

CASE NO. 10-1349

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

EDWARD J. KERBER,
NELSON B. PHELPS,
JOANNE WEST,
NANCY A. MEISTER,
THOMAS J. INGEMANN, JR.,
MARTHA A. LENSINK,
SAMUEL G. STRIZICH,
Individually, and as Representative of plan
participants and plan beneficiaries of the
Qwest Group Life Insurance Plan,

Plaintiffs-Appellants,

vs.

QWEST GROUP LIFE INSURANCE PLAN,
QWEST EMPLOYEES BENEFIT COMMITTEE,
QWEST PLAN DESIGN COMMITTEE,
QWEST COMMUNICATIONS
INTERNATIONAL, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado
Civil Action No. 07-cv-00644-WDM-KLM
The Honorable Senior Judge Walker D. Miller, Presiding

PLAINTIFFS – APPELLANTS’ OPENING BRIEF

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

This appeal involves a challenge pursuant to the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §§ 1001-1461, contesting the reduction of Qwest Group Life Insurance Plan (“Plan”) benefits for all of Qwest’s retirees. For over 50 years, Qwest and its predecessors have provided service pension eligible retirees some basic life insurance coverage.

In October 2005, successor Plan sponsor Qwest announced it would amend the Plan so as to reduce basic life insurance coverage to \$10,000 for a certain group of retirees effective January 1, 2006. In October 2006, Qwest announced it would reduce basic life insurance coverage to \$10,000 for all other retirees effective January 1, 2007.

Appellants are six Plan participants (Kerber, Phelps, West, Meister, Ingemann and Strizich) and one Plan beneficiary (Lensink). Ms. Lensink received reduced life insurance benefits upon the death of her husband.¹ In the trial court, Appellants made numerous ERISA based challenges to the reduction of retirees’ basic life insurance benefits. Appellants contend the benefit reductions carried out by Qwest violated the rules and terms of the governing plan documents.

¹ One Appellant, Samuel G. Strizich, is both a Plan participant and Plan beneficiary. Mr. Strizich received reduced Plan benefits upon the death of his wife Sharon Strizich.

Appellants sought to represent the interests of all retiree Plan participants and their beneficiaries. Appellants sought to have minimum coverages restored and corrected payments made to Plan beneficiaries of retirees who passed away before the dates of adoption of operative Plan amendments purporting to reduce benefits.

The District Court granted Appellees favorable rulings on all claims. Appellants timely filed a Fed.R.Civ.Proc. Rule 59(e) motion to alter or amend the judgment, which motion was denied. This appeal is timely.

STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals concerning the parties' dispute with respect to the subject group life insurance plan benefits.

STATEMENT OF INTERESTED PARTIES

There are no undisclosed or unlisted parties to this appeal.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. §1331 (federal question). The District Court had jurisdiction pursuant to the civil enforcement provisions of the ERISA, 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), 1132(a)(3), 1132(e)(1), and 1132(f). The Tenth Circuit Court of Appeals has appellate jurisdiction under 28 U.S.C. § 1291, as the District of Colorado entered a

final and appealable judgment dismissing all claims with prejudice. The District Court's order of dismissal with respect to the Amended Complaint was entered on February 27, 2008. (4 App. 836-852).² On August 25, 2009, the last summary judgment order with respect to the claims asserted in the Second Amended Complaint was entered. (13 App. 2697-2728). Final judgment entered on August 27, 2009. (13 App. 2732-2734).

On September 8, 2009, Appellants timely filed a Fed.R.Civ.Proc. Rule 59(e) motion. (13 App. 2735-2759). The District Court's order denying the Rule 59(e) motion was entered on July 22, 2010. (13 App. 2786-2792). On August 10, 2010, the Notice of Appeal was timely filed. (13 App. 2793-2795).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court committed reversible error when dismissing Claim 1 of the Amended Complaint and failing to find the Plan's rules circumscribed the Plan sponsor's general right to reduce retirees' Basic Life Coverage.
2. Whether the District Court committed reversible error when dismissing Claim 1 of the Amended Complaint and failing to recognize ERISA equitable estoppel as a viable claim.
3. Whether the District Court committed reversible error when granting Appellees summary judgments on Claims 3, 4, 5 and 6 of the Second Amended Complaint and failing to determine the date of adoption of enabling Plan amendments and failing to declare Plan beneficiaries' rights were governed by more favorable unamended Plan terms

² "4 App. 836-852" is the convention Appellants use herein to identify the volume and page numbers of the Appendix wherein the filing, order, exhibit or argument appears in the trial record.

existing in the governing plan documents - Master Plan Document and Group Contract.

4. Whether the District Court committed reversible error when denying Appellants summary judgment on Claims 3, 4 and 5 of the Second Amended Complaint.
5. Whether the District Court committed reversible error when granting Appellees summary judgment on Claim 2 of the Second Amended Complaint and failing to find the Plan sponsor's broadcast explanation about the ROR was a material misrepresentation and omission and, thus, a breach of ERISA fiduciary duty.

STATEMENT OF THE CASE

Amended Complaint ("AC") – Appeal with respect to Claim 1

On March 30, 2007, this case was commenced. On May 15, 2007, the AC was filed alleging three separate claims under ERISA. (1 App. 29-70). Appellees filed a Rule 12(b)(6) partial motion to dismiss directed at Claim 1 of the AC. (1 App. 99-130).

On February 27, 2008, the District Court entered an Order of Dismissal with respect to Claim 1 of the AC, and ruled that Qwest was not contractually barred to reduce retirees' benefits below the stated minimum levels of coverage. (4 App. 836-852). And, the District Court ruled the ERISA equitable estoppel component of Claim 1 failed to state a claim recognized by the Tenth Circuit. (*Id.*).

Second Amended Complaint (“SAC”) – Appeal with respect to Claims 2-6.

On April 3, 2008, Appellants filed a SAC asserting eight ERISA based claims. (5 App. 958-995). This appeal does not pertain to Claims 1, 7 and 8 of the SAC.

Appellees filed a motion to dismiss Claims 1, 2 and 7 of the SAC. (5 App. 1045-1066). On March 25, 2009, the District Court entered an order granting dismissal of Claims 1 and 7. (13 App. 2591-2606).

Both sides filed cross-motions for summary judgment on Claims 3, 4 and 5 of the SAC. (5 App. 874-878 and 6 App. 1174-1195). On March 31, 2009, the District Court entered an order denying Appellants’ motion and granting Appellees’ motion. (13 App. 2607-2623).

Appellees’ filed a separate motion for summary judgment on Claim 2 of the SAC. (8 App. 1633-1656). Appellees’ filed an additional motion for summary judgment on Claims 6, 7 and 8 of the SAC. (9 App. 1883-1907). On August 25, 2009, in the last dispositive order, the District Court granted summary judgment for Appellees and dismissed the case. (13 App. 2697-2728).

On August 27, 2009, an Amended Judgment was entered. (13 App. 2729-2734).

On September 8, 2009, Appellants filed their Rule 59(e) motion to alter or amend judgment. (13 App. 2735-2759)

On July 22, 2010, the District Court denied the Rule 59(e) motion. (13 App. 2786-2792).

On August 10, 2010, Appellants timely filed a Notice of Appeal. (13 App. 2793-2795).

Appellants appeal the District Court's rulings on Claim 1 of the AC. Appellants also appeal the District Court's rulings on Claims 2-6 of the SAC.

STATEMENT OF FACTS

1. In 2000, Qwest Communications International, Inc. ("Qwest") acquired and merged with U S WEST, Inc. Qwest became and remains to this day the plan sponsor of the Qwest Group Life Insurance Plan ("Plan"), the successor to U S WEST's plan. (12 App. 2549 ¶ F). The Plan is an "employee welfare benefit plan," pursuant to ERISA § 3(1), 29 U.S.C. § 1002(1). (12 App. 2548 ¶ C). The Plan provides life insurance benefits payable to the estate or beneficiaries of Plan participants who retired from Qwest or predecessor companies after becoming eligible for a service or disability pension. (12 App. 2549 ¶ D).

2. The Qwest Plan Design Committee ("PDC") has authority to make amendments to the Plan. (12 App. ¶ E).

3. In 1990, U S WEST made a special early retirement offering, hereinafter referred to as the "5+5 Option", to thousands of management employees, including Appellants Kerber and Mr. Phelps. (App. 922, ¶ 2; App.

926, ¶ 2). The 5+5 Option included the Plan's specified Basic Life Coverage.

4. In June 1998, U S WEST created a governing plan document which hereinafter Appellants refer to as the "Master Plan Document." (8 App. 1592-1632). The Master Plan Document expressly incorporates the terms of the Plan sponsor's contract with the insurer, hereinafter referred to as the "Group Contract". (8 App. 1600, defining "Plan").

5. The relevant material terms of both the Master Plan Document and the Group Contract are accurately recited in the Argument section hereinbelow.

6. In October 2005, Qwest announced its intention to change Plan benefits and pay out only \$10,000 upon the death occurring on or after January 1, 2006 of: 1) a currently employed worker; and 2) a Post-1990 Occupational Retiree.³ (7 App. 1352). Later in 2006, Qwest announced its intention to change Plan benefits and pay out only \$10,000 upon the death occurring on or after January 1, 2007 of any other retiree. (10 App. 2074).

7. In March 2007, this ERISA based civil action was commenced as a putative class action on behalf of all retirees and their beneficiaries.

³ Qwest categorizes a retiree according to whether he or she last worked as management or occupational worker and when he or she retired, to-wit: a) Pre-1991 Occupational Retiree; b) Pre-1991 Management Retiree; c) Post-1990 Occupational Retiree; and 4) Post-1990 Management Retiree.

