IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **05-cv-00478-MSK-PAC**

EDWARD J. KERBER,
NELSON B. PHELPS,
Individually, and as Representative of plan participants
and plan beneficiaries of the QWEST PENSION PLAN,

Plaintiffs,

vs.

QWEST PENSION PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PENSION PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS INTERNATIONAL, INC.,

Defendants.

PLAINTIFFS' RESPONSE IN OPPOSITION To [Docket No. 12]
DEFENDANTS' August 12, 2005 MOTION TO DISMISS

Counsel for Plaintiffs EDWARD J. KERBER and NELSON B. PHELPS submits their brief in opposition to Defendants' Fed. R. Civ. P. Rule 12(b)(1) Motion to Dismiss filed on August 12 , 2005. For the following reasons, this Court has subject matter jurisdiction, there is a true "case or controversy," and Plaintiffs' Amended Complaint should not be dismissed as a matter of law.

I. PRELIMINARY STATEMENT and ALLEGATIONS OF THE AMENDED COMPLAINT. [1]

Plaintiffs EDWARD J. KERBER and NELSON B. PHELPS are participants in the Qwest Pension Plan (PLAN) and they assert two claims for relief based upon ERISA. For many decades, a stable feature of the PLAN (and predecessor plans) has been a "Pension Death

[1] This is simply a summary, and Plaintiffs incorporate all of the allegations of the Amended Complaint which allegations Defendants accept as true for purposes of their Motion to Dismiss. See Defendants' Brief, at p. 2, fn. 1).

Benefit" payable upon the death of a retiree receiving a service pension and delivered to his or her surviving spouse or dependent beneficiaries. Qwest and its predecessors have a long history of treating the Pension Death Benefit as an "accrued" or protected pension benefit payable from trust fund assets.

AT&T and U S WEST, as PLAN sponsors, and PLAN administrators (including the U S WEST Employee Benefits Committee) designated and treated the "Pension Death Benefit" under the PLAN to be a vested, protected or accrued **defined** pension benefit. For instance, in all of the SPDs issued during years 1977 through at least 1996, under the heading "Type of Plan" the PLAN sponsor and PLAN fiduciaries affirmatively represented that under the definitions of ERISA", the PLAN was "classified" as a "'**defined** benefit plan' for service and deferred vested pension purposes and for payment of certain sickness death benefits upon the death of a Pension Plan participant." [2]

By classifying and representing the Pension Death Benefit to be a defined benefit plan, U S WEST and PLAN administrators (including the COMMITTEE) elected to treat the Pension Death Benefit to be an entitlement, an "accrued benefit" under ERISA Section 3(23), 29 U.S.C. § 1002(23), subject to strict vesting requirements.

When Plaintiffs retired from U S WEST and made their respective retirement elections and chose the structure of benefits to be received for themselves and their spouses, they specifically and detrimentally relied upon representations and assurances classifying the Pension Death Benefit to be protected, not a "take away" benefit. The Pension Death Benefit was a *huge*

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[2] The PLAN sponsor deliberately chose not to classify the "payment of certain sickness death benefits" as a "welfare benefit." At the very least, that language appearing in all of the SPDs representing the "payment of certain sickness death benefits" as a "defined benefit plan" is positive indication of ambiguity, something to make you scratch your head, thus, opening the door to consideration of extrinsic evidence, including testimony of former PLAN sponsor executives, former COMMITTEE members and former PLAN administrators.

financial component of each Plaintiff's financial and estate planning. For most retirees, the Pension Death Benefit is the equivalent of the retiree's last annual salary at U S WEST.

In July 2000, U S WEST merged with Qwest, the surviving named company. After U S WEST's merger with QWEST and up until at least September 2003, PLAN administrators continued to treat the Pension Death Benefit to be an accrued benefit.

In September 2003, Qwest formally announced to Plaintiffs that, contrary to what Plaintiffs understood, the Pension Death Benefit was not a protected or accrued defined pension benefit and that "Qwest is considering eliminating the death benefit for all retirees regardless of their retirement date." Plaintiffs realized they had been duped into believing the Pension Death Benefit was a protected benefit, and it was then too late for them to make other financial arrangements for their spouses and beneficiaries to replace the expected Pension Death Benefit. To the extent there was a breach of fiduciary duty, and Named Plaintiffs had been duped, grounds for that claim were then discovered in September 2003, and the three year statute of limitations began to run on any such claim.

