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 BRIEF IN OPPOSITION TO PLAINTIFFS' SECOND AMENDED MOTION FOR CLASS CERTIFICATION

June 30, 2008

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Table of Contents

I. INTRODUCTION 1

II. CLAIMS AND PROPOSED CLASSES/SUBCLASSES 3

III. ARGUMENT 5

A. Plaintiffs' Motion Should Be Denied Because Plaintiffs Cannot Satisfy the Requirements of Rule 23(a). 6

1. The Commonality Requirement Is Not Satisfied With Respect to the Third, Fourth, Fifth, and Sixth Claims Because the Class and Subclasses Proposed for Those Claims Include Tens of Thousands of Retirees Who Were Not Affected by the Conduct Underlying Those Claims and Cannot Benefit from the Relief Sought Therein. 6

2. Plaintiffs' Claims and Defenses Are Not Typical of the Claims and Defenses of Numerous Members of the Class and Subclass Proposed for Plaintiffs' First, Third, Fourth, Sixth, and Seventh Claims. 10

3. Plaintiffs Are Not Adequate Class Representatives Because Their First, Third and Fourth Claims Seek Relief that Could Jeopardize Putative Class Members' Existing Benefits. 13

a) The Relief Sought by Plaintiffs Could Jeopardize All Benefits for Which Putative Class Members Are Eligible Under the Life Plan. 14

b) The Relief Sought by Plaintiffs Could Jeopardize Substantial Benefits that Many Putative Class Members Have Received Under the Health Plan. 15

B. Plaintiffs' Motion Should Be Denied Because Plaintiffs Cannot Establish the Additional Requirements of Rule 23(b). 19

1. Certification Is Not Proper Under Rule 23(b)(1). 22

2. Certification Is Not Proper Under Rule 23(b)(2). 24

a) Rule 23(b)(2) Certification Is Improper with Respect to Plaintiffs' First Through Sixth Claims Because Those Claims Involve Detrimental Reliance Issues. 24

b) Rule 23(b)(2) Certification Is Also Improper with Respect to Plaintiffs' Fifth and Sixth Claims Because Those Claims Seek Primarily Monetary Relief. 26

3. Certification Is Not Proper Under Rule 23(b)(3)................................... 27

IV. CONCLUSION 29

Table of Authorities

Cases

Adams v. Avondale Industries, Inc.,
905 F.2d 943 (6th Cir. 1990) 20

Albertson's, Inc. v. Amalgamated Sugar Co.,
503 F.2d 459 (10th Cir. 1974) 13, 18

Aldridge v. Lily-Tulip, Inc.,
40 F.3d 1202 (11th Cir. 1994) 20

Alford v. Kimberly-Clark Tissue Co.,
14 F. Supp. 2d 1290 (S.D. Ala. 1998) 21

Allison v. Citgo Petroleum Corp.,
151 F.3d 402 (5th Cir. 1998) 24

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997).. 13, 27

Andrews v. Am Tel. & Tel. Co.,
95 F.3d 1014 (11th Cir. 1996) 27

Beck v. Pace Int'l Union,
551 U.S. __, 127 S. Ct. 2310 (2007).. 14

Bolin v. Sears, Roebuck & Co.,
231 F.3d 970 (5th Cir. 2000) 27

Broussard v. Meineke Discount Muffler Shops, Inc.,
155 F.3d 331 (4th Cir. 1998) 9, 17

Burstein v. Retirement Acct. Plan,
334 F.3d 365 (3rd Cir. 2003) 20

Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 28

Dierks v. Thompson,
414 F.2d 453 (1st Cir. 1969).. 13

Elliot Indus. Limited Partnership,
407 F.3d 1091 (10th Cir. 2005) 19

Franklin v. First Union Corp.,
84 F. Supp. 2d 720 (E.D. Va. 2000) 21

General Tel. Co. of the Southwest v. Falcon,
457 U.S. 147 (1982).. 6

Hansberry v. Lee,
311 U.S. 32 (1940) 13

Heffner v. Blue Cross & Blue Shield of Alabama, Inc.,
443 F.3d 1330 (11th Cir. 2006) 25

Hooven v. Exxon Mobil Corp.,
465 F.3d 566 (3rd Cir. 2006) 20

Hudson v. Delta Air Lines, Inc.,
90 F.3d 451 (11th Cir. 1996) 25

In re Electronic Data Systems Corp. "ERISA" Litigation,
224 F.R.D. 613 (E.D. Tex. 2004) 22, 25, 27

In re HealthSouth Corp. Securities Lit.,
213 F.R.D. 447 (N.D. Ala. 2003) 10

In re Initial Public Offering Sec. Lit.,
471 F.3d 24 (2d Cir. 2006) 6, 27

In re Integra Realty Resources, 354 F.3d 1246 (10th Cir. 2004) 23

In re Telectronics Pacing Systems, Inc.,
221 F.3d 870 (6th Cir. 2000) 23

JB. ex rel. Hart v. Valdez,
186 F.3d 1280 (10th Cir. 1999) 5

Jensen v. SIPCO, Inc.,
38 F.3d 945 (8th Cir. 1994) 26

Jones v. Am. Gen. Life & Accident Ins. Co.,
213 F.R.D. 689 (S.D. Ga. 2002) 25

Kas v. Financial General Bankshares, Inc.,
105 F.R.D. 453 (D.D.C. 1984) 11

Langbecker v. Electronic Data Systems Corp.,
476 F.3d 299 (5th Cir. 2007) 26

Lemon v. Int'l Union of Operating Engineers, Local 139, AFL-CIO,
216 F.3d 577 (7th Cir. 2000) 24

Lockheed Corp. v. Spink,
517 U.S. 882 (1996) 14

Loskill v. Barnett Banks, Inc. Severance Pay Plan,
289 F.3d 734 (11th Cir. 2002) 21

McFarland v. Yegen,
1989 U.S. Dist. LEXIS 16965 (D.N.J. 1989) 11

Metzger v. American Fidelity Assur. Co.,
249 F.R.D. 375 (W.D. Okla. 2007) 18

Monarch Asphalt Sales Co., Inc. v. Wilshire Oil Co. of Texas,
511 F.2d 1073 (10th Cir. 1975) 5, 19

Murphy v. Keystone Steel & Wire Co.,
61 F.3d 560 (7th Cir.1995) 20

Noble v. 93 University Place Corp.,
224 F.R.D. 330 (S.D.N.Y. 2004) 10

Oscar Private Equity Investments v. Allegiance Telecom, Inc.,
487 F.3d 261 (5th Cir. 2007) 5, 6

Phillips v. Klassen,
502 F.2d 362 (D.C. Cir. 1974) 13

Pickett v. Iowa Beef Processors,
209 F.3d 1276 (11th Cir. 2000) 18

Plekowski v. Ralston Purina Co.,
68 F.R.D. 443 (M.D. Ga. 1975) 13

Pueblo of Zuni v. U.S.,
243 F.R.D. 436 (D.N.M. 2007) 9

Reed v. Bowen,
849 F.2d 1307 (10th Cir. 1988) 6

Renton v. Kaiser Foundation Health Plan, Inc.,
2001 WL 1218773 (W.D. Wash. 2001) 11