STANDARD OF REVIEW

ERISA contract interpretation is a question of law, which this Court reviews de novo. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1244 (10th Cir.2002).

Thus Court reviews de novo the District Court's grant of a motion to dismiss pursuant to Rule 12(b)(6). *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1223 (10th Cir. 2009). This Court will "assume the factual allegations are true and ask whether it is plausible that the plaintiff is entitled to relief." *Gallagher v. Shelton*, 587 F.3d 1063, 1068 (10th Cir. 2009).

This Court reviews de novo the District Court's grant of a motion for summary judgment pursuant to Rule 56. *Proctor v. United Parcel Serv.*, 502 F.3d 1200, 1205 (10th Cir. 2007). In reviewing the District Court's decisions, this Court draws all justifiable inferences in favor of the non-moving party. *Trujillo v. PacificCorp.*, 524 F.3d 1149, 1154 (10th Cir. 2008).

SUMMARY OF THE ARGUMENT

With respect to Appellants' appeal of the District Court's ruling to dismiss Claim 1 of the AC, Appellants contend the District Court erred when concluding the Plan's rules do not circumscribe the Plan sponsor's rights to reduce retirees' Basic Life Coverage. Although, the Plan contains a reservation of rights provision ("ROR") specifically giving the Plan sponsor the general right to reduce any Plan participant's Basic Life Coverage, the Plan also contains special rules that an

ordinary retiree understands to serve as a specific limitation on the Plan sponsor's right to reduce Eligible Retirees' Basic Life Coverage. The District Court misapplied this Court's principles established in *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir.1996).

Also with respect to Claim 1 of the AC, Appellant's contend the District Court erred when concluding Appellants failed to state a cognizable claim of ERISA equitable estoppel that this Court will recognize. This Court should firmly recognize ERISA equitable estoppel as a viable claim and reverse the District Court's dismissal of Claim 1 of the AC.

Appellants appeal the District Court's rulings granting Appellees summary judgments on Claims 3, 4, 5 and 6 of the SAC, which claims center around the fact the Plan sponsor had not adopted enabling amendments so as to change terms in the controlling Plan documents. Appellants contend Plan beneficiaries of retirees who died before the date of adoption of enabling amendments to controlling Plan documents were entitled to be paid Basic Life Coverage in accordance with the unchanged Plan terms existing when the retirees died. The District Court erred in its serial rulings pertaining to Claims 3-6 because the District Court never determined the date of adoption of any operative Plan amendment, and the District Court failed to find that the terms in both controlling Plan documents - Master Plan Document and Group Contract - had not been properly changed prior to

January 21, 2009. This Court should reverse the District Court's summary judgment rulings on Claims 3-6 of the SAC.

Appellants appeal the District Court's ruling granting Appellees summary judgment on Claim 2 of the SAC, which claim focuses on former Plan sponsor U S WEST's failure to adequately disclose the potential adverse affects of the ROR provision when promoting an early retirement offer in 1990. This Court should set forth the necessary elements of an ERISA breach of fiduciary duty due to a material misrepresentation or omission and, accordingly, reverse the District Court's summary judgment ruling on Claim 2 of the SAC.

ARGUMENT

A. The District Court's Ruling Dismissing Claim 1 of the Amended Complaint Should Be Reversed.

1. The District Court Erred in Ruling Qwest May Reduce Eligible Retirees' Basic Life Coverage to Any Level Because the Plan's Rules Forbid Qwest From Reducing Such Coverage Below Stated Minimums.

In Claim 1 of the AC, Appellants contend that prior Plan sponsor U S WEST deliberately chose two specific situations in which to circumscribe its power and rights to reduce benefits under any reservation of rights ("ROR") language set forth in the Master Plan Document or SPDs. (1 App. 36 ¶ 23, 45-46 ¶¶ 57-61, 49 ¶68). The limitations are binding upon successor Plan sponsor Qwest. Appellants sought an order declaring Qwest's reduction of Plan benefits to

only \$10,000 violated Plan document rules and constituted a violation of ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).⁴ (1 App. 59 ¶ 108). The District Court considered this a claim that Appellees were “contractually barred” from reducing retirees’ minimum life insurance benefit. (4 App. 840; 13 App. 2594).⁵ Appellants also asked the District Court to apply ERISA equitable estoppel principles and grant appropriate equitable relief under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3). (1 App. 59 ¶ 109).

In their motion to dismiss, Appellees misrepresented Appellants’ primary contention in Claim 1 of the AC and said: “Plaintiffs assert that this case ‘involves one overarching question’ – whether the ‘minimum benefits’ language in the *Plan’s Benefit Formula* ‘circumscribed the PLAN sponsor’s rights under the reservation of rights clause to reduce the life insurance coverage below the minimum thresholds.’ ” (emphasis added) (1 App. 106, Appellees referring to, but incorrectly quoting, Appellants’ contention made in 1 App. 73 ¶ 6). In their

⁴ ERISA Section 404(a)(1)(D) is commonly known as the “plan documents rule.” While this case was pending, the Supreme Court amplified that a “plan administrator is obliged to act ‘in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA],’ § 1104(a)(1)(D), and the Act provides no exemption from this duty when it comes time to pay benefits.” *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, ___ U.S. ___, 129 S.Ct. 865, 875 (2009).

⁵ The District Court ruled in its “Amended Order on Motion to Dismiss” that “Plaintiffs have failed to state claim a upon which relief can be granted for their contractual bar claim. . . .” (4 App. 847).

opposition brief, Appellants corrected Appellees and explained that the “most important issue presented in this litigation is whether or not Plan sponsor Qwest is bound by the *rules* that Basic Life Insurance Coverage ‘*shall not be reduced below*’ the stated coverage amounts set forth in the 1998 Governing Plan Document.” (4 App. 754).⁶

In opposition to the motion to dismiss, Appellants argued that the Plan’s “rules circumscribed Qwest’s discretionary rights under the ‘reservation of rights’ provision in the Plan”. (*Id.*). Appellants argued that, although the sponsor may generally reduce other Plan participants’ benefits and even terminate the Plan, the sponsor is barred from reducing certain Eligible Retirees’ Basic Life Coverage below stated minimum amounts. (4 App. 759).

Nevertheless, the District Court accepted Appellees’ incorrect description of the case and arrived at an erroneous decision. Throughout the Amended Order of dismissal, the District Court does not refer to the terms in Appendix 7 as “rules”, but, rather characterizes the same as the “Minimum Benefits Promise,” a characterization never used by either side in their memorandum briefs.

Appellants argued that the District Court had to examine the Plan as a whole, including the contested rules from the viewpoint of an objectively

⁶ The “1998 Governing Plan Document” is the same document that Appellants refer to herein as the “Master Plan Document.”

reasonable employee. (4 App. 756). Examining the Plan as whole, the District Court, at a minimum, should have reviewed and applied in its analysis the following material provisions of the Plan:

1.1: “Plan” means the U S WEST Group Life Insurance Plan set forth herein, together with the Contracts, if any, and the Appendices attached hereto, as amended from time to time.

(3 App. 618).

1.1 “Benefits” means coverage or payments provided in accordance with the terms of the Plan and any applicable Contract. The Benefits available under the Plan, as set forth in Appendix 2, are **Basic Life Coverage**, AD&D Coverage, Supplemental Life Coverage and Dependent Life Coverage and such other coverages as may be added to the Plan from time to time.

(emphasis added) (3 App. 614).

1.1 “**Basic Life Coverage**” means the basic life insurance coverage in an amount equal to an Eligible Employee’s Annual Pay that is available as a Benefit; provided, however, that the basic life insurance coverage amount for ELIP Participants shall be limited to \$50,000.

(emphasis added) (3 App. 614).

2.6(a) **Basic Life Coverage**. On the first day of the month coinciding with or next following the date upon which an Eligible Retiree attains age 66, the amount of Basic Life Coverage in effect at retirement shall be reduced annually by 10 percent until the last day of the month in which an Eligible Retiree attains age 70, at which time, such Eligible Retiree’s Basic Life Coverage shall remain at 50 percent of the Basic Life Coverage amount in effect prior to his 66th birthday. Notwithstanding the foregoing, for certain Eligible Retirees, such Basic Life Coverage amounts shall not be reduced below certain minimum amounts set forth in Appendix 7 or such coverage shall be augmented with Grandfathered Benefits as set forth in Appendix 3.

(emphasis added) (3 App. 624-625)

5.2 Payment of Benefits. The payment of Benefits under the Plan shall be in accordance with the Plan and the applicable Contracts. . .

(3 App. 631).

10.1 Amendment. Except to the extent limited by any applicable collective bargaining agreement, **the Company reserves the right**, in its sole discretion, to amend the Plan at any time, in any manner, including without limitation, the right to amend the Plan **to reduce**, change, eliminate, or modify the type or amount of Benefits provided to any class of Participants. Moreover, unless otherwise explicitly provided in a Contract, no amendment shall be made to the Plan without the consent of the Company. Any such amendment of the Plan shall be effective on such date as the Plan Sponsor may determine, provided, however, that no amendment shall reduce the benefits of any Participant with respect to a loss incurred prior to the date such amendment is adopted.

(emphasis added) (3 App. 638).

Appendix 7 Minimum and Maximum Benefits for Certain Eligible Retirees

Minimum and maximum Benefit coverage shall apply to certain Eligible Retirees in accordance with the following rules:

1.1 Minimum Benefit.

(a) The **Basic Life Coverage** amount for an Eligible Retiree who retires before January 1, 1996 and dies after December 31, 1996 **shall not be reduced below \$20,000**.

(b) The **Basic Life Coverage** amount for an Eligible Retiree who retires on or after January 1, 1996 **shall not be reduced below \$30,000**.