After there was a widespread uproar from the Qwest retirement community protesting Qwest leadership's threat and plans to end the Pension Death Benefit, Qwest leadership thought about the matter and told Plaintiffs that the decision was being delayed. It is noteworthy that Qwest leadership's decision has not been formally rescinded; implementation has merely been delayed. However, the subsequent announcement to delay implementation only served to create more uncertainty and anguish amongst the retirees.

Named Plaintiffs learned that Qwest inserted new language in restated pension plan documents classifying the Pension Death Benefit as a "welfare benefit," not an accrued defined pension benefit. Named Plaintiffs wanted the original protective language appearing in former plan documents, including past SPDs, reinserted into the governing plan document.

Accordingly, an internal ERISA claim was submitted on behalf of Named Plaintiffs and a proposed class of retirees and sent to Qwest seeking a resolution that the Pension Death Benefit payable under the PLAN is a protected pension benefit and would neither be eliminated nor reduced. In the denial letters, Qwest formally denied the request and confirmed that all administrative remedies under the Qwest Pension Plan have been exhausted and that an action under ERISA § 502)(a) may be commenced.

Qwest has repeatedly told Plaintiffs that the company's position is that senior leadership could decide *at any time* to end the Pension Death Benefit. Defendants have been rather coy about the entire situation, unwilling to reveal deliberations and the exact decisions that have been made.

Since the Pension Death Benefit is so critical to not only Plaintiffs' families, but thousands of Qwest retirees and their spouses and their beneficiaries, and Qwest senior leadership continue to hold out with the threat that the company may some day take away that important benefit, Plaintiffs have exercised their rights under ERISA § 502)(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to seek an order that will clarify Qwest Pension Plan participants' rights to future Pension Death Benefits under the terms of the pension plan and for other declaratory, injunctive and appropriate equitable relief. The Court has jurisdiction of the claims for Relief based upon the civil enforcement provisions of ERISA, 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), 1132(a)(3), 1132(e)(1), and 1132(f), and upon 28 U.S.C. §§ 1331 and 1337.

Named Plaintiffs incorporate their two claims and relief requested, as fully stated in their Amended Complaint. To summarize, the first claim is based upon breach of fiduciary duty and equitable estoppel due to a failure to disclose material information and failure to issue SPDs containing correct information about the Pension Death Benefit. Named Plaintiffs contend Defendants QWEST and the Plan Administrators had a duty to communicate material facts

affecting the interests of Named Plaintiffs and other participants. Defendants had a duty to disclose material information, including whether the "death benefit" could be reduced or eliminated in the absence of a Plan termination.

In all the Summary Plan Descriptions ("SPDs") issued to Named Plaintiffs and proposed class members during the years 1977 through at least the merger of U S WEST and Qwest, there were representations that retirees were entitled to the Pension Death Benefit and other written information was provided representing that benefit was a protected defined pension benefit.

Prior to December 2003, neither Defendant QWEST nor PLAN Administrators ever made a *formal* disclosure in the SPDs distributed to Named Plaintiffs and the proposed class advising that the Pension Death Benefit was not a protected benefit or that said pension benefit could either be reduced or eliminated by the sponsoring company even in the absence of PLAN termination. Defendants' past failure to disclose that the Pension Death Benefit could be either reduced or eliminated even in the absence of a Plan termination was recklessness, [3] a material omission and fiduciary misconduct, since there was a substantial likelihood that omission would mislead a reasonable Plan participant about whether or not to purchase life insurance on the open market. Named Plaintiffs and Plan participants have been systematically tricked for many years into believing the Pension Death Benefit was a funded protected benefit under the Plan.