Retired Chicago Police Ass'n v. City of Chicago,
7 F.3d 584 (7th Cir. 1993) 18

Rex v. Owens ex rel. Okla.,
585 F.2d 432 (10th Cir. 1978) 5

Ruckelshaus v. Sierra Club,
463 U.S. 680 (1983) 10

Sandwich Chef v. Reliance Nat'l Indem. Ins. Co.,
319 F.3d 205 (5th Cir. 2003) 27

Shook v. El Paso County,
386 F.3d 963 (10th Cir. 2004) 6, 24

Smith v. Brown & Williamson Tobacco Corp.,
174 F.R.D. 90 (W.D. Mo. 1997) 22

Spann v. AOL Time Warner, Inc.,
219 F.R.D. 307 (S.D.N.Y. 2003) 12

Sprague v. General Motors Corp.,
133 F.3d 388 (6th Cir. 1998) 25

Taylor v. Safeway Stores, Inc.,
524 F.2d 263 (10th Cir. 1975) 10

Tober v. Charnita, Inc.,
58 F.R.D. 74 (M.D. Pa. 1973) 22

Tootle v. ARINC, Inc.
222 F.R.D. 88 (D. Md. 2004) 25

Trevizo v. Adams,
455 F.3d 1155 (10th Cir. 2006) 6

United States Parole Comm'n v. Geraghty,
445 U.S. 388 (1980) 9

United Steelworks of Am. v. IVACO,
216 F.R.D. 693 (N.D. Ga. 2002) 26

Valley Drug Co. v. Geneva Pharmaceuticals, Inc.,
350 F.3d 1181 (11th Cir. 2003) 18

Vaszlavik v. Storage Technology Corp.,
175 F.R.D. 672 (D. Colo. 1997) 10

Vengurlekar v. Silverline Technologies, Ltd.,
220 F.R.D. 222 (S.D.N.Y. 2003) 27

Whitfield v. Torch Operating Co.,
935 F. Supp. 822 (E.D. La. 1996) 21

Williams v. Imhoff,
203 F.3d 758 (10th Cir. 2000) 11

Statutes

ERISA Section 402(b)(3), 29 U.S.C. § 1102(b)(3) 3

Treatises

2 H. Newberg & A. Conte, *Class Actions* §§ 4.4, 4:11, 4:17 (3d ed. 1992).... 22, 24, 25

Jayne E. Zanglein & Susan J. Stabile,
Erisa Litigation 479-80 (2d ed. 2005) 12

Rules

Fed. R. Civ. P. 23.......... passim

Defendants Qwest Group Life Insurance Plan ("Plan" or "Life Plan"), Qwest Employee Benefits Committee ("EBC"), Qwest Plan Design Committee ("PDC"), and Qwest Communications International Inc. ("QCII") (collectively, "Qwest") respectfully submit this brief in opposition to Plaintiffs' Second Amended Motion for Class Certification ("Motion," Doc. No. 63).

I. INTRODUCTION

Plaintiffs' Motion seeks class certification on seven of the eight claims for relief in plaintiffs' Second Amended Complaint ("Complaint" or "SAC"). Those claims relate principally to three Plan documents:

- The Amended and Restated Group Life Insurance Plan dated June 12, 1998 (the "1998 Plan Document").

- Minutes and Resolutions dated October 14, 2005 (the "Oct. 2005 Resolutions") by which Qwest contends the PDC approved a Plan amendment (the "2005 Amendment") reducing the life insurance benefit to $10,000 effective January 1, 2006 for post-1990 retirees who are former occupational (*i.e.*, union) employees ("Post-1990 Occupational Retirees").

- Minutes and Resolutions dated September 13, 2006 (the "Sept. 2006 Resolutions") by which Qwest contends the PDC approved a Plan amendment (the "2006 Amendment") effective January 1, 2007 reducing the life insurance benefit to $10,000 for retirees who are former management employees ("Management Retirees") and pre-1991 retirees who are former occupational employees ("Pre-1991 Occupational Retirees").

Class certification is inappropriate in this case for a host of reasons, including the following.

First, the class and subclasses proposed for plaintiffs' Third, Fourth, Fifth, and Sixth Claims include tens of thousands of retirees who were not affected by the conduct that is the subject of those claims, and who cannot benefit from the relief sought in those claims.

Second, the class proposed for plaintiffs' First, Third, Fourth, Fifth, and Seventh Claims includes more than 1,400 retirees who have executed agreements requiring that they arbitrate, rather than litigate, any ERISA claims against Qwest, as well as approximately 150 retirees who have executed agreements releasing all ERISA claims they may have against Qwest. A number of these retirees are also members of the subclass proposed for plaintiffs' Sixth Claim.

Third, the relief sought in plaintiffs' First, Third and Fourth Claims is antithetical to the long-terms interests of putative class members, because such relief could jeopardize (1) all benefits that all Eligible Retirees are currently eligible for under the Life Plan, and (2) significant benefits that Post-1990 Occupational Retirees have received under the Qwest Health Care Plan ("Health Plan").

Fourth, to obtain the relief sought in plaintiffs' First, Second, Third, Fourth, Fifth, and Sixth Claims, putative class members must individually prove that they (*inter alia*) detrimentally relied on the alleged ambiguities, inaccuracies, and other defects in the Plan and other documents that are the subject of those claims.

These and the additional circumstances described below render certification of the class and subclasses proposed by plaintiffs improper. Plaintiffs' Motion should accordingly be denied in its entirety.

II. CLAIMS AND PROPOSED CLASSES/SUBCLASSES

Qwest describes below each of the claims as to which plaintiffs seek class certification, and the class or subclass that plaintiffs ask to be certified for each such claim.

- **First Claim.** This claim alleges that the 2005 and 2006 Amendments are null and void because the 1998 Plan Document does not specify a procedure for amending the Plan that complies with ERISA Section 402(b)(3), 29 U.S.C. § 1102(b)(3). (SAC ¶ 77.) The proposed class for this claim consists of "all 'Eligible Retirees,' as defined by the Governing PLAN Document (and beneficiaries thereof)" (the "Class"). (Motion ¶ 1.)

- **Second Claim.** This claim, entitled "Breach of Fiduciary Duty—Material Misrepresentations," alleges that Qwest sent Confirmation Notices, Summary Plan Descriptions, and other documents to certain Eligible Retirees who retired before 1991 ("Pre-1991 Retirees") that allegedly contained "material misrepresentations that the formula for their promised life insurance coverage was not subject to amendment, suspension or discontinuance at any time." (SAC p. 22 & ¶ 86.) The proposed subclass for this claim ("Subclass A") consists of "Eligible Retirees classified as Pre-1991 Retirees to whom PLAN administrators sent Confirmation Notices stating that their PLAN benefits were not subject to amendment, suspension or discontinuance." (Motion ¶ 2.)

- **Third and Fourth Claims.** These claims allege that the 2005 Amendment is null and void due to alleged defects in the Oct. 2005 Resolutions and in subsequent Minutes and Resolutions (the "Dec. 2006 Resolutions") by which the PDC restated the 2005 Amendment. (SAC ¶¶ 90 & 92.) Plaintiffs seek to certify a Class with respect to these claims consisting of all Eligible Retirees and their beneficiaries. (Motion ¶ 1.)

- **Fifth Claim.** This claim alleges that if the 2005 Amendment is not null and void in its entirety (as alleged in the First, Third and Fourth Claims), its effective date was December 13, 2006 rather than January 1, 2006, so that it did not apply to Post-1990 Occupational Retirees who died during the period between these two dates (the "2006 Period"). (SAC ¶ 95.) Plaintiffs seek to certify a subclass for this claim ("Subclass B") consisting of "beneficiaries of Eligible Retirees who died between the period January 1, 2006 and December 12, 2006." (Motion ¶ 3.)

- **Sixth Claim.** This claim alleges that if the 2006 Amendment is not null and void in its entirety (as alleged in the First Claim), it did not become effective on January 1, 2007, such that it did not apply to Management Retirees or Pre-1991 Occupational Retirees who died between January 1, 2007 and the date of any subsequent Plan amendment reducing life insurance benefits for such retirees. (SAC ¶¶ 98-99.) Plaintiffs seek to certify a subclass for this claim ("Subclass C") consisting of "beneficiaries of Eligible Retirees who died after January 1, 2007 and prior to the adoption of any PLAN amendment subsequent to 'Amendment 2006-1.'" (Motion ¶ 4.)

- **Seventh Claim.** Plaintiffs' Seventh Claim alleges that the EBC breached its fiduciary duties under ERISA Section 404(a)(1) by failing to help Plan participants "mitigate against the reduction of PLAN benefits" by "investigat[ing] and advocat[ing]" a means by which Plan participants could either convert their life insurance coverage under the Plan into individual policies or pay premiums sufficient to continue the same level of Plan coverage. (SAC ¶¶ 105-06.) The proposed Class for this claim is identical

to the proposed Class for the First, Third and Fourth Claims, *i.e.*, all Eligible Retirees and their beneficiaries. (Motion ¶ 1.)