1.2 Maximum Benefit. The maximum Basic Life Coverage amount for an Eligible Retiree who retires on or after January 1, 1996 shall be \$100,000 or, if greater, the Basic Life Coverage amount in effect on December 31, 1995 for any such individual covered as an Eligible Employee on that date.

(emphasis added) (3 App. 647).

This Court holds that in interpreting a plan's terms, a trial court must

“examine the plan documents as a whole and, if unambiguous . . . construe them as

a matter of law.” *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir.1996).

Here, while the Plan’s terms allow the Plan sponsor an unlimited right to reduce the Basic Life Coverage for all active employee Plan participants, there is no similar unlimited right to reduce the Basic Life Coverage of certain Eligible Retirees.

Appellants argued that the Master Plan Document specifically contemplates two situations in which Qwest’s discretion to change the Plan is circumscribed. (4 App. 756-757). First, it states “no amendment shall reduce the benefits of any Participant with respect to a loss incurred prior to the date such amendment is adopted.” (3 App. 638 ¶ 10.1). The parties and the District Court refer to this restriction as the “Prior Loss Proviso”. Second, rules prevent the Plan sponsor from reducing Eligible Retirees’ Basic Life Coverage below the floors established in Appendix 7. (3. App. 647).

The District Court correctly determined the Prior Loss Proviso circumscribes the Plan sponsor’s discretionary rights.

However, the District Court erred by declaring the rules found in Appendix 7 do not circumscribe the Plan sponsor’s discretionary rights. The District Court’s ruling presumes that the rules stated in Appendix 7 are tied to the Plan’s age based reduction formula. But, the rules do not even remotely refer to a formula. The rules do not have application that is only limited to a retiree’s

certain age. The rules are much more absolute. The following hypothetical applies a straightforward reading and demonstrates an objective reasonable Plan participant's understanding of the Plan's terms as a whole:

Suppose an Eligible Employee earning \$90,000 annual pay retires at age 55 on or about January 1, 1999. Normally, upon retirement that person's starting amount of Basic Life Coverage and the amount going forward during the next 10 years would be \$90,000, the equivalent of his or her final annual pay. However, in accordance with the Plan's ROR and rules set forth in Appendix 7, the Plan sponsor could choose to amend the Plan so as to start that retiree and all other retirees as of January 1, 1999 with Basic Life Coverage of only \$31,000, regardless of age on January 1, 1999. In year 2000, the plan sponsor could reduce that retiree's Basic Life Coverage to \$30,000. But, not below \$30,000.

The District Court erred by giving weight to the fact that the ROR's right to "reduce" rule and Appendix 7's "shall not reduce below" rules are found in different parts of the Master Plan Document. (4 App. 846). In *Chiles*, this Court did not hold that an express statement of a limitation on the plan sponsor's rights must be stated within the ROR clause itself.

This Court should reverse because the District Court did not give the Plan's terms found in Appendix 7 a simple straightforward reading. Both the ROR and the other stated rules should be looked at from the viewpoint of the objectively reasonable employee. See *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1202 (10th Cir. 1992) (court gives words their common and ordinary meaning, as a reasonable person in the position of the Plan participant would have

understood them). Applying this analysis, the District Court erred by concluding the rules in Appendix 7 do not circumscribe the general right of the Plan sponsor to reduce Eligible Retirees' Basic Life Coverage. The District Court's decision conflicts with basic principles of contractual interpretation because it fails to give specific terms greater weight than general language. See Restatement (Second) of Contracts § 203 (1981) ("In the interpretation of a promise or agreement or a term thereof, . . . specific terms and exact terms are given greater weight than general language.").

Appellants' do not contend within Claim 1 of the AC that the plan sponsor promised lifetime benefits and, thus, had no right to *terminate* the plan. Hence, the circuit cases that Appellees relied upon in their trial court briefs and supplemental authority submissions are inapposite. Each of the cited circuit cases involved resolving the tension between a plan's lifetime benefits clause and the plan's clause reserving the plan sponsor's right to reduce or terminate benefits.⁷ This litigation does not involve a challenge to the termination of Plan benefits. None of the cases relied upon by Appellees involved tension between the reserved right to reduce and rules limiting the right to reduce the benefits for a particular

⁷ *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 98 (2nd Cir. 2001); *In re Unisys Corp. Retiree Medical Benefit ERISA Litig.*, 58 F.3d 896, 903-04 (3rd Cir. 1995); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 410 (6th Cir. 1998) (*en banc*); *UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698, 703(7th Cir. 2003); *Gable v. Sweetheart Cup. Co.*, 35 F.3d 851, 856 (4th Cir. 1994); *Spacek v. Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998); *Howe v. Varsity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990).

group of plan participants. In contrast, this case involves an extra-ERISA commitment. . . stated in clear and express language (*Chiles*, 95 F.3d at 1513) that Eligible Retirees' Basic Life Coverage would not be reduced below the minimum levels stated in the rules. Appellants concede that while Eligible Retirees' Basic Life Coverage can be reduced, it may not be reduced below certain levels.

A plan sponsor may choose to limit its right to reduce welfare benefits. See *International Union, U.A.W. v. Skinner Engine Co.*, 188 F.3d 130, 138 (3rd Cir. 1999) (citing *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515, 117 S.Ct. 1513, 1516 (1997) (noting that employer may "contractually cede its freedom"). Appellees concede that all of the circuit cases recognize that "a plan sponsor can contractually limit its ability to change or eliminate plan benefits." (4 App. 787).

Appellants contend former Plan sponsor U S WEST chose to place a limitation on its right to reduce Eligible Retirees' Basic Life Coverage. Appellants argued that Appendix 7's "reduction rules suffice for the "clear and express language" necessary to vest Plaintiffs and all Eligible Retirees an extra-ERISA commitment and Qwest chose to disobey the clearly stated rules." (4 App. 761).

In *Chiles*, this Court noted the subject welfare plan specifically circumscribed one situation restraining the plan sponsor's discretionary right to

make changes pursuant to the ROR provision. That one situation was ‘termination’ of the plan vis-a-vis the rights of persons receiving long-term disability. This Circuit ruled:

[T]he LTD Plan’s reservation of rights clause contains a proviso. Described in the Plan’s SPD, it states: “If the group Long-Term Disability Plan terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claim for such benefits will continue as long as you remain totally disabled as defined by the Plan.” Here, the LTD Plan specifically contemplates a situation in which Control Data’s discretion to change the Plan is circumscribed.

Id. at 1512. Although the plan sponsor in *Chiles* reserved the right to make virtually all other changes to plan benefits, including charging retirees monthly premiums, it deliberately chose to remove that right for persons on disability benefits in the event of a plan termination.

Likewise, in this case, while the Plan’s ROR allows the Plan sponsor to reduce benefits, there are rules specifically limiting that right when it comes to affecting Eligible Retirees’ Basic Life Coverage.

This Court should reverse the District Court’s erroneous determination that the rules in Appendix 7 do not restrain the Plan sponsor’s reserved general right to reduce benefits. Appellants stated a viable claim in Claim 1 of the AC that the Plan sponsor’s general right to reduce Eligible Retirees’ Basic Life Coverage was specifically restrained. Since Appellees’ failed to act in accordance with the Plan’s rules, they violated ERISA Section 404(a)(1)(D).

2. Appellees' Subsequent Confirmation that the Master Plan Document Included an Additional Appendix 8 Makes the District Court's Dismissal of Claim 1 in the Amended Complaint Reversible Error.

There was no formal discovery before the District Court made its ruling on the Fed.R.Civ.Proc Rule 12(b)(6) motion to dismiss. (4 App. 801). In February 2008, when ruling to dismiss Claim 1 of the AC, the District Court did not include in its analysis the Plan rules set forth in an additional appendix made part of the Master Plan Document. After the District Court's February 27, 2008 Order, two actions were taken by Appellees that served to undermine that ruling and implicate the importance of an additional appendix to the Master Plan Document.

First, on July 14, 2008, Appellees filed their Brief in Opposition to Plaintiffs' Amended Motion for Summary Judgment and attached to their brief the declaration of Erik P. Ammidown, the Plan Administrator. Mr. Ammidown swore that a "true and correct copy" of the Plan was attached to his declaration as Exhibit 4. (6 App. 1219 at ¶ 12). That copy of the Plan included an Appendix 8. (6 App. 1263).

Second, on August 20, 2008, Appellees' counsel delivered to Appellants' counsel a copy of a memorandum with "the official, original executed copy of the US West Group Life Insurance Plan." (8 App. 1590-1632). That document also includes Appendix 8. (8 App. 1632).

Appellees' pre-discovery position, which Appellants mistakenly accepted when stipulating to the authenticity of Appellees' business records, was that Appendix 8 had not been made part of the Master Plan Document. But that position was overridden by Appellant's formal supplemental discovery disclosure made over a year after this case began. And, Appellants' pre-discovery position was refuted by the fact that after the AC was filed, in June of 2007, Defendants adopted a plan amendment specifically stating that both Appendices 7 and 8 "were deleted in their entirety" from the Master Plan Document. (7 App. 1425; 7 App. 1436). Moreover, the parties' mistaken position about inclusion of Appendix 8 in the Master Plan Document was directly refuted and corrected by the Plan administrator's sworn statement made long after the case was underway.

Appendix 8 contains information regarding the particular terms of the Plan at issue in this case – the limitation on the right of the Plan sponsor to reduce retirees' Basic Life Coverage. The rules set forth in Appendix 8 are material terms of the Plan. Any provision of a plan subject to ERISA that establishes a benefit is a material term of the plan. *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d. 226, 237 (3rd Cir. 1994); *Baker v. Lukens Steel Co.*, 793 F.2d 509, 512 (3rd Cir. 1986). "In interpreting the terms of an ERISA plan we examine the plan documents as a whole. . . ." *Chiles*, 95 F.3d at 1511. The rules set forth in Appendix 8 cannot be ignored.