Accordingly, Named Plaintiff's and PLAN participants reasonably and detrimentally relied upon the written representations made by PLAN administrators that there was a commitment to provide a Pension Death Benefit to the surviving spouse or dependent beneficiaries, and Named Plaintiffs and PLAN participants did not obtain the equivalent in life

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[3] By "recklessness" Named Plaintiffs mean the PLAN fiduciaries' conduct was an extreme departure from the standards of ordinary fiduciary care and the misconduct presented a danger of misleading Plan participants about important information concerning the "death benefit" that was either known to AT&T (Baby Bells) and U S WEST controlled PLAN fiduciaries or was so obvious that the PLAN fiduciaries should have been aware of the false impression given to PLAN participants.

insurance coverage from other sources. Named Plaintiffs and PLAN participants have been prejudiced from the lack of notice of material information contrary to the written representations in PLAN publications and SPDs given to them about the Pension Death Benefit. Defendants' omissions and written misrepresentations and SPDs about the Pension Death Benefit were material to Named Plaintiffs and PLAN participants because a reasonable PLAN participant considered the information important in making retirement elections and estate planning decisions about whether to buy life insurance on the market.

Now, due to a combination of age, health condition, and meager financial factors, thousands of PLAN participants cannot possibly afford the cost of purchasing life insurance on the market so as to replace the face amount of the expected Pension Death Benefit under the PLAN. The current cost of life insurance to replace the face amount of the expected Pension Death Benefit makes mitigation of damages impracticable for Named Plaintiffs and the proposed class of PLAN participants. Named Plaintiffs seek an order declaring that, if the Pension Death Benefit is truly a welfare benefit, QWEST, its predecessors, and PLAN administrators, by making omissions and failing to make necessary disclosures in the SPDs, failed to discharge duties to act solely in the interests of Named Plaintiffs, PLAN participants and beneficiaries, as required by ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1). Named Plaintiffs request this Court to apply principles of equitable estoppel, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and issue an order forbidding Defendants and successors from ever altering, modifying, eliminating or terminating the death benefit in the absence of a PLAN termination.

Named Plaintiffs contend Qwest has issued a current SPD which falsely states the Pension Death Benefit is a welfare benefit, subject to reduction or elimination at any time. Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), Named Plaintiffs request this Court grant injunctive relief requiring QWEST, as PLAN sponsor, to correct the current faulty

language in the PLAN's current SPD and issue a corrected SPD with language disclosing the Pension Death Benefit is a vested, protected or accrued defined pension benefit, not subject to reduction or elimination absent a PLAN termination.

To summarize, for their second claim, Named Plaintiffs, pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B), bring this action and request this Court to clarify their rights to future Pension Death Benefits under the terms of the PLAN. Named Plaintiffs seek a declaration that their mandatory beneficiaries, to the extent there are any at time of death, are entitled to the Pension Death Benefit payable from the PLAN.

III. ARGUMENT.

A. This Federal Court Has Subject Matter Jurisdiction of Named Plaintiffs' Claims Arising Under Federal Law ERISA.

Federal courts have exclusive jurisdiction over suits for breach of fiduciary. 29 U.S.C. § 1132(e)(1). The federal district courts have jurisdiction "without respect to the amount in controversy or the citizenship of the parties" under ERISA § 502(f), 29 U.S.C. § 1132(f) For example, a federal court has jurisdiction to decide questions of the purposes for which a pension fund is established. *Lipton v. Consumers Union of the United States*, 37 F. Supp. 2d 241, 246 (S.D.N.Y. 1999).

Likewise, federal courts have jurisdiction of causes of action under ERISA Section 502(a)(1)(B), in which a participant or beneficiary seeks "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B); *see Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 418 (6th Cir. 1998) (noting that ERISA Section 502(a)(1)(B) "provides a contract-based cause of action to participants and beneficiaries to recover benefits, enforce rights, or clarify rights to future benefits under the terms of an

employee benefit plan"). Venue is not an issue. [4]

Defendants' contend this case should be dismissed arguing the Named Plaintiffs have not suffered any injury and their claims are not ripe for judicial review. [5] In determining whether a case is ripe for judicial review, courts apply the analysis set forth in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). Broadly, *Abbott Laboratories* cautions against the courts "entangling themselves in abstract disagreements." 387 U.S. at 148-49. To assure a live "case or controversy," *Abbott* instructs courts to assess "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. at 149. Here, this case presents a case or controversy concerning a breach of fiduciary duty and the statute of limitations began to run in September 2003.

