

DISTRICT COURT, OTERO COUNTY, COLORADO Otero County Courthouse 13 W. 3rd Street, Room 207 La Junta, CO 81050-1536	FILED IN COMBINED COURT OTERO COUNTY, COLO. APR - 7 2005 ▲ COURT USE ONLY ▲
Plaintiffs: WESLEY COLVIN v. Defendant: QWEST COMMUNICATIONS INTERNATIONAL, INC.	Case Number: 04CV39 Div. B Ctrm.: 205
FINDINGS OF FACT AND CONCLUSIONS OF LAW	

THIS MATTER is before the Court on Marlys Rathbun's ("Rathbun's") Motion to Intervene ("Motion") as of right pursuant to Colo.R.Civ.P. 24(a)(2), and in the alternative for permission to intervene pursuant to Colo.R.Civ.P. 24(b)(1) and 24(b)(2). Plaintiff Wesley Colvin ("Colvin") and Defendant Qwest Communications International, Inc. ("Qwest") have filed a joint response in opposition to the motion contending that Rathbun has failed to meet the requirements of intervention of right, and alternatively, that the COURT should decline to exercise its discretion and permit intervention under Colo.R.Civ.P. 24(b).

The Court, having reviewed and considered the Motion by proposed Intervenor, Rathbun, the briefs filed in support of and opposition to that Motion, and the oral arguments made at a hearing on December 15, 2004, hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On March 11, 2004, Plaintiff Wesley Colvin filed a class action suit asserting claims for breach of contract and promissory estoppel

against Defendant Qwest Communications International, Inc. on behalf of a class of “all Qwest Retirees whose Telephone Concession Reimbursement was terminated in January 2004, including those Qwest Retirees served by Independent Telephone Companies, not Qwest.” Defendant filed an Answer and several proposed and entered Case Management Orders have been entered. A motion for class certification was filed after Ms. Rathbun filed the instant motion to intervene and after the Parties reached a proposed settlement in this case.

- 2. Ms. Rathbun filed her own putative class action complaint in the United States District Court of the District of Arizona alleging that Defendant Qwest violated the Employee Retirement Income Security Act (“ERISA”) with respect to its establishment and maintenance of the Telephone Concession. In her Arizona Action, Ms. Rathbun asserts that the Telephone Concession Benefit qualifies as a pension plan under ERISA.**
- 3. Before Ms. Rathbun filed the Arizona Action, Colvin and Qwest (jointly, the “Parties”) had begun negotiations regarding the possible settlement of retirees’ claims relating to the Telephone Concession Benefits. Those negotiations culminated in a lengthy mediation on September 14, 2004 before former Colorado Supreme Court Chief Justice William D. Neighbors. The attendees and participants at the mediation included, not merely the Parties and their counsel, but**

additional retiree representatives of an organization formed by the retirees and a representative of, and counsel for, the Communications Workers of America (the "Union"). The Union and its counsel attended the mediation because the Union had filed a grievance on behalf of Union retirees, many of whom are putative class members in this case, in which it alleged (as does Colvin here) that Qwest's termination of the Telephone Concession Benefits was improper.

- 4. As a result of this mediation, the Parties reached, with the Union's concurrence, a proposed settlement of putative class members' claims relating to the Telephone Concession Benefits. During the month following the mediation, the Parties negotiated the terms of documents memorializing their settlement, including a proposed Settlement Agreement. Among other things, the agreement provides for a lump sum \$300 cash payment and free lifetime unlimited long distance services (both in-state and out-of-state) to each putative class member. The settlement is binding upon any Qwest successor in interest.**
- 5. The Plaintiff and Defendant executed the Settlement Agreement effective October 18, 2004, and on Friday, October 22 sent to this Court for filing: (1) a Stipulated Motion for Entry of Order Regarding Conditional Settlement Class Certification and Preliminary Settlement Approval ("Motion for Preliminary Settlement Approval"), to which was attached the proposed**

Settlement Agreement; and (2) a Stipulated Motion To Amend Complaint, to which was attached Colvin's proposed Amended Class Action Complaint. The amended complaint set forth, in addition to the state law claims previously asserted by Colvin, a claim for benefits under ERISA (the "ERISA Benefits Claim").