The rules set forth in Appendix 8 lend further support to Appellants' contention that the Plan sponsor intended to limit its right to reduce certain retirees' benefits. At the very least, Appendix 8 makes the Plan's terms ambiguous. It is axiomatic that when a court is "examining the language of the plan document, each provision should be read consistently with the others and the terms must be construed to render none of them nugatory." *Conley v. Pitney Bowes*, 34 F.3d 714, 717 (8th Cir. 1994) (quoting *Jacobs v. Pickands Mather & Co.*, 933 F.2d 652, 657 (8th Cir. 1991). This Court has repeatedly rejected efforts to stray from the express terms of a plan, regardless of whom those express terms may benefit. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002) (citations omitted).

During the trial court proceedings, Appellees never sought either equitable reformation of the Master Plan Document or a declaration that Appendix 8 was at all times immaterial to the Plan. See *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 615 F.3d 808, 819 (7th Cir. 2010) (concluding that ERISA § 502(a)(3) authorizes equitable reformation of a plan that is shown, by objective, clear and convincing evidence, to contain a scrivener's error that does not reflect participants' reasonable expectations of benefits.) Although Appellees' counsel surmised in their opposition to a motion to compel discovery that Appendix 8 was a mistake, there is neither sworn testimony nor other competent evidentiary

support in the trial court's record for that supposition.

Appellees' *post-hoc* supplemental disclosure, coupled with the Plan administrator's *post-hoc* declaration, proves that when the Order dismissing Claim 1 of the AC was entered the District Court had not examined the Plan documents as a whole. Thus, the District Court's analysis and ruling on the motion to dismiss is both incomplete and erroneous. The situation is akin to that which Fed.R.Civ.Proc. Rule 60(b) contemplates to be sufficient grounds for relief from an order due to either a mistake or newly discovered evidence. This Court should reverse the February 27, 2008 order of dismissal of Claim 1 of the AC and remand for further proceedings.

3. The District Court Erred By Dismissing the ERISA Equitable Estoppel Component of Claim 1 of the Amended Complaint.

Within Claim 1 of the AC, Appellants claimed Qwest should be equitably estopped, by virtue of the Plan's rules combined with official confirmation notices sent to Appellants and Eligible Retirees, from reducing their Basic Life Coverage. Appellants alleged that Qwest Defendants and their predecessors previously interpreted or explained that the rules of the Master Plan Document prevented the company from reducing Eligible Retirees' coverage below the stated minimum thresholds. (1 App. 51). Appellants alleged the Plan administrator's past promises of minimum life insurance coverage were made with the intent that Appellants and

Plan Participants act on the basis of that information when deciding survivor's pension benefits and whether or not to purchase additional life insurance on the market. (1 App. 58 ¶ 102). Appellants alleged they had been systematically tricked into believing their minimum life insurance coverage was a protected and irrevocable Plan benefit. Appellants further alleged that they reasonably and detrimentally relied upon the written representations made by Plan administrators that there was a commitment to provide the promised Plan benefits to their estate or beneficiaries, including surviving spouse, and Appellants did not obtain the equivalent in life insurance coverage from other sources. (1 App. 58 ¶ 104).

When dismissing the ERISA equitable estoppel component of Claim 1, the District Court, not knowing about Appendix 8, catapulted off its ruling that the terms of the Plan were unambiguous. (4 App. 849). Also, the District Court erred by faulting Appellants for having not yet "identified any lies, fraud, or an intent to deceive to demonstrate the limited, extraordinary circumstances necessary to support an estoppel claim." (*Id.*). The District Court should not have expected Appellants to identify and present such evidentiary support when opposing a preliminary Rule 12(b)(6) motion. Indeed, at that stage in the case, there had been no formal discovery and Appellants' hands were tied. (4 App. 801).

The District Court noted that this Court has not yet recognized equitable estoppel as a viable ERISA claim. (4 App. 848). While this Court has neither

adopted nor rejected an ERISA equitable estoppel claim, this Court has outlined a framework of rules and elements to be followed when analyzing an equitable estoppel claim. See, e.g., *Cannon v. Group Health Serv.* 77 F.3d 1270, 1275-77 (10th Cir. 1996), *cert. denied*, 519 U.S. 816, 117 S.Ct. 66 (1996); *Averhart v. U S WEST Management Pension Plan*, 46 F.3d 1480, 1486 (10th Cir. 1994).

In *Cannon*, the Tenth Circuit considered whether the plaintiff had stated an equitable estoppel claim applying the Eleventh Circuit's test for equitable estoppel in ERISA cases, to-wit: (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted upon or had reason to believe that the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably and detrimentally relied on the misrepresentation. *Cannon*, 77 F.3d at 1276-77 (citing *National Companies Health Benefit Plan v. St. Joseph's Hosp. of Atlanta*, 929 F.2d 1558, 1572 (11th Cir.1991)).

In *Averhart*, this Court avoided a decision of the viability of such a claim but noted that estoppel may be a cognizable claim “where ‘the terms of the plan are ambiguous’ and the employer[s] communications constituted an interpretation of that ambiguity.” *Averhart*, 46 F.3d at 1485-86 (noting that other courts have

recognized estoppel claims under these circumstances but failing to reach the issue). Most Circuit Courts recognize equitable estoppel as a viable claim in an ERISA context.⁸

In *Pell v. E.I. DuPont de Nemours & Co. Inc.*, 539 F.3d 292 (3rd Cir. 2008), a retiree brought an ERISA action against his former employer and the pension and benefits board claiming that his pension benefit was lower than his employer had led him to expect. The appellate court affirmed the judgment for the retiree on a claim of equitable estoppel and reiterated its prior holding that “[t]o succeed under this theory of relief, an ERISA plaintiff must establish (1) a material representation, (2) reasonable and detrimental reliance upon the representation, and (3) extraordinary circumstances,” *Id.* at 300. (citing to *Curcio*, 33 F.3d at 235, ruling that “giving up an opportunity to accommodate their insurance needs through an independent insurance carrier” to be detrimental reliance)).

In this case, Appellants Kerber and Phelps meet all the necessary elements

⁸ See *Sprague, et al. v. General Motors Corp.*, 133 F.3d 388, 403 (6th Cir. 1998) (en banc), *cert. denied*, 524 U.S. 923, 118 S. Ct. 2312 (1998); *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 458 n.12 (11th Cir. 1996), *cert. denied*, 519 U.S. 1149, 117 S.Ct. 1082 (1997); *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 542 (7th Cir. 1996); *Fink v. Union Central Life Ins. Co.*, 94 F.3d 489, 492 (8th Cir. 1996); *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72, 78 (2nd Cir. 1996); *In re Unisys Corp. Retiree Medical Benefit “ERISA” Litigation*, 58 F.3d 896, 907 (3rd Cir. 1995); *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 821-22 (9th Cir. 1992); *Cleary v. Graphic Communications International Union Supplemental Retirement and Disability Fund*, 841 F.2d 444, 447 (1st Cir. 1988).

including the nebulous “extraordinary circumstances”, in as much as they alleged in their ERISA equitable estoppel claim that misrepresentations were made to them and thousands other long term workers when they chose to take an early retirement and made irrevocable decisions about whether to accept a lump sum option or an annuity and, if an annuity, whether to select survivor’s benefits. (1 App. 49-50 ¶¶ 71-74).

Immediately after Mr. Kerber and Mr. Phelps retired, the Plan sponsor assured Pre-1991 Retirees with an official confirmation letter stating, “You are entitled to the benefits paid under the Group Life Insurance Program.” (1 App. 49 ¶ 69; 5 App. 501). More than a decade after their retirements, Qwest continued to assure Appellants Kerber, Phelps and all other Pre-1991 Retirees about the security of their Plan benefits by sending them annual “Confirmation Statements.” The official statements reported that Plan benefits could not be amended, suspended or discontinued for those who retired before 1991. (1 App. 50-51 ¶ 76).⁹ Those careless and inaccurate official publications, coming from the Plan sponsor’s benefits department, informed Appellants’ reasonable expectations for Plan benefits. This Court holds that:

Any burden of uncertainty created by careless or inaccurate drafting of the summary must be placed on those who do the drafting, and who are most

⁹ Appellees concede the Confirmation Statements “summarized the amount of benefits available to certain pre-1991 retirees under two distinct welfare plans - a health care plan and the group life insurance plan at issue here.” (4 App. 790).

able to bear that burden, and not on the individual employee, who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document. Accuracy is not a lot to ask.

Chiles, 95 F.3d at 1518 (citing *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 982 (5th Cir.1991)).

Similar to *Pell*, in this case, Appellants Kerber and Phelps contend that the repeated misrepresentations and assurance about Plan benefits misled them into making an inadequately informed decision about whether to accept the 5+5 Option and how best to provide for survivor's benefits. (1 App. 49-50). Appellants alleged that U S WEST senior leadership and former Plan fiduciaries have acknowledged that representations and commitments about Plan benefits were made to retirees with the intent that retirees act upon that information when deciding survivor's pension benefits and whether or not to purchase additional life insurance on the market. (1 App. 50 ¶ 74 and 58 ¶ 102).¹⁰ Appellants' cumulative allegations in Claim 1 of the AC about the repeated misrepresentations and resulting consequences for the retirees surpass the "extraordinary circumstances" threshold. *Pell*, 539 F.3d at 303-304 (appellate panel reiterating that, "[e]xtraordinary circumstances can arise where there are 'affirmative acts of

¹⁰ When ruling on a Rule 12(b)(6) motion to dismiss, a court "must accept as true all well pleaded facts, and construe all reasonable allegations in the light most favorable to the plaintiff." *United States v. Colorado Supreme Court*, 87 F.3d 1161, 1164 (10th Cir. 1996).

fraud,’ where there is a ‘network of misrepresentations ... over an extended course of dealing,’ or where particular plaintiffs are especially vulnerable.’”). It is too late for Appellants Kerber and Phelps and other Pre-1991 Retirees to undo their retirement decisions and choices about survivor’s benefits.