III. ARGUMENT

Rule 23 requires a two-step analysis to determine whether class certification is appropriate. First, plaintiffs must satisfy all four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. These elements are prerequisites to certification of a class, and failure to meet any one of them precludes certification. *Rex v. Owens ex rel. Oklahoma,* 585 F.2d 432, 435 (10th Cir. 1978). Second, the action must also satisfy one of the conditions of Rule 23(b). *Id.*

The party seeking to certify a class bears the burden of proving that all the requirements of Rule 23 are met. *JB. ex rel. Hart v. Valdez,* 186 F.3d 1280, 1287 (10th Cir. 1999). Moreover, "[e]ach class or subclass must independently satisfy all the prerequisites of Rules 23(a) and (b)." *Manual for Complex Litigation (Fourth)* § 21.23; *accord Monarch Asphalt Sales Co., Inc. v. Wilshire Oil Co. of Texas*, 511 F.2d 1073, 1077 (10th Cir. 1975).

Rule 23 was revised in 2003 to, *inter alia*, eliminate the characterization of class certification orders as "conditional," and the advisory committee notes to Rule 23 now state that "[a] court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." As the Fifth Circuit stated in *Oscar Private Equity Investments v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007): "These subtle changes . . . recognize that a district court's certification order often bestows upon plaintiffs extraordinary leverage and its bite should dictate the process that precedes it." Thus, "a district judge may certify a class only after making determinations that each of the

Rule 23 requirements has been met." *In re Initial Public Offering Sec. Lit.*, 471 F.3d 24, 41 (2d Cir. 2006); *accord Oscar Private Equity Investments*, 487 F.3d at 268.

A. Plaintiffs' Motion Should Be Denied Because Plaintiffs Cannot Satisfy the Requirements of Rule 23(a).

As the Tenth Circuit has noted, "the district court must engage in its own 'rigorous analysis' of whether 'the prerequisites of Rule 23(a) have been satisfied.'" *Shook v. El Paso County*, 386 F.3d 963, 968 (10th Cir. 2004), *quoting General Tel. Co. of the Southwest v. Falcon,* 457 U.S. 147, 161 (1982). Moreover, "[a] party seeking class certification must show 'under a strict burden of proof' that all four requirements are clearly met." *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006), *quoting Reed v. Bowen*, 849 F.2d 1307, 1309 (10th Cir. 1988). In this case, plaintiffs cannot satisfy three of the four prerequisites of Rule 23(a) with respect to some or all of the proposed classes and subclasses—commonality, typicality, and adequacy of representation.

1. The Commonality Requirement Is Not Satisfied With Respect to the Third, Fourth, Fifth, and Sixth Claims Because the Class and Subclasses Proposed for Those Claims Include Tens of Thousands of Retirees Who Were Not Affected by the Conduct Underlying Those Claims and Cannot Benefit from the Relief Sought Therein.

Under Rule 23(a)(2), a class may be certified only if "there are questions of law or fact common to the class." As the Tenth Circuit stated in *Trevizo*:

> In the principal case on Rule 23(a) commonality, *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 156 (1982), the Supreme Court held members of a putative class must "possess the same interest and suffer the same injury." * * * The Court emphasized the necessity of rigorous analysis by the district court before granting class certification because of the "potential unfairness to the class members bound by the judgment if the framing of the class is overbroad." *Id.* at 161, 102 S.Ct. 2364.

455 F.3d at 1163. In this case, plaintiffs cannot satisfy the commonality requirement with respect to the Class proposed for the Third and Fourth Claims, Subclass B proposed for the Fifth Claim, and Subclass C proposed for the Sixth Claim, because those classes/subclasses include numerous retirees who are unaffected by the conduct that is the subject of those claims, and who have suffered no injury by virtue of that conduct.

- **Class Proposed for Third and Fourth Claims.** Plaintiffs seek to certify a Class with respect to the Third and Fourth Claims that consists of *all* Eligible Retirees under the Plan and their beneficiaries. (Motion ¶ 1.) The Third Claim seeks a declaration that the Oct. 2005 Resolutions, which Qwest contends approved the 2005 Amendment, had no such effect. (SAC ¶¶ 46 & 90.) The Fourth Claim likewise seeks a declaration that a document plaintiffs call "Plan Amendment 2006-1," which Qwest contends restated the 2005 Amendment, had neither this nor any other effect. (*Id.* ¶¶ 60-61 & 92-93.) The Third and Fourth Claims seek to invalidate *only* the 2005 Amendment, which affects *only* Post-1990 Occupational Retirees and their beneficiaries. Of the approximately 49,389 Eligible Retirees, only about 20,252 are Post-1990 Occupational Retirees. (Declaration of Carla A. Laudel attached hereto as Attachment A ("Laudel Decl.") ¶ 2(a).) This means that almost 30,000 of the nearly 50,000 Class members were not affected by the conduct that is the subject of those claims, and cannot benefit from the relief sought in those claims.

- **Subclass B Proposed for Fifth Claim.** Subclass B, which plaintiffs ask this Court to certify with respect to the Fifth Claim, consists of beneficiaries of *all* Eligible Retirees who died during the 2006 Period. (Motion ¶ 3.) This claim alleges that if the 2005 Amendment is not null and void in its entirety (as alleged in the Third and Fourth

Claims), its effective date was December 13, 2006 rather than January 1, 2006. (SAC ¶ 95.) But as noted above, the 2005 Amendment applied, not to *all* Eligible Retirees, but instead only to Post-1990 Occupational Retirees. And the relief sought in the Fifth Claim is a declaration that the 2005 Amendment is null and void as applied to beneficiaries of *Post-1990 Occupational Retirees* who died during the 2006 Period. (*Id.*) Although approximately 1,166 Eligible Retirees died during the 2006 Period, only about 177 of those retirees were Post-1990 Occupational Retirees. (Laudel Decl. ¶ 2(b).) Thus, almost 1,000 members of Subclass B are unaffected by the conduct that is the subject of the Fifth Claim, and cannot benefit from the relief sought in that claim.

- **Subclass C Proposed for Sixth Claim.** Subclass C, which plaintiffs ask this Court to certify with respect to their Sixth Claim, consists of beneficiaries of *all* Eligible Retirees who died between January 1, 2007 and the date of any subsequent Plan amendment reducing life insurance benefits for such retirees (the "2007 Period"). (*See* Motion ¶ 4.)[1] The Sixth Claim seeks to invalidate the 2006 Amendment, which affects the beneficiaries only of *selected* Eligible Retirees—namely, Management Retirees and Pre-1991 Occupational Retirees who died during the 2007 Period—and only these selected beneficiaries could obtain the relief sought in this claim. (*See* SAC ¶¶ 98-99.) Although approximately 550 Eligible Retirees died during the 2007 Period, only about 461 of these were Management Retirees or Pre-1991 Occupational Retirees. (*See* Laudel Decl. ¶ 2(c).)

[1] Plaintiffs' counsel has acknowledged that the 2007 Period ends June 6, 2007. *See* Declaration of Christopher J. Koenigs attached hereto as Attachment B ("Koenigs Decl."), Ex. 3 (stating that "the Company adopted Amendment 2007-1 on June 7, 2007" and that plaintiffs "claim that Plan Amendment 2007-1 adopted on June 7, 2007 cannot be applied retroactively to beneficiaries and estates of Management Retirees who died before June 7, 2007").

Thus, about 89 members of Subclass C are unaffected by the conduct that is the subject of the Sixth Claim, and cannot benefit from the relief sought in that claim.

