the management employees that the Pension Death Benefit might have been considered, if at all, by someone at U S WEST as a take-away benefit. Instead, up

until at least all of year 1996, the company kept telling everyone that you will always remain eligible to a death benefit. By now, you have seen hundreds of such documents within the thousands of pages gathered by Named Plaintiffs and other U S WEST/Qwest retirees and produced to you which documents represented and confirmed the death benefit was an entitlement. You have seen the thousands of email messages and letters sent to Qwest senior leadership confirming these matters. You have seen numerous pre-1997 SPDs sent to retirees, none of which SPDs told anyone that the Pension Death Benefit could be considered a takeaway benefit. You have seen the official Form 5500s filed with both the federal Internal Revenue Service and the federal Department of Labor, signed under penalty of perjury by the pension plan administrators, reporting that the Pension Death Benefit was factored into the "vested benefits" column.

So, in light of all the overwhelming documentary evidence in favor the position of the retirees, Named Plaintiffs must ask: Why doesn't the company at least agree upon a *partial settlement* of this case and confirm that the Pension Death Benefit is an entitlement to at least all those persons who took service pension retirements up to the end of year 1996? Common sense says we should file a stipulation with the court advising that we have reached a partial settlement in the *Kerber* case protecting the rights of all pre-1997 retirees and that we agree to litigate only those issues with respect to the Pension Death Benefits rights of persons retiring in year 1997 and going forward. It only make good sense to limit this dispute, and at least agree upon a guarantee to be memorialized in the governing pension plan documents, especially in light of the overwhelming evidence supportive of the rights of pre-1997 U S WEST retirees who were always told they were "entitled" to the Pension Death Benefits.

After you share this proposal with the Qwest decision makers, including Senior Attorney Cynthia Delaney, please respond. As soon as possible, I think we should jointly report to Judge Boland that common sense has prevailed. Thank you.

Curtis

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Attachment (*Kerber v. Qwest* - Rule 26 supplemental document production - 7 pages)

c: Named Plaintiffs in *Kerber v. Qwest*
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March 13, 2006

VIA EMAIL AND FACSIMILE

Mr. Curtis L. Kennedy
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Re: Edward Kerber, et al. v. Qwest Pension Plan, et al.

Dear Curtis:

This letter is in response to your email of February 23 proposing a settlement of part of this case. You propose that Qwest confirm that the Pension Death Benefit is an entitlement to individuals who retired with a service pension prior to January 1, 1997. Qwest rejects that proposal. Your purported "common sense" proposal as you know, from earlier statements you have made regarding the death benefit and the decision by Judge Nottingham in the Jarvis case, ignores the status of the Pension Death Benefit as an ancillary pension benefit that is subject to elimination pursuant to Qwest's reservation of rights. Common sense, in fact, would lead, not to an agreement by defendants to guarantee the Death Benefit, but to plaintiffs' dismissal, at the very least, of claims by pre-2004 retirees who continue to receive the Death Benefit.

As you have previously acknowledged, "ERISA does not give life insurance or death benefits the same protection afforded to 'accrued pension benefits' or 'vested benefits,' such as a monthly annuity payment. ERISA allows companies ...to treat life insurance and death benefits as 'take away benefits', provided there is a 'reservation of rights' language published in the written employee benefit booklet materials given to workers and retirees." *November 17, 2003 Letter from Curtis Kennedy to Barbara M. Wilcox.* The Pension Plan [including the Summary Plan Description as modified throughout the years] has consistently contained clear reservation of rights language that allows the Plan Sponsor to amend the Plan to eliminate benefits, such as the Death Benefit, that you refer to as a "take away benefit." This language appeared in the earliest

version of the post divestiture Plan documents. Section 11 of the U.S. WEST Management Pension Plan effective January 1, 1984, As Amended Effective January 1, 1986, and Section 10 of the U.S. West Pension Plan, Effective January 1, 1984, As Amended Effective January 1, 1986, for example provided that "The Committee...may from time to time make changes in the Plan as set forth in this document, and the Company may terminate said Plan, but such changes or termination shall not affect the rights of any employee without his consent, to any benefit or pension to which he may have previously become entitled hereunder."[1] As you are undoubtedly aware, but persist in ignoring, Judge Nottingham has held that this language is not more restrictive of the plan sponsor's right to amend than subsequent reservation of rights language that excludes the employee consent language. See Jarvis v. U S WEST, Inc., et al. Civil Action No. 97-N-2189 (D.Colo. 1999) at 11,12. Once this issue is resolved in favor of defendants, there is no question that subsequent reservation of rights language clearly allows for elimination of pension benefits, such as the Death Benefit, that are not accrued.

Although certain language in plan documents can create a "vested" or non forfeitable benefit, courts have considered language similar to the reservation of rights language in the Pension Plan and have concluded the death benefit is not a vested benefit until the participant dies with a qualified beneficiary. Howe v. Varity, 896 F.2d 1107 (8th Cir. 1990), appealed to U.S. Supreme Court on other grounds, see Varity v. Howe, 516 U.S. 489 (1996). Moreover, the Tenth Circuit has stated intent to vest an ancillary benefit must be in "clear and express language." Chiles v. Ceridian Corp., 95 F.3d 1505, 1513 (10th Cir. 1996). No such language appears in any of the plan documents.

Your attempt to rely on documents other than the Pension Plan or applicable summary plan descriptions, such as the form 5500s filed with the government and employer communications that generally refer to the Death Benefit as an entitlement, do not, and cannot, act to vest the Death Benefit, which is clearly an ancillary benefit under the Pension Plan and applicable summary plan descriptions. See Helfrik v. Carle Clinic Ass'n P.C., 328 F.3d 915, 917, *cert. denied,* (7th Cir.) 540 U.S. 1071 (2003)("Employer prepared summaries...have no footing in ERISA and could not be enforced against the plan without disregarding the boundary between two distinct entities: the plan and the employer.") Although you have expended significant effort to identify employer communications that you assert "vest" the Death Benefit, to date, you have failed to identify any legal authority that supports your claim that these documents require that the Pension Plan treat the Death Benefit as vested.

Defendants, however, are confident of ultimate success in this case, regardless of the number of times the Death Benefit may have been referred to as an "entitlement." Use of that or similar words simply does not render the Death Benefit an accrued benefit.

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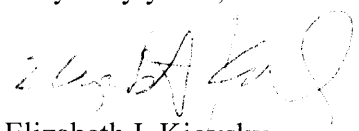
[1] Similarly, the Summary Plan Descriptions, which relate to the early versions of the Plan, from the inception of U. S. WEST to the restatement of the Plan in 1989, contain language allowing for changes in the Plan as long as such changes do not affect the rights to benefits to which the employee has already become entitled.

The Death Benefit always has been and remains an ancillary benefit that can be changed by plan amendment. Your settlement proposal is therefore unacceptable to Defendants.

Very truly yours,



Elizabeth I. Kiovsky

cc: Cynthia Delaney, Esq.