This case gives this Court reason to expand upon *Cannon* and *Averhart* and firmly adopt ERISA equitable estoppel as a viable claim. Appellants urge this Court to adopt the Third Circuit’s reasoning in *Pell* and, accordingly, reverse the District Court’s order dismissing the ERISA equitable estoppel component of Claim 1 of the AC and remand for further proceedings.

B. The District Court Erred By Granting Appellees a Summary Judgment on Claim 3 of the Second Amended Complaint.

The ROR in Section 10.1 of the Master Plan Document states that “no amendment shall reduce the benefits of any Participant with respect to a loss incurred prior to the date such amendment is adopted.” (8 App. 1620). The parties and the District Court refer to this restriction on the Plan’s sponsor’s rights as the “Prior Loss Proviso”. The Prior Loss Proviso bars retroactive application of a Plan amendment and protects the rights of each beneficiary of a retiree who died before the actual calendar date of adoption of a Plan amendment that reduces Plan benefits. The actual adoption date of an operative amendment is critical with respect to the rights of Appellant Martha A. Lensink, the surviving spouse of

retiree Joseph Lensink who passed away on January 5, 2006. (5 App. 963 ¶ 15; 5 App.1030 ¶ 15). Ms. Lensink contends Plan benefit payments made to her and a proposed class of other beneficiaries were wrongly limited to \$10,000 prior to the actual adoption date of an enabling Plan amendment that reduced Basic Life Coverage. (5 App. 982-983). Appellees heavily rely upon an October 14, 2005 dated document so as to defeat Appellant Lensink's claim.

1. The October 14, 2005 Document Was Not Formally Adopted and Made Part of the Master Plan Document.

In Claim 3 of the SAC, Appellants sought a declaration, pursuant to ERISA Section 502(a)(1)(B), that a certain October 14, 2005 document, a recommendation by the PDC, is not an "adopted" Plan amendment. (5 App. 980-981).

Appellees' records reflect there was a PDC meeting late at night (9:00 p.m. – 10:00 p.m.) on October 14, 2005. (8 App. 1541). The Agenda for the PDC's meeting shows that approval was sought for "resolutions" concerning the "Qwest Group Life Plan." (*Id.*). In contrast, approval was sought for an "amendment" to the "Qwest Savings and Investment Plan." (*Id.*). The following are pertinent provisions of the resolutions for the Plan taken under consideration by the PDC on October 14, 2005:

Recommendation: That the Director, Employee Benefits, Health Life & Disability, Human Resources, or his delegate, be authorized to take all actions

clear what, if anything, was actually approved late night on October 14, 2005.

The October 14, 2005 document reflects unfinished business and the document was not formally adopted to become part of the Master Plan Document.

In Appellees' summary judgment briefing, Appellees ignore the adoption date issue and argue the District Court should apply the concept of corporate "ratification" of an announced change to Plan benefits. Due to beneficiaries' legal rights arising from the Prior Loss Proviso, a determination of whether Qwest's collective actions served to ratify an announced change is not the same as pinpointing the calendar date of adoption of a Plan amendment to reduce Basic Life Coverage. Appellees touted the fact that during October through December 2005 Qwest made various announcements and disclosures which actions Appellees argued served to manifest Qwest's intent to reduce benefits for Post-1990 Occupational retirees. Appellants countered argued that the dates on which Qwest either made announcements or mass mailed notices to retirees are irrelevant for purposes of enforcing Plan beneficiaries' rights under the Prior Loss Proviso. (7 App. 1431 and 1449). Likewise, the dates on which Qwest either sent a filing to the Securities Exchange Commission or massed mailed a Plan enrollment form to retirees are irrelevant for purposes of the Prior Loss Proviso. (7 App. 1450-1451). No Plan beneficiary should ever have to cobble together all of that extrinsic evidence in order to determine his or her rights to a proper Plan payment

vis-a-vis the Prior Loss Proviso. As this Court has exclaimed, “[r]esort to a plan’s terms in the event of a dispute should not require the presence of a clairvoyant” as to the date of adoption of an amendment. *Allison*, 289 F.3d at 1236.

2. The October 14, 2005 Document Did Not Amend Any Terms of the Master Plan Document.

The October 14, 2005 document uses incorrect terminology and neither deletes nor amends any of the material specific terms of the Master Plan Document. The October 14, 2005 document recommends changing “Basic Life Insurance Benefit,” an undefined term appearing nowhere within the Master Plan Document. At least 35 times, the Master Plan Document uses a different defined term, “Basic Life Coverage.” (8 App. 1593-1632). Since the October 14, 2005 document’s inconsistent provision did not effectively change the necessary term, “Basic Life Coverage”, it is invalid or unenforceable and the Master Plan Document “shall be construed and enforced as if such provision had not been included.” (8 App. 1621 ¶ 11.5).

In their summary judgment briefs, Appellees presented extrinsic evidence, *post hoc* statements by PDC members that they intended for the October 14, 2005 document to serve as a Plan amendment. The District Court wrongly accepted that evidence of intent. (See 4 App. 2618 wherein the District Court concluded “the PDC, the entity with authority to amend the Plan, clearly manifested their intent to

amend the Plan to provide a reduced \$10,000 life insurance benefit for all Post-1990 Occupational Retirees.”). In view of the Prior Loss Proviso’s plain wording, it was error for the District Court to consider any PDC member’s self serving statement of intent. “. . .ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule. . .” *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, ___ U.S. ___, 129 S.Ct. 865, 875 (2009).

Appellees’ key witness, PDC member Erik Ammidown, revealed his confusion about the October 14, 2005 document identified in his sworn declaration as Exhibit 3. (6 App. 1218 ¶ 7). Mr. Ammidown vacillates between referring to the document as the “Oct. 2005 Resolutions” and the “2005 Amendment.” (6 App. 1218-1220, ¶¶ 7, 12 and 16). Mr. Ammidown explains the October 14, 2005 document reflects that PDC members contemplated a restated Plan document would be drafted that would incorporate the terms of an amendment to reduce retirees’ benefits. (6 App. 1219, ¶ 12). Presumably, that task was to be completed before January 1, 2006, the planned effective date for reduced Basic Life Coverage for the group of Post-1990 Occupational Retirees. But, that job was never carried out. After the October 14, 2005 late night meeting, there was no decisive action taken either to create a restated Plan document or formally adopt an enabling amendment to the Master Plan Document until

December 13, 2006, exactly 14 months later. Appellees' records reflect that on

December 13, 2006:

The Committee was asked to consider and approve Amendment 2006-1 to the Qwest Group Life Insurance Plan to reflect changes in the plan and its benefits.

Following discussion, the Committee unanimously approved and **adopted** all of the proposed changes. To reflect its approval and **adoption** of the proposed changes, the Committee approved and **adopted** the resolutions that are attached hereto and made a part hereof as Exhibit A. . . .

(emphasis added) (5 App. 922). Exhibit A thereto states, in part:

That the attached amendment which is effective January 1, 2006 is **adopted** in substantially the form attached hereto.

RESOLVED, that the Amendment 2006-1 to the Qwest Group Life Insurance Plan be and hereby is **adopted** effective January 1, 2006, in substantially the form as the attached document, and

FURTHER RESOLVED, that Erik P. Ammidown, the Director, Health, Life & Disability Benefits is hereby authorized to publish the amendment, together with descriptions as required, as soon as is administratively practicable.

(emphasis added) (5 App. 924). The attached Amendment 2006-1, also dated

December 13, 2006, states that it serves:

Effective January 1, 2006 to **amend** the Section 1.1 definition of "Basic Life Coverage" to add:

Effective January 1, 2006, with respect to Occupational Employees upon their retirement, the **Basic Life Coverage** is a flat \$10,000 Benefit.
Effective January 1, 2006, with respect to Post-1990 Occupational Retirees, the **Basic Life Coverage** is a flat \$10,000 Benefit. . .

(emphasis added) (5 App. 926). Amendment 2006-1 states:

RESOLVED, that the Life Plan be and hereby is amended to incorporate the

amendments and modifications outlined above and in substantially the form attached hereto;

(5 App. 927).

The language in the December 13, 2006 documentation, when contrasted with the language in the October 14, 2005 document, proves no plan amendment was “adopted” on October 14, 2005. The absence of any reference to the October 14, 2005 document being adopted and the informality attendant to it distinguishes it from the December 13, 2006 formal Plan amendment wherein there was a declaration of adoption to the Plan. As this Court stated in *Allison*, “[t]his circuit has recognized that the requirement of formal amendments reflects ERISA’s overall goal of protecting ‘the interests of participants in employee benefit plans and their beneficiaries.’” *Allison*, 289 F.3d at 1236 (citing *Miller v. Coastal Corp.*, 978 F.2d 622, 624 (10th Cir. 1992) (quoting 29 U.S.C. § 1001(b)).

The October 14, 2005 document was a recommendation to change “Basic Life Insurance Benefits,” an incorrect term. Thus, it changed nothing within the Master Plan Document. The December 13, 2006 documentation amends the necessary term, “Basic Life Coverage.”