- 6. Section 3.1 of the proposed Settlement Agreement entitles Ms. Rathbun to exclude herself from the settlement, and to continue pursuing all claims she has asserted in the Arizona Action.**
- 7. Ms. Rathbun filed her Motion to Intervene on October 25, the same day that Colvin and Qwest motions identified above were received by the Court and filed. Ms. Rathbun's proposed complaint in this case is virtually identical to the complaint she filed in the Arizona Action, except that her Colorado complaint includes a single claim for ERISA benefits (the same ERISA Benefits Claim contained in Colvin's amended complaint), whereas her Arizona complaint includes additional ERISA claims.**
- 8. Notwithstanding the assertions made in her Motion to Intervene, Ms. Rathbun has presented no proof of collusion between Mr. Colvin and Qwest, nor does she present any evidence that Mr. Colvin and his counsel have not been striving to consider the best interests of the putative class of retirees. Likewise, Ms. Rathbun has made no showing that Mr. Colvin and his counsel's representation has been inadequate. The Affidavits of the Honorable William D. Neighbors,**

the mediator, and LeRoy Christensen, the Union officer, provide persuasive evidence that no collusion occurred between Colvin and Qwest.

- 9. Notwithstanding her attempt to intervene in this case, Ms. Rathbun has informed the court in the Arizona Action that she intends to continue pursuing that action regardless of what happens in this case. This can occur only if Ms. Rathbun opts out of the settlement here, because Section 4.1 of the proposed Settlement Agreement requires Ms. Rathbun to release her claims in the Arizona Action in order to participate in the settlement of this action.**
- 10. During the December 15 hearing, both Mr. Colvin's counsel and Mr. Colvin (who personally addressed the COURT) explained that most putative class members were older retirees and there was widespread support for the proposed class settlement, and that intervention by Ms. Rathbun will unnecessarily complicate, delay, and prejudice the expectations of many retirees in light of the mediated settlement agreement. Ms. Rathbun did not personally appear at the December 15 hearing.**
- 11. Prior to the filing of the Settlement Agreement with the Court in this case, Plaintiff Colvin never filed a motion for class certification nor was any class certified in this case.**
- 12. Ms. Rathbun's primary argument in her briefs and at the December 15 oral argument concern the alleged financial inadequacy of the**

mediated settlement. These arguments are premature, inasmuch as they are in the nature of an "objection" to the proposed class-wide settlement. Should Rathbun elect not to opt out of the proposed settlement class after notice of the proposed settlement is given to all of the putative class members, she can then advance these arguments to the Court, at which time the Court can consider them along with the comments and objections, if any, from other retirees in deciding whether to give final approval to the proposed settlement.

CONCLUSIONS OF LAW

- 1. This motion to intervene is directly controlled by the provisions of Rule 24 of the Colorado Rules of Civil Procedure which states in part:**

RULE 24. INTERVENTION

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

- 2. Ms. Rathbun asserts that she is entitled to intervene in this action: (a) as a matter of right under Colo. R. Civ. P. 24(a)(2); and (b) permissively under Colo. R. Civ. P. 24(b).**

3. **All parties are in agreement that there is no statute that confers an unconditional right to intervene to Ms. Rathbun.**
4. **All parties are in agreement that Ms. Rathbun claims an interest in the property or transaction which is the subject of this transaction.**
5. **Ms. Rathbun may intervene under Colo. R. Civ. P. 24(a)(2) if she can show that She is so situated that the disposition of the action may as a practical matter impair or impede her ability to protect her interest and her interest is not adequately represented by the existing parties.**
6. **In Feigin v. Alexa Group, Ltd., 19 P.3d 23, 26 (Colo. 2001) the Colorado Supreme Court declared: "An intervenor's interest is impaired if the disposition of the action in which intervention is sought will prevent any future attempts by the applicant to pursue his interest. Thus, courts in other jurisdictions have held that where there were alternative forums in which to bring a suit, an intervenor is neither impaired nor impeded in his ability to protect his interests under Rule 24(a)(2). * * * We are persuaded by the reasoning of these courts." (emphasis added).**
7. **The Colorado Supreme Court also noted in Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001) at p. 31 n. 11 the following "See O'Neill v. Simpson, 958 P.2d 1121, 1123 n. 4, 5 (Colo.1998) (noting that res judicata only bars subsequent claims by identical parties based on the same claim for relief, and that collateral estoppel only applies where the party against whom estoppel is being asserted has been a party to**