1. Named Plaintiff's Have Suffered An Injury-in-Fact.

Named Plaintiffs contend that in September 2003 they first learned the basis for a breach of fiduciary duty claim. In September 2003, when Qwest senior leadership announced to Named Plaintiffs and the other Board members of the Association of U S WEST Retirees (AUSWR) that the company had made the decision to eliminate the Pension Death Benefit because the company's position was that the Pension Death Benefit was not a protected or accrued pension

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[4] ERISA's venue provision (Section 502(e)(2), 29 U.S.C. § 1132(e)(2)), provides that venue is appropriate where the plan is administered, where the breach took place, or where a defendant resides or may be found. This provision is liberally interpreted as Congress intended to expand rather than restrict the ERISA plaintiff's choice of forum. *Varsic v. U.S. Dist. Ct. for Central Dist.*, 607 F.2d 245, 247 (9th Cir. 1979).

[5] The ripeness doctrine "is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 n.18 (1993). Because a ripeness concern challenges the federal court's power to resolve a case, the court must be convinced the questions presented satisfy the several ramifications of "case or controversy" jurisdiction. Courts apply the analysis set forth in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

benefit. At that point in time, the Named Plaintiffs first realized they had been duped. In many prior years, Named Plaintiffs had been told otherwise and they specifically relied in good faith upon the SPDs and the other written representations made in the past. The past SPDs and publications reported the Pension Death Benefit was an entitlement, meaning a protected benefit. Relying upon those SPDs and publications, Named Plaintiffs made important and irrevocable financial planning decisions, foregoing the purchase of life insurance as an alternative to the Pension Death Benefit.

Therefore, when Qwest senior management, particularly Executive Vice President Barry Allen, made the announcement in September 2003, Defendants essentially, put Named Plaintiffs on notice that, assuming Qwest leadership was right and the Pension Death Benefit was a 'take-away' benefit, Named Plaintiffs and all the other similarly situated retirees had been mislead all those prior years and there had been a breach of fiduciary duty.

Accordingly, the injury Named Plaintiffs and others alike have suffered is the inability to change their prior pension elections which choices heavily factored in the Pension Death Benefit as an "entitlement" according to the previously issued SPDs. It is too late for Named Plaintiffs to do anything about changing their respective pension elections. Now that Named Plaintiffs have learned of a basis for breach of fiduciary duty, they face a direct and immediate dilemma caused by ERISA's statute of limitations.

ERISA Section 413, 29 U.S.C. §1113, establishes a combination of limitations provisions to govern breach of fiduciary duty claims. It provides:

> "No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of–
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> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date

> on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation."

This section creates a general six year statute of limitations, shortened to three years in cases where the plaintiff has actual knowledge, and potentially to six years from the date of discovery in cases involving fraud or concealment." *Kurz v. Philadelphia Electric Co.*, 96 F.3d 1544, 1551 (3d Cir. 1996) .

Claims for breach of fiduciary duty must be brought under ERISA § 502(a)(2) or (a)(3), and not under Section 502(a)(1)(B) which provides for recovery of plan benefits. See *Anweiler v. American Elec. Power Serv. Corp*., 3 F.3d 986, 992 (7th Cir. 1993). ERISA provides for a broad range of equitable remedies: a breaching fiduciary "shall be subject to such other equitable or remedial relief *as the court may deem appropriate. . . .*" ERISA § 409, 29 U.S.C. § 1109. "Where there has been a breach of fiduciary duty, ERISA grants to the courts broad authority to fashion remedies for redressing the interests of participants and beneficiaries." *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983).

Named Plaintiffs contend that, should Defendants be correct in their announced position about the Pension Death Benefit, the court should grant Named Plaintiffs and the class of similarly situated PLAN participants who detrimentally and reasonably relied upon contrary language set forth in prior SPDs and written representations, equitable relief as set forth in the Prayer for Relief. Equitable relief may take the form of a declaratory judgment of entitlement to benefits. *Smith v. Dunham-Bush, Inc*., 959 F.2d 6, 8 (2d Cir. 1992).

Moreover, Named Plaintiffs contend the current governing PLAN documents have faulty language lacking the prior commitments and representations that the Pension Death Benefit is an

entitlement. The new language classifying the Pension Death Benefit as a mere welfare benefit is fully traceable to Defendants' conduct and a favorable ruling by this Court will redress this problem. In this case, relief may take the form of an order to reform the PLAN documents to include the original "entitlement" language as set forth in the PLAN documents that were distributed to Named Plaintiffs and other retirees.