The District Court should have granted Appellant Lensink a summary judgment on Claim 3 of the SAC. It was error for the District Court to grant Appellees a summary judgment on Claim 3 and, in so doing, rule that:

Amending the Plan, either via the 2005 Resolutions, any other actions

evidencing Defendants' intent to amend the Plan, or ratification of the Plan, is plainly an "adoption" of the reduction in benefits as the change was accepted, put into effect and confirmed. That the amendment may have been "ratified" rather than formally "adopted" is irrelevant as the reduction in benefits was clearly approved or accepted. Therefore, I conclude that there remains no question of fact as to whether the changes referenced in the 2005 Resolutions were adopted within the meaning of the Prior Loss Proviso."

(13 App. 2620). The ruling leaves unanswered the key factual issue for purposes of the Prior Loss Proviso, to-wit: On what specific date was the necessary enabling Plan amendment adopted? In a later issued order, the District Court belatedly acknowledged and ruled:

On December 13, 2006, the PDC **adopted** 'Amendment 2006-1' which essentially formalized the reduced benefit change for post-1990 occupational retirees.

(emphasis added) (13 App. 2701).

For all the foregoing reasons, this Court should reverse and instruct the District Court to grant summary judgment in favor of Appellants. At the very least, this Court should order a remand because a reasonable factfinder, based on Appellants' cumulative evidence presented, could hold in Appellants' favor with regard to the issue that the October 14, 2005 document did not change "Basic Life Coverage" and the document was not formally adopted as a Plan amendment. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 148,106 S.Ct. 2505, 2510 (1986) (holding that a requirement for a Rule 56 summary judgment is that there be no genuine issue of a material fact).

C. The District Court Erred By Granting Appellees a Summary Judgment on Claim 4 of the Second Amended Complaint Because the December 13, 2006 Amendment Left in Tact More Favorable Terms in the Master Plan Document and Did Not Serve to Change the Group Contract's Terms.

In Claim 4 of the SAC, Appellants seek a declaratory ruling that the December 13, 2006 documentation was ineffective to reduce benefits payable upon the death of Post-1990 Occupational Retirees for two reasons: 1) the December 13, 2006 documentation left in tact within the Master Plan Document conflicting more favorable terms; and 2) more favorable terms continued to govern the benefit rights of Eligible Retirees and their beneficiaries. (5 App. 981-982).

The Final Pretrial Order entered before the District Court made summary judgment rulings clarified that Appellants were invoking the “plan documents rule” which is ERISA Section 404(a)(1)(D). (12 App. 2522-2523, 2529-2531). The Final Pretrial Order states it “will control the subsequent course of this action. . . and the “pleadings will be deemed merged herein.” (12 App. 2564, ¶ 12). Appellants explained in both the Final Pretrial Order and in their brief opposing Appellees’ motion for summary judgment that until such time as the terms in both the Master Plan Document and the Group Plan had been properly changed, Amendment 2006-1 was ineffective and it was wrong to pay beneficiaries only \$10,000 in Plan benefits. (7 App. 1455-1456; 12 App. 2529-2531). The

summary judgment rulings entered after the Final Pretrial Order do not comport with the Final Pretrial Order which clearly reflects the fact that Appellants had invoked the plan documents rule.

The Master Plan Document says the “Plan” includes the “Contracts”, as amended from time to time, and requires that “the payment of Benefits under the Plan shall be in accordance with the Plan *and* the applicable Contracts.” (emphasis added). (8 App. 1600 ¶ 1.1 and 1613 ¶ 5.2).

Effective January 1, 2001, the Prudential Insurance Company of America (“Prudential”) and Qwest entered into a Group Insurance Contract (“the Group Contract”) pursuant to which Qwest purchases group life insurance covering certain Qwest retirees. (11 App. 2181 ¶ 3). Effective January 1, 2006, a restated Group Contract was issued. (10 App. 2144). In harmony with the Prior Loss Proviso, Group Contract G-93634 states that “an amendment will not affect a claim incurred before the date of change.” (10 App. 2149 ¶ I). And, an amendment making a change to the Group Contract must be “signed by the Contract Holder and an officer of Prudential.” (*Id.*). The District Court noted and ruled:

[o]n February 7, 2007, Qwest and Prudential entered into a written amendment to the Restated Group Contract, the governing contract with respect to Qwest’s Life Plan, to effect the reduction in Life Benefit. Qwest did not sign the amendment.

(13 App. 2702). The District Court wrongly ruled that the parties had entered into

a written amendment because Appellees admit that “no relevant amendment to the Group Policy was executed by both parties.” (11 App. 2165 ¶ 26). The February 7, 2007 dated document states in pertinent part:

AMENDMENT TO GROUP CONTRACT NO. G-93634

By their signatures below, the Contract Holder and Prudential agree that the Group Contract is changed as follows:

- * The Notice of Change listed below is attached to this **Amendment** and forms part of the Group Contract as of its Effective Date.

(emphasis added) (11 App. 2200-2201) However, the document is signed only by an officer of Prudential. Unless signed by both Prudential and Qwest, it was not an effective amendment to the Group Contract. Qwest belatedly executed the document on January 21, 2009. (12 App. 2502-2503). That event occurred three years after Appellees started sending only \$10,000 benefit payments to Plan beneficiaries, including Appellants Lensink and Strizich.

Appellees cannot minimize Appellants’ claims by asserting that Qwest’s failure to have all necessary documents in order is a “technical violation,” especially in light of *Kennedy’s* general holding concerning the plan documents rule. Appellees took a rather cavalier approach to such an important proposed modification of the Plan.¹¹ This Court holds that the law of ERISA “leaves no

¹¹ Appellees’ cavalier approach is further amplified by their failure to send retirees and beneficiaries the required formal notice due 210 days after adoption of Plan Amendment 2006-1. ERISA Section 104(b)(1)(B), 29 U.S.C. § 1024(b)(1)(B) requires a notice to be sent to each participant and beneficiary who is receiving benefits under the plan. Appellants’ witness Erik Ammidown confirms in his declaration that “Qwest did not send Life Plan participants or

room for a substantial compliance argument given the requirement that a fiduciary apply the terms of a written plan and the unambiguous nature of the provision before us.” *Allison*, 289 F.3d at 1237.

Both the execution of the October 14, 2005 recommendation and the adoption of Amendment 2006-1 left in tact within both the Master Plan Document and the Group Contract inconsistent more favorable terms that should have continued to govern the Plan beneficiaries’ rights. The ambiguity created by the inconsistent terms should be construed strictly in favor of Plan beneficiaries, due to the unequal bargaining positions of the parties to an insurance contract. *LaAsmar v. Phelps Dodge Corp. Life, Accidental Death & Dismemberment and Dependent Life Ins. Plan*, 605 F.3d 789, 805 (10th Cir.2010).

As Appellants argued in the trial court, if the Plan sponsor wanted Amendment 2006-1 to control over more favorable inconsistent terms left in tact, the amendment should have contained a proviso stating, “Any inconsistent provisions of the Plan shall be read consistent with this Amendment.” (5 App. 891; 7 App. 1443). The PDC used that language in other employee benefit plan amendments when that was the purpose of the amendments. (See, e.g., 8 App.

beneficiaries SMMs or other notices following execution of the Dec. 2006 Resolutions.” (6 App. 1220, ¶ 14). Appellants argued that since there was no disclosure of the adoption date, many beneficiaries (mostly elderly survivors) who unexpectedly received reduced benefits upon the deaths of retirees occurring during January 1, 2006 through December 12, 2006 would not know that their rights under the Prior Loss Proviso had been violated. (7 App. 1450-1451).

1522 ¶ 28). But, no such proviso is stated in Amendment 2006-1. (See generally 5 App. 925-928).

Therefore, since Amendment 2006-1 was insufficient and the Group Contract had not been amended, Appellants argued that Plan administrators should have acted in the best interests of Plan participants and beneficiaries, as required by ERISA Section 404(a)(1), and they should have applied principles of *contra proferentem* and carried out the more favorable terms of the controlling documents when making Plan benefit payments to beneficiaries of deceased Eligible Retirees. (5 App. 891).

The District Court erroneously granted Appellees a summary judgment on Claim 4 and wrongly ruled that “the Plan does not require inconsistent language be stricken” and “the amendment procedure for the Plan does not require a valid amendment of the insurance contract to effectuate an amendment to the plan.” (13 App. 2622).

It was error for the District Court to rule that Amendment 2006-1, together with the October 14, 2005 document, was sufficient to effectuate the change in retirees’ benefits. Limited payments of \$10,000 were sent to Plan beneficiaries before two requirements had been met: 1) adoption to the Master Plan Document of an enabling plan amendment with terms not in conflict with other rules; and 2) a Group Contract amendment co-signed by Qwest and Prudential specifically

changing the terms of benefit payments.

This Court should reverse the District Court's ruling on Claim 4 of the SAC and remand with instructions to apply principles of *contra proferentem*, so as to construe more favorable Plan terms remaining in tact when Amendment 2006-1 was adopted in favor of Appellants and Eligible Retirees and against the drafter. *Miller v. Monumental Life Insurance Company*, 502 F.3d 1245, 1254 (10th Cir. 2007) ("Failure to employ *contra proferentem* would 'afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted, a result that would be at odds with the congressional purposes of promoting the interests of employees and beneficiaries and protecting contractually defined benefits.'" (citation omitted)).

D. The District Court Erred By Granting Appellees a Summary Judgment on Claim 5 of the Second Amended Complaint Because the Plan's Prior Loss Proviso Was Violated.

In Claim 5 of the SAC, Appellant Lensink, individually and on behalf of a proposed class of Post-1990 retirees, asked the District Court to declare her rights to Plan benefits pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and to enter an order declaring her benefit payment should have been based upon more favorable Plan terms existing in January 2006 when her husband Joseph Lensink passed away. (5 App. 963 ¶ 9, 982-983). As demonstrated hereinabove in Appellants' arguments with respect to Claims 3 and

4, at no time prior to December 13, 2006 was there an enabling amendment changing the term “Basic Life Coverage.” In accordance with the Prior Loss Proviso and the terms of the restated Group Contract, Ms. Lensink’s payment should not have been limited to \$10,000.