In summary, many members of the Class and subclasses referred to above were not affected by the conduct that is the subject of the claims in question, and have no remedy whatever under those claims. The law is clear that such classes do not satisfy the commonality (or, for that matter, typicality) requirement of Rule 23(a). *See, e.g., Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998) ("The typicality and commonality requirements of the Federal Rules ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class.") (citation omitted); *Pueblo of Zuni v. U.S.*, 243 F.R.D. 436, 443 (D.N.M. 2007) (holding that only those tribes injured by defendant's conduct were properly included in the class, and that plaintiffs' proposed class was overbroad because it included tribes that could not allege any such injury).

To avoid imposing on this Court the task of deciding a class certification motion burdened with grossly overbroad class definitions, Qwest's counsel sent plaintiffs' counsel an e-mail ten weeks ago pointing out the problems with each of the class definitions discussed above, and inviting plaintiffs to submit a revised motion with properly defined classes. (Koenigs Decl. ¶ 2 & Ex. 1.) Plaintiffs rejected Qwest's invitation. (*Id.* Ex. 2.) Particularly under these circumstances, this Court has no obligation to do plaintiffs' work for them, *i.e.*, to define subclasses for plaintiffs' Third, Fourth, Fifth, and Sixth Claims that satisfy the commonality requirement of Rule 23(a)(2). *See, e.g., United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 408 (1980) ("[I]t is not the District Court that is to bear the burden of constructing subclasses. That burden is on the [plaintiff] and it is he who is

required to submit proposals to the court."); *Vaszlavik v. Storage Technology Corp.*, 175 F.R.D. 672, 685 (D. Colo. 1997) ("it is not for me to revise the proposed class definition for plaintiffs").

For the reasons set forth above, this Court should deny plaintiffs' Motion to certify the Class with respect to the Third and Fourth Claims, Subclass B with respect to the Fifth Claim, and Subclass C with respect to the Sixth Claim. *See In re HealthSouth Corp. Securities Lit.*, 213 F.R.D. 447, 465 (N.D. Ala. 2003) (denying motion for class certification in light of plaintiffs' failure to propose a proper class definition and necessary subclasses and stating that "[w]hile some other class, or subclasses, and some other class period *might* be appropriate for certification, the burden rests on the plaintiffs—not the court—to propose a class that meets the requirements for certification under Fed.R.Civ.P. Rule 23") (emphasis in original).

2. Plaintiffs' Claims and Defenses Are Not Typical of the Claims and Defenses of Numerous Members of the Class and Subclass Proposed for Plaintiffs' First, Third, Fourth, Sixth, and Seventh Claims.

Rule 23(a)(3) requires that plaintiffs' claims be "typical" of the claims of all putative class members. As the Tenth Circuit has stated: "Any inquiry into typicality under Rule 23(a)(3) requires a comparison of the claims or *defenses* of the representative with the claims or *defenses* of the class." *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975), *overruled on other grounds, Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983) (emphasis added); *accord Noble v. 93 University Place Corp.*, 224 F.R.D. 330, 337 (S.D.N.Y. 2004) ("the presence of an affirmative defense should be considered in determining whether class certification is appropriate"). Indeed, "the presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may

destroy the required typicality of the class." *Kas v. Financial General Bankshares, Inc.*, 105 F.R.D. 453, 461 (D.D.C. 1984); *accord McFarland v. Yegen*, 1989 U.S. Dist. LEXIS 16965 *17 (D.N.J. 1989) (Koenigs Decl. Ex. 4) ("[t]he existence of unique dispositive defenses applicable only to the putative class members or the plaintiff, but not both, is indicative of a significant disparity in their respective legal positions, thus precluding the plaintiff from meeting the typicality requirement").

Plaintiffs define the Class with respect to the First, Third, Fourth and Seventh Claims to consist of all Eligible Retirees and their beneficiaries, and define Subclass C with respect to the Sixth Claim to consist of beneficiaries of Eligible Retirees who died during the 2006 Window. (Motion ¶¶ 1 & 4.) More than 1,400 Management Retirees who are members of the putative Class, a number of whom are also members of putative Subclass C, are subject to a defense to which the named plaintiffs are not subject—namely, that the claims against them are subject to mandatory arbitration. (*See* Declaration of Michael B. Ward attached hereto as Attachment C ("Ward Decl.") ¶¶ 2-4.) These Management Retirees signed Agreements of Waiver and Release (the "Release Agreements") in which they agreed to binding arbitration of all claims against Qwest, including claims arising under ERISA. (*See id.* & Exs. 1-2 § 4.) Such arbitration provisions govern ERISA claims to the same extent as they govern other claims. *See, e.g., Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000).

Because Qwest has a dispositive mandatory arbitration defense applicable to more than 1,400 Management Retirees that it does not have with respect to the named plaintiffs, the named plaintiffs do not satisfy the typicality requirement with respect to those retirees. *See, e.g.*, *Renton v. Kaiser Foundation Health Plan, Inc.*, 2001 WL 1218773 *5 (W.D. Wash. 2001) (Koenigs Decl. Ex. 4) (declining class certification when some class

members' claims were arguably subject to mandatory arbitration; "[w]hile plaintiff argues that . . . the proposed class's ERISA claims are not subject to arbitration, that is an unresolved issue").

Qwest has another dispositive defense applicable to approximately 150 Management Retirees who signed Release Agreements that it doesn't have with respect to the named plaintiffs—namely, that those class members have released the ERISA claims that the named plaintiffs seek to pursue on their behalf. (*See* Ward Decl. ¶¶ 2-4 & Exs. 1-2 § 1.) As a leading commentator has stated:

> [C]ourts have regularly found standing, typicality, or adequacy lacking where the defense of a release of claims was not shared by the named plaintiffs and the purported class . . . . [I]f none of the named plaintiffs signed releases, they are inadequate representatives because none of them would have any need to litigate or interest in litigating the release issue.

Jayne E. Zanglein & Susan J. Stabile, *Erisa Litigation* 479-80 (2d ed. 2005). *See, e.g.*, *Spann v. AOL Time Warner, Inc.*, 219 F.R.D. 307, 320 (S.D.N.Y. 2003) (class representatives who were ostensibly not subject to "release" defense were not adequate representatives of putative class members who were subject to "release" defense).

In summary, the named plaintiffs do not satisfy the typicality requirement with respect to: (1) the more than 1,400 Management Retirees who agreed to arbitrate rather than litigate their ERISA claims against Qwest; and (2) the approximately 150 Management Retirees who released their ERISA claims against Qwest.

3. Plaintiffs Are Not Adequate Class Representatives Because Their First, Third and Fourth Claims Seek Relief that Could Jeopardize Putative Class Members' Existing Benefits.

Rule 23(a)(4) requires that named plaintiffs "adequately protect the interests of the class." This "adequacy" requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). In *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463 (10th Cir. 1974), the Tenth Circuit stated: "It is axiomatic that a plaintiff cannot maintain a class action when his interests are antagonistic to, or in conflict with, the interests of the persons he would seek to represent." In challenging plaintiffs' adequacy, a defendant "does not have to show actual antagonistic interests; the potentiality is enough." *Plekowski v. Ralston Purina Co.*, 68 F.R.D. 443, 452 (M.D. Ga. 1975); *accord Phillips v. Klassen*, 502 F.2d 362, 366 (D.C. Cir. 1974) ("[c]lass members whose interests are . . . even 'potentially conflicting' with the interests of the ostensibly representative parties cannot be bound").

In *Dierks v. Thompson*, 414 F.2d 453, 456 (1st Cir. 1969), the court stated: "Unless the relief sought by the particular plaintiffs who bring the suit can be thought to be what would be desired by the other members of the class, it would be inequitable to recognize plaintiffs as representative, and a violation of due process to permit them to obtain a judgment binding absent plaintiffs." *See also Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (class representatives "whose substantial interests are not necessarily or even probably the same as those who they are deemed to represent [do] not afford that protection to absent parties that due process requires").