In making their arguments for dismissal of this action, Defendants rely upon several ERISA cases rulings that are inapposite. In *Devlin v. Transportation Communications Int'l Union*, 175 F.3d 121 (2nd Cir. 1999), the appellate court upheld the trial court's ruling that the plaintiffs lacked standing to deny the union's planned elimination of a Cost of Living Adjustment ("COLA"), because the COLA had not yet been eliminated. Id. at 130. But, unlike in this case, the *Devlin* plaintiffs did not complain about faulty plan language in the governing plan documents, nor did the *Devlin* plaintiffs complain about a breach of fiduciary duty. Likewise, in the case of *International Union UAW v. Facet Enterprises*, 601 F. Supp. 292 (S.D. Mich. 1984), the trial court was asked by plaintiffs to enter a declaratory judgment since the employer had threatened to unilaterally reduce benefits. The trial court noted that the union would not consent and since the employer - Facet - "apparently will not reduce benefits without the union's consent and since there is no possibility of obtaining such consent, plaintiff's 'injury' or potential 'injury' is too abstract and speculative to satisfy standing requirements." Id. at 297. In this case, Named Plaintiffs are not speculating, they specifically contend there has been a breach of fiduciary duty and the current plan documents contain faulty language and must be reformed to accurately reflect past fiduciary commitments about the Pension Death Benefit. Also, in the case of *United Mine Workers of America Int'l Union v. G.M&W. Coal Co.*, 642 F. Supp. 57 (W.D. Pa 1985), the court dismissed the plaintiffs' claim for a declaration that they had the right to retirement benefits under an ERISA plan because within the complaint "no showing [was] made that defendants

have threatened or have contemplated such action." Id. at 62. Here, there is no disputing the fact that Qwest threatened Named Plaintiffs and AUSWR Board members to immediately end the Pension Death Benefit and had a letter drafted ready to send out to all retirees. Qwest's current position is that the decision has been delayed.

2. Defendants Completely Fail to Recognize Named Plaintiffs' Claim of Breach of Fiduciary Duty to the PLAN Due to the Faulty Language in the Current Governing Documents. In Order to Seek Reformation of the Incorrect PLAN Documents, Named Plaintiffs Need Not Prove Actual Personal Harm.

Defendants completely fail to acknowledge Named Plaintiff's contentions that Qwest has wrongfully inserted faulty language in the current governing PLAN documents – language that does not comport with commitments set forth in prior SPDs and other written information issued to Named Plaintiffs confirming the Pension Death Benefit was a protected entitlement. (See Amended Complaint at ¶s 149-152). Pursuant to ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), Named Plaintiffs seek equitable and remedial relief for the benefit of the PLAN as a whole including an order requiring the Qwest Pension Plan Design Committee, the Qwest Employee Benefits Committee and PLAN administrators to correct the current faulty language in the PLAN's current SPD and issue a corrected SPD with language disclosing the Pension Death Benefit is a vested, protected or accrued defined pension benefit, not subject to reduction or elimination absent a PLAN termination. (See Amended Complaint, Prayer ¶ G).

Named Plaintiffs are exercising their right to seek appropriate equitable relief to enforce ERISA's requirement that governing plan documents contain correct plan language. For instance, ERISA Section 102, 29 U.S.C. § 1022 provides in pertinent part that a summary plan description (SPD) must contain "the plan's requirements respecting eligibility for participation and benefits . . . [and] circumstances which may result in disqualification, ineligibility, or denial

or loss of benefits. . . ." [6] Named Plaintiffs contend the current SPD issued by Qwest fails to correctly report that the Pension Death Benefit is, indeed, an entitlement and a protected accrued defined pension benefit for which the plan sponsor is required to maintain sufficient funding within the trust fund. The maintenance of incorrect plan documents is a clear violation of ERISA and breach of fiduciary duty. Named Plaintiffs are not required to suffer "harm" before they become entitled to seek relief for the benefit of the PLAN to have the PLAN documents reformed to report the truth. *Larson v. Northrop Corp.*, 21 F.3d 1164, 1171 (D.C. Cir. 1994) (holding a plaintiff need not suffer harm (i.e., be denied pension benefits) before he becomes entitled to bring an action under 29 U.S.C. § 1104(a), agreeing with Ninth and Third Circuit decisions)) (citations omitted).