In a single paragraph, the District Court ruled that in view of the rulings on Claims 3 and 4, Claim 5 was without any basis. (13 App. 2623). For all the reasons supporting Appellants’ arguments that the summary judgment rulings on Claims 3 and 4 must be reversed, the District Court’s summary judgment ruling on Claim 5 of the SAC should also be reversed.

E. The District Court Erred By Granting Appellees a Summary Judgment on Claim 6 of the Second Amended Complaint.

In Claim 6 of the SAC, Appellant Samuel G. Strizich, individually and on behalf of a proposed class of Plan beneficiaries, asked the District Court to declare his rights to Plan benefits pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and to enter an order declaring his benefit payment should have been based upon more favorable Plan terms existing in March 2007 when his wife Sharon Strizich passed away. (5 App. 963 ¶ 10, 983-984).

The District Court ruled that, in view of the rulings on Claims 3, 4 and 5, Claim 6 was a claim without any basis. (13 App. 2724). In so doing, the District Court repeated the same errors as made with respect to Claims 3, 4 and 5. While

acknowledging the word “adopt” generally means “to accept formally and put into effect”, the District Court reiterated its position that the date of adoption of an enabling amendment for purposes of determining Appellant Strizich’s rights under the Prior Loss Proviso was unimportant. The District Court said:

. . . the fact that the amendment may have been ‘ratified’ rather than formally ‘adopted’ is not determinative as the reduction in benefits was clearly approved or accepted.

(13 App 2723). This ruling does not comport with the Prior Loss Proviso’s plainly worded operative phrase, “the date such amendment is adopted.” Prior to Appellant Strizich’s wife’s death on March 20, 2007, there had been no formal adoption to the Master Plan Document of an enabling amendment changing “Basic Life Coverage” for Pre-1991 Retirees, including Sharon Strizich.

1. The September 14, 2006 Document Was Not Formally Adopted and Made Part of the Master Plan Document and it Did Not Amend Any Terms of the Master Plan Document.

The District Court erred by opining that a September 14, 2006 dated recommendation executed by the PDC before Sharon Strizich passed away was sufficient to make a change affecting all Pre-1991 Retirees. The September 14, 2006 document, just like the October 14, 2005 document, repeatedly uses the wrong term, “Basic Life Insurance Benefit”. (See 10 App. 1959). That undefined term appears nowhere within the Master Plan Document. Therefore, the District Court wrongly ruled:

I have concluded that the September 2006 Resolutions amended the Plan by its express language. . .

(13 App. 2724). To the contrary, the September 14, 2006 document changed none of the terms found within the Master Plan Document. As previously argued with respect to Claim 3 of the SAC, “Basic Life Insurance Benefit” is undefined and inconsistent with the defined term, “Basic Life Coverage”, used more than 35 times throughout the Master Plan Document. The District Court noted that Appellants “allege that the September 2006 Resolutions, if considered an amendment, creates an internal inconsistency in the 1998 Plan documents” (13 App. 2722). Then, the District Court wrongly concluded “this does not create an ambiguity.” (*Id.*).

Amendment 2007-1 was executed and adopted on June 7, 2007, several months after Sharon Strizich passed away. (10 App. 1967). The document uses the correct term and amends “Basic Life Coverage” for Pre-1991 Retirees. (10 App. 1965). Nevertheless, no amendment of the terms of the restated Group Contract was executed by Qwest until January 21, 2009. (12 App. 2481). The District Court wrongly ruled that “whether Qwest complied with the terms of the Group Contract by executing a signed amendment to that document is irrelevant.” (13 App. 2722). This ruling is completely dismissive of the Master Plan Document’s requirement that “[t]he payment of Benefits under the Plan shall be in accordance with the Plan *and* the applicable Contracts.” (emphasis added) (8

App. 1613 ¶ 5.2).

To arrive at its decision that Qwest either manifested its intent to change Plan terms or ratified its announcements, the District Court belabored to cobble together a lot of extrinsic evidence proffered by Appellees, including affidavits. But, no Plan beneficiary should ever have to go through such an exercise. To become informed of his or her rights, a Plan beneficiary should need only examine the terms of the governing plan documents, in this case, the Master Plan Document and the restated Group Contract.

2. Retroactive Application of the June 7, 2007 Amendment 2007-1 Violated the Prior Loss Proviso and the Amendment Did Not Change the Terms of the Group Contract.

The June 7, 2007 Amendment 2007-1, which document did not change any of the terms of the Group Contract, was applied retroactively to January 1, 2007 in violation of the Prior Loss Proviso. Upon Sharon Strizich's death in March 2007, the more favorable terms left in tact in both the Master Plan Document and the restated Group Contract should have continued to govern Appellant Strizich's rights as a Plan beneficiary. In accordance with the Prior Loss Proviso and the terms of the restated Group Contract, Mr. Strizich's payment should not have been limited to \$10,000.

For all the reasons supporting Appellants' arguments that the summary judgment rulings on Claims 3, 4 and 5 must be reversed, the District Court's

summary judgment ruling on Claim 6 of the SAC should also be reversed.

F. The District Court Erred By Granting Appellees a Summary Judgment on Claim 2 of the Second Amended Complaint.

In Claim 2 of the SAC, Appellants Kerber and Phelps contend they should be granted appropriate equitable relief due to material misrepresentations and omissions amounting to a breach of ERISA fiduciary duty. (5 App. 979-980).

When ruling to grant Appellees a summary judgment, the District Court noted that “the Tenth Circuit has not articulated a test for analyzing a breach of fiduciary duty claim for misrepresentations. (13 App. 2707).

In December 1989, U S WEST offered an early retirement option to some of its management employees. (the “5+5 Option”). (13 App. 2699). U S WEST sent a packet of materials detailing the 5+5 Option to eligible retirees. (*Id.*). The packet included a two-page document titled “U S WEST Insurance Plan” (the “Insurance Plan Description”). (*Id.*; 9 App. 1797). The Insurance Plan Description summarized the Plan and other insurance benefits that the prospective retiree would be eligible for if he or she chose to participate in the 5+5 Option. At the top of the page, the Insurance Plan Description stated:

While the plans listed below are the plans currently provided to eligible employees upon retirement, the Company reserves the right to amend or terminate any or all provisions in the future for any reason.

(emphasis original) (9 App. 1797). The Insurance Plan Description does not

constitute either a plan or a SPD. *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1316 (3rd Cir. 1991). It does not constitute a SPD because it lacks information required under ERISA Section 102(b), 29 U.S.C. § 1022(b) and Department of Labor Regulations set forth at 29 C.F.R. § 2520.102-2, 102-3. See *Palmisano v. Allina Health Systems, Inc.*, 190 F.3d 881, 888 (8th Cir.1999) (loose-leaf compilation describing various benefits was “so lacking in detail” that it could not be deemed an SPD); *Louderback v. Litton Industries, Inc.*, 504 F.Supp.2d 1145, 1151 (D. Kan. 2007) (ruling a company bulletin in the form of power point presentations or slides is not enough to constitute a SPD). “If a document is to be afforded the legal effects of an SPD. . . , that document should be sufficient to constitute an SPD for filing and qualification purposes”. *Hicks v. Fleming Cos.*, 961 F.2d 537, 541 (5th Cir.1992) (ruling a booklet summarizing various benefits did not constitute an SPD). Clearly, the two page Insurance Plan Description fails the test of a SPD and it gave the Plan sponsor no enforceable rights or protections.

The District Court correctly observed that the SPD issued in June 1987, which was in effect when Appellants Kerber and Phelps accepted the 5+5 Option and retired in February 1990, included the following ROR:

PLAN CONTINUANCE

The Company intends to continue the Group Life Insurance Benefit Program but reserves the right to terminate or amend it at any time, subject

to applicable limitations in the law or any applicable collective bargaining agreements.

(13 App. 2698-2699; 8 App. 1707). In the District Court, Appellants argued that particularly worded ROR is ambiguous and would cause any reasonable Plan participant to apply “applicable limitations of the law” in order to fully understand its meaning. (10 App. 2092 at ¶5 and 2100-2101). Very similar ROR language has been found by courts to be ambiguous. In *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3rd Cir. 1992), the appellate court declared the following ROR was ambiguous:

American expects to continue this Plan indefinitely, but necessarily reserves the right to amend, modify, or discontinue the Plan in conformity with applicable legislation and also subject to any applicable bargaining agreement.

The appellate court noted that “empirical research has demonstrated that a summary not unlike this one can lead readers to conclude that benefits are for life.” (citing James F. Stratman, “*Contract Disclaimers in ERISA Summary Plan Documents: A Deceptive Practice ?*” 10 Indus.Rel.L.J. 350 (1988). *Id.* at 93.

The appellate court remanded the case instructing the lower court, in interpreting the ambiguous provision, to consider the plan sponsor’s intent, the reasonable understanding of the beneficiaries, and past practice. *Id.* at 96.

None of the Appellants are lawyers. (10 App. 2092 ¶5, 2121 and 2126). Back in early 1990, upon reading the ROR set forth in the 1987 SPD, a reasonable

Plan participant could surmise then existing law prevented U S WEST from detrimentally changing benefits after one retires. With awareness that persons considering the 5+5 Option were worried, U S WEST deliberately chose to explain and interpret the ROR.