In this case, members of the putative Class and Subclass B would likely not seek the relief sought in plaintiffs' First, Third and Fourth Claims if they knew that (as is the

case) such relief could jeopardize: (1) *all* benefits for which *all* such class members are eligible under the Life Plan, and (2) *significant* benefits that *many* such class members have received under the Health Plan.

a) The Relief Sought by Plaintiffs Could Jeopardize All Benefits for Which Putative Class Members Are Eligible Under the Life Plan.

The 2005 and 2006 Amendments substantially reduced the costs Qwest incurs to provide life insurance benefits to retirees by replacing the 1998 Plan Document's benefit formula, which provided that all Eligible Retirees would receive a minimum life insurance benefit of either $20,000 or $30,000 depending on their retirement date, with a provision stating that all such retirees would receive a $10,000 life insurance benefit. The First Claim seeks to nullify both of these amendments on the ground that the 1998 Plan Document lacked an adequate amendment procedure, while the Third and Fourth Claims seek to nullify the 2005 Amendment (only) on the ground that the Oct. 2005 and Dec. 2006 Resolutions were inadequate to effectuate that amendment.

Plaintiffs appear to concede that Qwest has the authority to terminate the Life Plan altogether, and thereby eliminate *all* life insurance benefits for *all* still-living Eligible Retirees. *See* Doc. No. 44 ¶ 4 (acknowledging that "Qwest may have retained the right to . . . *entirely terminate the Plan*") (emphasis added). This concession is compelled by the holdings of numerous Supreme Court cases. *See, e.g., Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("employers or other plan sponsors are generally free under ERISA, for any reason at any time, to . . . *terminate* welfare plans") (emphasis added); *Beck v. Pace Int'l Union*, 551 U.S. __, 127 S. Ct. 2310, 2316 (2007) ("It is well established in this Court's

cases that an employer's decision whether to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations.") (emphasis omitted).

Because Qwest can terminate Plan benefits whenever it wishes, if plaintiffs prevail on their claims seeking to invalidate the 2005 and 2006 Amendments, Qwest can recoup the amounts it had saved via those amendments by terminating all Plan benefits for still-living Eligible Retirees. Although Qwest previously elected merely to reduce rather than eliminate such benefits, if plaintiffs prevail on their First, Third or Fourth Claims, Qwest would need to consider terminating the Life Plan benefits for Eligible Retirees altogether in an effort to recoup the amounts it would have saved by means of the invalidated 2005 and 2006 Amendments. (Declaration of Erik Ammidown attached hereto as Attachment D ("Ammidown Decl.") ¶ 11.) As a result, by pursuing these claims, the seven named plaintiffs are playing dice with the life insurance benefits of the nearly 50,000 retirees they purport to represent.

b) The Relief Sought by Plaintiffs Could Jeopardize Substantial Benefits that Many Putative Class Members Have Received Under the Health Plan.

None of the seven named plaintiffs seeking to represent the Class is a Post-1990 Occupational Retiree, and only one is the beneficiary of such a retiree. (*See* SAC ¶¶ 10-14 & 16.) Nevertheless, plaintiffs' First, Third and Fourth Claims seek to nullify in its entirety the 2005 Amendment, which affects only Post-1990 Occupational Retirees. Any such relief could jeopardize substantial benefits that Post-1990 Occupational Retirees have received under the Health Plan.

Under the collective bargaining and associated letter agreements ("CBA") between QCII and the Communications Workers of American ("CWA"), QCII was entitled

to implement "caps," or maximums, effective January 1, 2006 on the amount Qwest would contribute towards the cost of providing Health Plan benefits to Post-1990 Occupational Retirees. Because the cost of Health Plan benefits has exceeded the caps since at least 2003, upon implementation of the Health Plan caps, Post-1990 Occupational Retirees would immediately become obligated to contribute on a monthly basis the amount in excess of the caps in order to continue to maintain Health Plan coverage. (Ammidown Decl. ¶ 3.)

In the summer of 2005, Qwest sought to accommodate the desire of Post-1990 Occupational Retirees for a three-year postponement, until January 1, 2009, of implementation of the Health Plan caps. The PDC approved the 2005 Amendment to the Life Plan in order to offset the enormous cost of its contemporaneous decision to postpone for three years implementation of Health Plan caps for Post-1990 Occupational Retirees. Qwest's approval of the 2005 Amendment to the Life Plan and its three-year postponement of implementation of the Health Plan caps were thus part of a *quid pro quo*, and Qwest would not have taken one of these actions without taking the other. (Ammidown Decl. ¶¶ 4 & 7; *see also id.* Exs. 1-5.)

If plaintiffs prevail in this lawsuit, and Qwest accordingly loses the savings provided by the 2005 Amendment, Post-1990 Occupational Retirees will receive an enormous windfall, because they will have received a substantial benefit (postponement of implementation of the Health Plan caps) without incurring the corresponding cost (reduction of the life insurance benefit to $10,000). For this reason, if plaintiffs obtain the relief they seek in their First, Third or Fourth Claims—invalidation of the 2005 Amendment in its entirety—Qwest would need to consider implementing various means of recovering the resulting windfall enjoyed by Post-1990 Occupational Retirees, including eliminating all life

insurance benefits for such retirees or seeking to recover from such retirees the amounts they saved by virtue of the three-year postponement of implementation of the Health Plan caps. (Ammidown Decl. ¶ 8.) Thus, for Post-1990 Occupational Retirees, the relief plaintiffs seek jeopardizes, not only the benefits they are eligible to receive under the Life Plan, but also a substantial benefit they have received under the Health Plan.[2]

Putative class members are almost certainly unaware that the relief their "representatives" seek is antithetical to their long term interests—*i.e.*, that such relief could cause Qwest to: (1) terminate all Life Plan benefits for all of the nearly 50,000 class members, and/or (2) seek to recover from the more than 20,000 Post-1990 Occupational Retirees the amounts they saved by virtue of the three-year postponement of implementation of the Health Plan caps. Under these circumstances, the named plaintiffs are inadequate class representatives, and class certification is improper.

For example, in *Broussard, supra,* the Fourth Circuit held that the district court erred in certifying a class, stating that a named plaintiff who was pursuing a remedy "antithetical to the long-term interests of a significant segment of the putative class" could not represent that class. 155 F.3d at 338. Similarly, in *Pickett v. Iowa Beef Processors*, 209

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[2] Six of the seven named plaintiffs do not face the loss that Post-1990 Occupational Retirees face if plaintiffs prevail on these claims, because none of those plaintiffs is a Post-1990 Occupational Retiree. The seventh named plaintiff, Martha Lensink, is the beneficiary of a Post-1990 Occupational Employee who died January 5, 2006 (*see* SAC ¶ 15), five days after the date on which implementation of Health Care caps was postponed in return for implementation of the Life Plan's 2005 Amendment. Individuals in Mrs. Lensink's situation may maintain their benefits under the Health Plan pursuant to COBRA at their own expense by paying 102% of the premium. Mrs. Lensink accordingly does not face the potential loss that Post-1990 Occupational Retirees would face if Qwest accelerated implementation of the Health Plan caps for such retirees. (Ammidown Decl. ¶ 9.)

F.3d 1276, 1280 (11th Cir. 2000), the Eleventh Circuit held that the district court erred in certifying a class, stating that "a class cannot be certified . . . when it consists of members who benefit from the same acts alleged to be harmful to other members of the class." *See also Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598-99 (7th Cir. 1993) (affirming district court's order denying class certification where benefits that some class members had received "would evaporate if the class action succeeded"); *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1189-90 (11th Cir. 2003) (vacating district court's order certifying class where named plaintiffs' economic interests and objectives conflicted with those of absent class members, and stating that "[t]o our knowledge, no circuit has approved of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class"); *Metzger v. American Fidelity Assur. Co.*, 249 F.R.D. 375, 377 (W.D. Okla. 2007) (holding that plaintiff failed to establish she was an adequate representative where "the likely result of a successful outcome for Plaintiff's proposed class will be an increase in insurance premiums" for many class members, "which places Plaintiff and her economic incentives at apparent odds with the purported class").