It is unquestionable that Named Plaintiffs have standing to assert a claim for breach of fiduciary duty and to insure that plan documents are accurate. *See Alexander v. Anheuser-Busch Cos., Inc.*, 990 F.2d 536, 538 (10th Cir. 1993) (holding that "[p]ursuant to 29 U.S.C. § 1132, a 'participant' has standing to bring a civil action to enforce his rights under the terms of an ERISA plan or to enforce ERISA's provisions.").

3. There Has Been A *Final* Administrative ERISA Decision Adverse to Named Plaintiff's ERISA Section 502(a)(1)(B) claim.

Defendants do not dispute that Named Plaintiffs completely exhausted the pension plan's internal two-step administrative claims process for their claim under ERISA Section 502(a)(1)(B). Those events are fully alleged in the Amended Complaint at ¶s 25-35). By letter dated May 28, 2004, Defendants reported to Named Plaintiffs that their ERISA Section 302(a)(1)(B) claim was fully denied and reiterated that "the EBC's December 22, 2003 denial letter made clear that its

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[6] In addition to ERISA Section 102, there are a plethora of regulations that require the SPD, the core disclosure document, to contain correct information. *See* 29 C.F.R. § 2520.102-3.

decision was final and that all administrative remedies under the Pension Plan had been exhausted." Acknowledging that there was, indeed, a case or controversy, Defendants told Named Plaintiffs that they "*have the right to bring a civil action under ERISA § 502(a).*" (See Amended Complaint, ¶s 28 and 30). Defendants should be judicially estopped to assert otherwise.

The Tenth Circuit teaches that in determining whether an ERISA administrative action is fit for judicial resolution, the courts must consider "the legal nature of the question presented and the finality of the administrative action." *Schwob v. Standard Insurance* Co., 2002 U.S. App. LEXIS 11651 (10th Cir. June 12, 2002) [7] (citing *Mountain Radar, Inc. v. FCC*, 158 F.3d 1118, 1123 (10th Cir. 1998) (quotation omitted). The Tenth Circuit further stated that the courts should engage in a three-part inquiry to determine: (1) whether delayed review would cause hardship to [plaintiff]; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented. (citing) *Roe #2 v. Ogden*, 253 F.3d 1225, 1231 (10th Cir. 2001) (quotation omitted).

Unlike in the *Schwob* case where the plan administrator said he would take another look at the plaintiff's claim, here, Defendants have proclaimed all administrative remedies have been fully exhausted and Defendants do not seek to further develop any administrative record. Thus, the court's actions will not interfere with further ERISA administrative action. Named Plaintiffs and putative class members alike will suffer hardship if they are not allowed to go forward with this civil action and gather formal discovery and take depositions to preserve needed testimony. Many anticipated key witnesses concerning fiduciary commitments made long ago and with

[7] The *Schwob* decision is attached as Exhibit B to Defendants' brief.

knowledge about the pre-Qwest era administration of the Death Pension Benefit are elderly.

Finally, with respect to Named Plaintiff's ERISA Section 502(a)(1)(B) claim for clarification of their rights to future pension benefits, it is undisputed that the parties' positions have crystallized and the conflict of interest is real and immediate. Named Plaintiffs should be allowed to forestall the accrual of potential damages by allowing this civil action to go forward for a declaratory judgment and other equitable relief to remedy the alleged breaches of fiduciary duty.

IV. CONCLUSION and REQUEST FOR ORAL ARGUMENT

For all the foregoing reasons, the Court should deny [Docket No. 12] Defendant's Motion to Dismiss. Due to the importance of the issues in this civil action which case is being monitored by many putative class members, an oral argument hearing is requested.

DATED this 1st day of September, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2005, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system.

I also certified that on this 1st day of September, 2005, a true and correct copy of the above and foregoing document was delivered to Defendants' counsel of record via email as follows:

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Also, copy of the same was delivered via email to Edward J. Kerber, ELKMAK@aol.com and Nelson B. Phelps, nbphelps@worlnet.att.net, the Named Plaintiffs.

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