1. There Was a Material Misrepresentation or Material Omission Concerning the ROR.

U S WEST broadcast a Video Conference designed to answer questions about the 5+5 Option and during that Video Conference the following colloquy took place:

Moderator: . . . [T]here is a statement in some of the paperwork that people received in their packets that's raised some questions, and that is the statement that says the company reserves the right to change benefits. There are some people worried about that. Can you speak to that statement?

Human Resources Director Charlie Kamen: Sure. **That's a typical reservation of rights statement** that appears in virtually every employee benefit plan, not just U S WEST benefit plans, but all companies' benefit plans. It is not intended to be divisive, it is not intended to be a below the board type of thing. What it is intended to do though, is it's intended to give the company the ability to modify the plans as circumstances and conditions change in the future. **It's really intended to make the plans more meaningful and more affordable not only for the employee but for the company.**

(emphasis added) (13 App. 2769-2700).¹²

The District Court erred by concluding the Video Conference "*clearly* and

¹² The trial record contains a DVD audio recording of the full Video Conference with a separate excerpt of this ROR explanation. (See 10 App. 2090, DVD filed as Docket No. 109). The excerpt bears the file name "ROR Excerpt from Video."

unequivocally stated that Qwest retained the right to alter or terminate the Life Benefit.” (emphasis added) (13 App. 2700).¹³ The Video Conference said nothing about the right of the company to terminate the Plan. More importantly, the Video Conference served to allay everyone’s worries, because the Company’s stated position was that the ROR was really intended to give the Company the right to make changes that are more meaningful and more affordable for the retiree.

Appellants contend that U S WEST’s explanation of the ROR made during the 5+5 Option was either intended to fully defuse workers’ (potential retirees’) concerns about the ROR or evinces an intent to confuse or deceive on U S WEST’s part, since there was a very positive spin given to the ROR. (5 App. 980 ¶ 87; 12 App. 2525). The trial record evidence infers that U S WEST engaged in an effort to conceal the potential adverse consequences of the ROR so as to get the maximum number of workers to take the 5+5 Option. John G. Shea, the former U S WEST Director of Employee Benefits who was the designated plan administrator for the 5+5 Option, confirmed in his unopposed sworn affidavit that the intent of the Video Conference representation was to correctly convey the company’s official position and get persons to accept the 5+5 Option so as to lock in their benefits during retirement. (10 App. 2139, ¶¶ 7-11).

¹³ U S WEST’s official explanation and interpretation that the ROR certainly paints a rosy picture about the Company’s right to amend the plan at its discretion.

The Video Conference explanation was a misrepresentation because, when the Plan sponsor and administrators chose to speak about the ROR, clearly, they failed to speak truthfully and fully disclose the possible adverse consequences of the ROR.

In *Varity Corp. v. Howe*, 516 U.S. 489, 497-504, 116 S.Ct. 1065, 1071-73, (1996), the Supreme Court held that an employer acted in a fiduciary capacity when making misrepresentations to its employees about their benefit plan. See also *In re Unisys Corp. Retiree Med. Benefits "ERISA" Litig.*, 57 F.3d 1255, 1261 n.10 (3rd Cir.1995) (concluding that conflicting statements give rise to an ERISA action because ERISA plan administrators have an obligation "not to misinform employees through material misrepresentations and incomplete, inconsistent, or contradictory disclosures.").

This is not the first case involving breaches of ERISA fiduciary duties related to the 5+5 Option. In *Farr v. U S WEST Communications, Inc.*, 151 F.3d 908 (9th Cir.1998), the appellate court held that the defendant's failure to explain to the plaintiffs in either written or verbal communications the potentially negative tax consequences they might face by choosing to participate in the 5+5 early retirement program was a breach of the defendant's fiduciary duties. *Id.* at 914. *Farr* involved the same 5+5 Option U S WEST administered to Appellants Kerber and Phelps in 1990. In *Farr*, the fiduciary duty breaches concerned

misrepresentations and omissions about the service pension component of the 5+5 Option. This litigation centers around the group life insurance benefit component.

The District Court correctly found, and it is undisputed, that Appellants Kerber and Phelps “agreed to participate in the 5+5 Option and declined to obtain alternative insurance at that time based on their belief that the Life Benefit was vested.” (13 App. 2718; 10 App. 2121-2122 ¶¶ 12-13; 10 App. 2127 ¶¶ 12-13). In addition, Mr. Phelps elected to decline the survivor’s annuity option. (10 App. 2127 ¶ 11). The District Court erred by not ruling that Appellants have shown harm and detrimental reliance. *Curcio*, 33 F.3d at 237 (ruling that “giving up an opportunity to accommodate their insurance needs through an independent insurance carrier because of their reasonable reliance on [their employer’s] representations” to be detrimental reliance).

More than a decade after Appellants Kerber and Phelps retired, Qwest continued to foster their belief about the security of their Basic Life Coverage by sending them and other Pre-1991 retirees official statements reporting that Plan benefits for those persons who retired before 1991 could not be amended, suspended or discontinued. (10 App. 2122 ¶ 14 and 2127 ¶ 15; See also Confirmation Statements, 9 App. 1732, 1736, 1739 and 1742). Qwest’s changed position and subsequent reduction of free coverage to a flat \$10,000 payment does not in any stretch of the imagination make the Plan more meaningful and/or more

affordable for retirees.

2. This Court Should Adopt the Third Circuit’s Test For a Breach of ERISA Fiduciary Duty Claim.

This Court should reverse and direct the District Court to apply the Third Circuit’s test that a breach of fiduciary duty claim may be premised on either a misrepresentation or an omission by a plaintiff showing:

(1) the defendant was “acting in a fiduciary capacity”; (2) the defendant made “affirmative misrepresentations or failed to adequately inform plan participants and beneficiaries”; (3) the misrepresentation or inadequate disclosure was material; and (4) the plaintiff detrimentally relied on the misrepresentation or inadequate disclosure.

In re Unisys Corp. Retiree Medical Benefits ERISA Litigation, 579 F.3d 220, 228, (3rd Cir. 2009) (citations omitted). The Third Circuit stated:

the message that Unisys communicated to its employees in the course of counseling them about retirement was at best a half-truth. . .

. . . it knew that its employees were receiving answers to their specific inquiries that were vague, misleading and contradictory.”

(*Id.* at 231).

Similarly, in this case, it is clear that during the 5+5 Option U S WEST made a vague, misleading and inadequate explanation about the future danger the ROR presented. When U S WEST chose to speak out about the ROR, the company should have put 5+5 Option retirees on notice that the ROR could prove to be divisive and something negative, so that the retirees could take appropriate action and protect their beneficiaries. But, U S WEST did not think the ROR

provision permitted negative consequences for retirees and that's the rosy message Appellants Kerber and Phelps received. It is too late to undue their retirement choices and life insurance planning decisions. Qwest should only be allowed to make Plan changes that are meaningful and affordable for the retirees.

Applying the *Unisys* decision and standards to this case, the inadequate explanation U S WEST chose to give Appellants Kerber and Phelps and other Pre-1991 Retirees about the ROR should be deemed to be a misrepresentation or omission. Since Appellants proved all the necessary elements for their breach of fiduciary duty claim, summary judgment should not have been entered for Appellees on Claim 2 of the SAC.

G. A Reversal Should Require the District Court to Reexamine Class Certification.

Either a reversal or order of remand to the District Court should include a directive that the District Court reexamine the issue of class certification. The District Court dismissed without prejudice Appellants' motion for class certification with the right to refile. (12 App. 2590).

CONCLUSION

For the reasons stated herein, this Court should vacate the judgment and reverse the District Court's order to dismiss Claim 1 of the Amended Complaint. This Court should reverse the District Court's orders granting Appellees summary

judgments on Claims 2 through 6 of the Second Amended Complaint and remand with instructions to enter summary judgments for Appellants and to revisit the issue of class certification.

REQUEST FOR APPEAL RELATED FEES

Pursuant to ERISA Section 502(g)(1), 29 U.S.C. § 1132(g)(1), Appellants first request this Court for an award of reasonable attorney's fees for successfully appealing the District Court's orders and the final judgment. See *Hoyt v. Robson Companies, Inc.*, 11 F.3d 983, 985 (10th Cir. 1993) (holding an application for appeal-related attorney's fees must first be made to the appellate court. "Should we decide that it is appropriate to award such fees, we may then remand to the district court to determine an award of reasonable fees.").

STATEMENT CONCERNING ORAL ARGUMENT

Due to the factual complexity of this case involving a series of dispositive rulings and unique legal arguments posed by the parties concerning ERISA, a complicated federal statute, oral argument may prove useful to this Court and, therefore, Appellants request oral argument.

Respectfully submitted this 19th day of October, 2010.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 13,967 words in text and footnotes, excluding (table of contents, table of citations, and certificates of counsel) the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Times New Roman 14-point font and word counted in WordPerfect 12, the word processing software system used to prepare this brief.

Dated: October 19, 2010

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CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Pursuant to the Federal Rules of Appellate Procedure and the Local Rules of the United States Court of Appeals for the Tenth Circuit, I hereby certify:

1. The text of the electronic PDF version of the foregoing Plaintiffs-Appellants' Opening Brief that was electronically filed with the Court is identical to the text of the hard copies of the brief that were filed with the Court and served on Counsel;
2. Plaintiffs-Appellants' Opening Brief complies with the privacy policy of the Judicial Conference of the United States; and
3. A virus check was performed on the electronic brief using Symantec/Norton Internet Security and Anti-Virus software (v.18.1.0.37, current as of 10-18-10) and, according to the software application, the PDF file was found to be virus free.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October 2010, a true and correct copy of the above and foregoing **PLAINTIFFS --APPELLANTS' OPENING BRIEF** was emailed to all Attorneys for Defendants-Appellees and a copy was hand delivered to the offices of:

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