A district court must undertake a stringent analysis of conflicts between the named plaintiff and class members even in Rule 23(b)(3) actions, because class members in such actions "are bound unless they affirmatively exercise their option to be excluded, even though they may not be actually aware of the proceedings." *Albertsons,* 503 F.2d at 463-64. Here, however, plaintiffs seek class certification principally under Rule 23(b)(1) or (b)(2) rather than (b)(3). *See* Plaintiffs' Memorandum of Points and Authorities in Support of Their Second Amended Motion for Class Certification ("Pl. Br.," Doc. No. 64) ¶ 36 (stating that

"if the proposed class action satisfies multiple sections or [*sic*] Rule 23(b), is [*sic*] should be approved under Rule 23(b)(1) or (b)(2) rather than (b)(3)"). Plaintiffs acknowledge that the reason they seek certification under Rule 23(b)(1) or (b)(2) is that those sections "generally do not permit opt-outs." (Motion ¶ 8.) Conflicts pose a particular problem when plaintiffs seek certification under Rule 23(b)(1) or (b)(2), precisely because certification under those rules carries no right to opt-out, *see Elliot Indus. Limited Partnership*, 407 F.3d 1091, 1103 n. 5 (10th Cir. 2005), or even to receive notice of the lawsuit, *see* Rule 23(c)(2)(A). Under Rules 23(b)(1) and 23(b)(2), most putative class members will remain oblivious to the fact that the position plaintiffs are espousing on their behalf could jeopardize existing benefits under the Life and/or Health Plans.

Because the relief sought by the named plaintiffs in their First, Third and Fourth Claims is antithetical to the long-term interests of many if not all putative class members, plaintiffs are inadequate class representatives, and their Motion to certify classes and/or subclasses for those claims should be denied.

B. Plaintiffs' Motion Should Be Denied Because Plaintiffs Cannot Establish the Additional Requirements of Rule 23(b).

"[C]onsideration of Rule 23(b) is unnecessary when, as here, Rule 23(a) is not satisfied." *Monarch Asphalt Sales Co.*, 511 F.2d at 1077. Even assuming *arguendo* plaintiffs have satisfied Rule 23(a), they cannot show that certification is proper under any of the subdivisions of Rule 23(b). The principal (but not sole) reason for this is that six of the seven claims as to which class certification is sought are permeated by an issue that would require individual determinations for each class member—whether the class member detrimentally

relied on ambiguities, inaccuracies, and other defects that allegedly exist in Plan and other documents.

- **First Claim.** As noted above, this claim seeks to invalidate the 2005 and 2006 Amendments on the ground that the 1998 Plan Document lacked an amendment procedure that complied with ERISA Section 402(b)(3). But even if the 1998 Plan Document lacked such a procedure, class members would be entitled to the relief sought in that claim only if they prove detrimental reliance by plaintiffs or bad faith or active concealment by Qwest. *See, e.g., Murphy v. Keystone Steel & Wire Co.,* 61 F.3d 560, 569 (7th Cir. 1995) (holding that a violation of Section 402(b)(3) does not justify relief "absent a showing of bad faith, active concealment, or detrimental reliance"); *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).

- **Second Claim.** This is a claim for breach of fiduciary duty based on misrepresentations. (SAC p. 22.) "To allege and prove a breach of fiduciary duty for misrepresentations, a plaintiff must establish . . . detrimental reliance by the plaintiff on the misrepresentation." *Burstein v. Retirement Acct. Plan*, 334 F.3d 365, 387 (3rd Cir. 2003); *accord Hooven v. Exxon Mobil Corp.*, 465 F.3d 566, 578 (3rd Cir. 2006) ("Detrimental reliance on a material misrepresentation made by the defendant is a necessary element of an ERISA breach of fiduciary duty claim.").

- **<u>Third, Fourth, Fifth, and Sixth Claims</u>.** These claims seek to invalidate the 2005 and 2006 Amendments, in whole or in part, on the ground that ambiguities and other alleged deficiencies in the Oct. 2005, Sept. 2006, and Dec. 2006 Resolutions rendered those amendments ineffective. But even if these resolutions were deficient, class members would be entitled to the relief sought in these claims only if they prove detrimental reliance by plaintiffs or bad faith or active concealment by Qwest. *See, e.g., Loskill v. Barnett Banks, Inc. Severance Pay Plan*, 289 F.3d 734, 738-739 & n. 5 (11th Cir. 2002) (holding that plan 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); *Alford v. Kimberly-Clark Tissue Co.*, 14 F. Supp. 2d 1290, 1299 (S.D. Ala. 1998) (same); *Franklin v. First Union Corp.*, 84 F. Supp. 2d 720, 728-29 (E.D. Va. 2000) (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).

The named plaintiffs may take the position that they themselves did not detrimentally rely on the defects in the Plan documents alleged in the six claims referred to above. But any such concession would hardly eliminate detrimental reliance as an issue under those claims. Detrimental reliance is an essential element of plaintiffs' Second Claim, and one of three alternative essential elements (along with active concealment and bad faith by Qwest) of plaintiffs' First, Third, Fourth, Fifth, and Sixth Claims. Absent discovery directed to all of the nearly 50,000 putative class members, there can be no assurance that all such class members will forego the opportunity to establish their alleged entitlement to relief under these claims by proving detrimental reliance.

Plaintiffs seek class certification as to their First through Sixth Claims under Rule 23(b)(1), Rule 23(b)(2), and/or Rule 23(b)(3). (Motion ¶ 6.) Certification is not proper under any of these subdivisions.

1. Certification Is Not Proper Under Rule 23(b)(1).

It is well-established that certification under Rule 23(b)(1) is inappropriate when the relief sought by plaintiffs involves individual issues. *See, e.g., Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 99 (W.D. Mo. 1997) ("When the relief in question is fraught with individualized issues, resort to Rule 23(b)(1) is inappropriate"); *Tober v. Charnita, Inc.*, 58 F.R.D. 74, 81 (M.D. Pa. 1973) ("Certification under 23(b)(1) should properly be confined to those causes of action in which there is a total absence of individual issues."). In this case, at least one individual issue—detrimental reliance—exists with respect to all six claims identified above.

Although plaintiffs seek certification under both subsections (A) and (B) of Rule 23(b)(1), neither subsection applies here. With respect to subsection (A), one commentator on class actions has stated: "The most commonly used and accepted limitation on Rule 23(b)(1)(A) is that *this subdivision was not designed to cover class situations where some members recover and others do not*." 2 H. Newberg & A. Conte, *Class Actions* § 4.4, p. 14 (3d ed. 1992) ("*Newberg*") (emphasis added). This case is one in which some members might prevail—*i.e.*, those who prove detrimental reliance—while others do not—*i.e.*, those who fail to prove such reliance. For example, as the court stated in *In re Electronic Data Systems Corp. "ERISA" Litigation*, 224 F.R.D. 613 (E.D. Tex. 2004):

> Plaintiffs' Misrepresentation Claim requires individual determinations of materiality and reliance. These individual determinations could result in differing outcomes. These

> differing outcomes would not necessarily be "inconsistent" because they would result from differing individualized determinations, which prevent individual adjudications from being dispositive of other class members' interests. Accordingly, Plaintiffs' Misrepresentation Claim is not suitable for certification under Rule 23(b)(1).

Id. at 628 (citation omitted).

With respect to subsection (B) of Rule 23(b)(1), "[t]he traditional and most common use of subsection (b)(1)(B) class actions is the 'limited fund' cases where claims are aggregated against a *res* or preexisting fund insufficient to satisfy all claims." *In re Telectronics Pacing Systems, Inc.*, 221 F.3d 870, 877 (6th Cir. 2000). Plaintiffs' cursory discussion of Rule 23(b)(1)(B) (*see* Pl. Br. ¶¶ 40-41) does not suggest that this case falls within such a fact pattern. Any such suggestion would be baseless, because plaintiffs bring all of the claims as to which they seek certification under Rule 23(b)(1)(B) against Qwest, and any "limited fund" rationale does not apply to Qwest.

Although plaintiffs cite *In re Integra Realty Resources*, 354 F.3d 1246 (10th Cir. 2004), to support their contention that certification under Rule 23(b)(1)(B) is proper (Pl. Br. ¶ 40), that case demonstrates that such certification would be *im*proper. The Tenth Circuit held in that case that "the bankruptcy court properly certified the class under Rule 23(b)(1)(B) based on the court's conclusion that, *in the absence of class certification, the Trustee's first suit against a defendant or group of defendants could be dispositive of all remaining suits*." 354 F.3d at 1264 (emphasis added). In this case, by contrast, in the absence of class certification plaintiffs' lawsuit would *not* be dispositive of the claims of other putative class members, because the merits of those claims depend on whether putative class

members can individually prove, *inter alia*, that they detrimentally relied on the allegedly defective Plan and other documents.

2. <u>Certification Is Not Proper Under Rule 23(b)(2)</u>.

Rule 23(b)(2) provides that a class action is appropriate if "the party opposing the class had acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This requirement is not satisfied here.

a) <u>Rule 23(b)(2) Certification Is Improper with Respect to Plaintiffs' First Through Sixth Claims Because Those Claims Involve Detrimental Reliance Issues.</u>

Rule 23(b)(2) "operates under the presumption that the interests of the class members are *cohesive and homogeneous* such that the case *will not depend on adjudication of facts particular to any subset of the class*." *Lemon v. Int'l Union of Operating Engineers, Local 139, AFL-CIO*, 216 F.3d 577, 580 (7th Cir. 2000) (emphasis added); *accord Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) ("because of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogeneous and cohesive group with few conflicting interests among its members."); 2 *Newberg* § 4:11 at 61 ("Rule 23(b)(2) includes an implicit 'cohesiveness' requirement, which precludes certification when individual issues abound."). For all the reasons set forth above, plaintiffs' putative class is not "a homogenous and cohesive group with few conflicting interests among its members" (*Allison*, 151 F.3d at 413).

In *Shook*, *supra*, the Tenth Circuit held that in determining whether to certify a 23(b)(2) class, courts "need to look to whether the class is amenable to uniform group remedies," *i.e.*, remedies that apply "equally to all cases pending within the class." 386 F.3d

at 973 & 971 (quotations and citation omitted). As *Shook* suggests, and as one class action commentator has stated, Rule 23(b)(2) certification is improper if the remedies sought by plaintiff are *not* "uniform group remedies"—if, for example, those remedies require "a specific or time-consuming inquiry into the varying circumstances and merits of each class member's individual case." 2 *Newberg* § 4:17. For the reasons set forth above, that is true here/

Numerous cases have held that certification under Rule 23(b)(2) is improper where reliance is an element of plaintiffs' claims. *See, e.g., Heffner v. Blue Cross & Blue Shield of Alabama, Inc.*, 443 F.3d 1330, 1340 (11th Cir. 2006) ("reliance is a critical element of the plaintiffs' [ERISA] case, and it renders certification under Rule 23(b)(2) inappropriate"); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 457 (11th Cir. 1996) (affirming denial of class certification based on lack of commonality prerequisite of Rule 23(a)(2) because reliance element of ERISA claims was "not susceptible to class-wide proof"); *see also Tootle v. ARINC, Inc.* 222 F.R.D. 88, 97 (D. Md. 2004) (refusing to certify class for ERISA breach of fiduciary duty claim due to detrimental reliance issues; "courts have found that ERISA fiduciary claims based on alleged misrepresentations are not suitable for class certification, because the element of detrimental reliance requires individualized proof"); *In re Electronic Data Systems Corp. "ERISA" Litigation*, 224 F.R.D. at 629-30 (same).[3] Certification under Rule 23(b)(2) is accordingly improper here.

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[3] In the similar context of estoppel claims under ERISA, where detrimental reliance is a required element, most courts have held that class certification is improper. *See, e.g., Sprague v. General Motors Corp.*, 133 F.3d 388, 398 (6th Cir. 1998) (reversing grant of class certification, based in part on the fact that plaintiffs would have to show individual detrimental reliance); *Jones v. Am. Gen. Life & Accident Ins. Co.*, 213 F.R.D. 689, 702 (S.D. Ga. 2002) (refusing to certify class under Rule 23(b)(2)

b) Rule 23(b)(2) Certification Is Also Improper with Respect to Plaintiffs' Fifth and Sixth Claims Because Those Claims Seek Primarily Monetary Relief.

The sole named plaintiffs seeking appointment as class representatives with respect to plaintiffs' Fifth and Sixth Claims are Plan beneficiaries Martha Lensink and Samuel Strizich, respectively. (*See* Motion ¶¶ 3-4.) These plaintiffs assert that Qwest short-changed them, and all other Plan beneficiaries who are members of putative Subclasses B and C, by paying only $10,000 in life insurance benefits upon the death of their spouses during the 2006 and 2007 Periods. (*See* SAC ¶¶ 96 & 99.) Although these plaintiffs purport to seek declaratory and injunctive relief under these claims (*see id.*), any such relief is ancillary to the main relief they seek—an order requiring the Plan administrator to make "corrected benefit payments" in the larger amount specified in the 1998 Plan Document, "together with prejudgment and post-judgment interest." (SAC ¶¶ 95 & 99.) Where, as here, the plaintiffs and putative class members seek primarily monetary relief, certification under Rule 23(b)(2) is improper. *See, e.g., Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299, 317 (5th Cir. 2007) ("This court has refused to permit certification of a class [under Rule 23(b)(2)] where many members 'have nothing to gain from an injunction, and the declaratory relief they seek serves only to facilitate the award of damages.") (*quoting Bolin v. Sears,*

"[b]ecause each individual's reliance would be in question" and "there would be no way to say with any certainty that the same relief would be appropriate for all class members"); *United Steelworks of Am. v. IVACO*, 216 F.R.D. 693, 697-98 (N.D. Ga. 2002) (denying class certification based on the necessity of establishing individual detrimental reliance); *see also Jensen v. SIPCO, Inc.*, 38 F.3d 945, 953 (8th Cir. 1994) (suggesting that ERISA equitable estoppel would not be suitable for class-wide relief, because it would require "factual precision" regarding whether a material misrepresentation was made on which a beneficiary reasonably relied to his detriment"). This Court has, of course, dismissed plaintiffs' estoppel claim. *See* Dismissal Order pp. 12-17.

Roebuck & Co., 231 F.3d 970, 978 (5th Cir. 2000)); *Vengurlekar v. Silverline Technologies, Ltd.*, 220 F.R.D. 222, 228-29 (S.D.N.Y. 2003) (refusing to certify class under Rule 23(b)(2) where primary remedy sought was monetary relief).

3. <u>Certification Is Not Proper Under Rule 23(b)(3).</u>

Plaintiffs seek in the alternative to certify a class under Rule 23(b)(3). That rule requires plaintiffs to demonstrate that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Plaintiffs cannot do so here.

Regarding whether common questions of law and fact predominate over individual questions, this predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a), and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.,* 521 U.S. at 623-24. In this case, individual reliance issues preclude a finding of predominance, and certification under Rule 23(b)(3) is therefore inappropriate. *See, e.g., In re Initial Public Offering Sec. Lit.*, 471 F.3d at 42-43 (vacating district court's order granting class certification because plaintiffs failed to satisfy Rule 23(b)(3)'s predominance requirement due to individual reliance issues in securities fraud class action); *Andrews v. Am Tel. & Tel. Co.*, 95 F.3d 1014, 1023-24 (11th Cir. 1996) (reversing certification of Rule 23(b)(3) class action asserting fraud claims in part because each plaintiff would be required to prove reliance which meant that the claims were "not wholly subject to class-wide resolution"); *see also Sandwich Chef v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003) ("cases that involve individual reliance fail the predominance test"); *In re Electronic Data Systems Corp. "ERISA" Litigation*, 224 F.R.D. at 630 (refusing to

certify ERISA misrepresentation claim and stating that "[g]enerally, claims involving individual reliance are unsuitable for class certification").

Rule 23(b)(3) also requires that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy." "The greater number of individual issues, the less likely superiority can be established." *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n. 19 (5th Cir. 1996). In light of the individual issues that would need to be decided to determine whether a particular class member should prevail on her ERISA claims, certification under Rule 23(b)(3) is inappropriate.

Effectively conceding that class certification with respect to their *claims* would be improper under Rule 23(b)(3), plaintiffs argue instead that "[t]his case should certify . . . the central *issues* to this case" because [t]he central *issues* are not subject to individualized proof." (Pl. Br. ¶ 47 (emphasis added).) Plaintiffs thereby invoke Rule 23(c)(4), which provides that "[w]hen appropriate, an action may be . . . maintained as a class action with respect to *particular issues*" (emphasis added). But as the Fifth Circuit stated in *Castano*:

> Severing the defendants' conduct from reliance under rule 23(c)(4) does not save the class action. A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). * * * Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

84 F.3d at 745-46 n. 21. In short, class certification in this case under Rule 23(b)(3) with respect to *either* issues or claims would be improper.

IV. CONCLUSION

For the reasons set forth above, plaintiffs' Motion should be denied.

Dated: June 30, 2008.

s/ Christopher J. Koenigs

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2008, I electronically filed the foregoing **Qwest's Brief in Opposition to Plaintiffs' Second Amended Motion for Class Certification** 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

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.

DECLARATION OF ERIK P. AMMIDOWN

I, Erik P. Ammidown, declare as follows:

1. I am employed by Qwest Corporation ("QC") as the Director of Employee Benefits. QC is a subsidiary of Qwest Communications International Inc. ("QCII," collectively with its affiliates "Qwest"), one of the defendants in this action. I have personal knowledge of the facts set forth below.

2. I have been a member of the Qwest Plan Design Committee ("PDC") between July 8, 2005 and the present, and a member of the Qwest Employee Benefits Committee ("EBC") between August 3, 2005 and the present. By virtue of my position at QC and my membership on the PDC and the EBC, I have certain responsibilities relating to the Qwest Group Life Insurance Plan ("Life Plan") and the Qwest Health Care Plan ("Health Plan"). Among other things, I participated in the decisions regarding the Life Plan and the Health Plan described below.

ATTACHMENT D

3. Under the collective bargaining and associated letter agreements ("CBA") between QCII and the Communications Workers of American ("CWA"), QCII was entitled to implement "caps," or maximums, effective January 1, 2006 on the amount Qwest would contribute towards the cost of providing Health Plan benefits to retirees who are former occupational employees and who retired after December 31, 1990 ("Post-1990 Occupational Retirees"). Under the CBA, Qwest was obligated to pay the full cost of Health Plan benefits for Post-1990 Occupational Retirees before that date. Because the cost of Health Plan benefits has exceeded the caps since at least 2003, upon implementation of the Health Plan caps, Post-1990 Occupational Retirees would immediately become obligated to contribute on a monthly basis the amount in excess of the caps in order to continue to maintain Health Plan coverage.

4. In the summer of 2005, Qwest sought to accommodate the desire of Post-1990 Occupational Retirees for a three-year postponement, until January 1, 2009, of implementation of the Health Plan caps.

5. On or about August 14, 2005, representatives of QCII and the CWA signed letters regarding the Health Plan and the Life Plan, true and correct copies of which are attached hereto as Exhibits 1 and 2 respectively. The letter regarding the Health Plan stated in pertinent part that "no retired employee shall be required to pay any contribution toward Plan costs for coverage prior to January 1, 2009" (emphasis in original). The letter regarding the Life Plan stated in pertinent part that "beginning January 1, 2006, the Basic Life Insurance benefit available under the Qwest Group Life Insurance Plan to current eligible retirees will be reduced to a flat ten thousand dollar ($10,000) benefit upon the death of the eligible retiree."

6. Attached hereto as Exhibit 3 is a true and correct copy of a document entitled "Plan Design Committee—Minutes and Resolutions October 14, 2005—Group Life Insurance Plan" (the "Oct. 2005 Resolutions"). The PDC intended by means of the Oct. 2005 Resolutions to amend the Life Plan to reduce the life insurance benefit to $10,000 for Post-1990 Occupational Retirees effective January 1, 2006. I refer below to this plan amendment as the "2005 Amendment."

7. Attached hereto as Exhibit 4 is a true and correct copy of a letter dated October 14, 2005 from Teresa Taylor, who was then QSC's Executive Vice-President and Chief Human Resources Officer, to Occupational Post-1990 Retirees regarding "Retiree Health & Basic Life Insurance Benefit Changes." Attached hereto as Exhibit 5 is a true and correct copy of a letter dated October 20, 2005 from Teresa Taylor to Mimi Hull, President of the Association of U S WEST Retirees. As these letters state, the PDC approved the 2005 Amendment to the Life Plan in order to offset the enormous cost of postponing for three years the obligation of Post-1990 Occupational Retirees to pay amounts in excess of the Health Plan benefit caps. Qwest's approval of the 2005 Amendment to the Life Plan and its three-year postponement of implementation of the Health Plan caps were part of a *quid pro quo*, and Qwest would not have taken one of these actions without taking the other.

8. The savings that Post-1990 Occupational Retirees have enjoyed by virtue of the three-year postponement of implementation of the Health Plan caps have been made possible by the savings Qwest has realized by virtue of the 2005 Amendment reducing the Life Plan benefit for these same retirees. If plaintiffs prevail in this lawsuit, and Qwest accordingly loses the savings provided by the 2005 Amendment, Post-1990 Occupational Retirees will receive an enormous windfall, because they will have received a substantial

benefit (postponement of implementation of the Health Plan caps) without incurring the corresponding cost (reduction of the life insurance benefit to $10,000). For this reason, if plaintiffs prevail in their effort to invalidate the 2005 Amendment in its entirety, Qwest would need to consider implementing various means of recovering the resulting windfall enjoyed by Post-1990 Occupational Retirees, including but not limited to (a) eliminating all life insurance benefits for such retirees, and/or (b) seeking reimbursement from such retirees of the amounts they have saved by virtue of the three-year postponement of implementation of the Health Plan caps.

9. The seventh named plaintiff, Martha Lensink, is the beneficiary of a Post-1990 Occupational Employee who died January 5, 2006 (*see* SAC ¶ 15), five days after the date on which implementation of Health Care caps was postponed in return for implementation of the Life Plan's 2005 Amendment. Individuals in Mrs. Lensink's situation may maintain their health benefits under the Health Plan pursuant to COBRA at their own expense paying 102% of the premium. She does not face the potential loss that Post-1990 Occupational Retirees face if Qwest accelerates implementation of the Health Plan caps for such retirees.

10. Attached hereto as Exhibit 6 is a true and correct copy of a document entitled "Plan Design Committee—Minutes and Resolutions September 14, 2006—Qwest Group Life Insurance Plan" (the "Sept. 2006 Resolutions"). The PDC intended by means of the Sept. 2006 Resolutions to amend the Life Plan to reduce the life insurance benefit to $10,000 for all eligible Pre-1991 Retirees, Post-1990 Management Retirees, and ERO-1992 Retirees effective January 1, 2007. I refer below to this plan amendment as the "2006 Amendment."

11. The PDC elected by means of the 2005 and 2006 Amendments to reduce, rather than eliminate, benefits provided to Eligible Retirees under the Life Plan. I understand that several claims asserted in this lawsuit seek to invalidate the 2005 and 2006 Amendments in their entirety, which would eliminate the savings achieved by those amendments. If plaintiffs prevail on these claims, Qwest would need to consider terminating the Life Plan benefits for Eligible Retirees altogether in an effort to recoup the amounts it would have saved by means of the invalidated 2005 and 2006 Amendments.

12. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED: June 27, 2008.

s/Erik P. Ammidown
Erik P. Ammidown