or is in privity with a party in a prior proceeding). The Investors' private suit would not be impaired by the doctrine of stare decisis because the civil enforcement action was resolved by Stipulation, and therefore does not involve a decision by a court on a specific issue of law. Moore, *supra*, § 24.03(3)(b) (noting that an intervenor's interest can be impaired or impeded if, "[u]nder the doctrine of stare decisis, a legal precedent is established when [the] court expressly decides a specific issue of law")."

8. "Inadequacy of representation is shown if there is proof of collusion between the representative and an opposing party, if the representative has or represents some interest adverse to that of the petitioner, or fails because of nonfeasance in his duty of representation." Feigin v. Alexa Group, Ltd., 19 P.3d 23 (Colo. 2001) at p. 32 n. 13

APPLICATION OF LAW TO THE FACTS OF THIS CASE

1. There is no question that Ms. Rathbun has an interest in the subject matter of this action. No one contests the fact that she is a member of the proposed class.
2. The key issue in this case is whether Ms Rathbun is so situated that the disposition of the action may as a practical matter impair or impede her ability to protect that interest, and whether Ms. Rathbun's interest is adequately represented by existing parties.



- 3. The proposed disposition (*i.e.*, settlement) of this case would not prevent any future attempts by Ms. Rathbun to pursue her interest in the subject matter of this case, because under Section 3.1 of the proposed Settlement Agreement, and under Rules 23(b)(3) & (c)(2) of the Colorado Rules of Civil Procedure, she has an absolute right to opt out of the settlement and pursue her interest in an alternative forum. Ms. Rathbun has in fact already elected to pursue her interest in an alternative forum, the federal court in Arizona. Ms. Rathbun is thus in the same position as the applicants in Feigin, whom the Colorado Supreme Court held did not satisfy Rule 24(a)(2)'s "impairment of interest" requirement. *See Feigin v. Alexa Group, Ltd.*, 19 P.3d 23 (Colo. 2001) at 30 (upholding denial of intervention because applicants retained right to bring a separate lawsuit by choosing "not to participate in the claims resolution process provided for by the Stipulation," and where applicants had in fact already filed such a suit).**
- 4. Although Rathbun argues that her interest may be impaired due to the stare decisis effect of this Court's judgment, the Parties' proposed settlement could have no stare decisis effect. . *See Feigin v. Alexa Group, Ltd.*, 19 P.3d 23 (Colo. 2001) at 31 n. 11 (stare decisis does not apply where plaintiff's claims are resolved via settlement rather than by "a decision by a court on a specific issue of law").**



- 5. Ms. Rathbun complains that if this Court approves the proposed settlement of this case and putative class members receive the lump sum payment and lifetime long distance telephone service provided for in the settlement, she will be able to recover less money for “funding” the alleged retirement plan, assuming *arguendo* she prevails in the Arizona Action. The effect of what Ms. Rathbun seeks to do is to make thousands of retirees, many of whom are elderly, wait years before possibly receiving any financial benefit—a delay that many of the retirees unfortunately would not outlive. This Court is mindful that some of the benefits provided under the proposed settlement have value throughout retirees’ “lifetime,” but not thereafter.**
- 6. There has been no proof that the representation for the class would be inadequate.**
- 7. Here as in *Feigin*, Mr. Colvin is charged in his capacity as representative of the proposed settlement class with representing the interests of all putative class members, including Ms. Rathbun. Moreover, Mr. Colvin’s and Ms. Rathbun’s interests in this case are identical: to obtain the maximum recovery from Qwest for its alleged improper handling of the Telephone Concession Benefits. Under these circumstances, Rathbun was required to make a “compelling showing” that Mr. Colvin’s representation of her interests was inadequate.**

8. **There has not been such a compelling showing.**
9. **For all the reasons set forth above, this Court concludes that Ms. Rathbun is not entitled to intervene under Rule 24(a)(2).**
10. **Ms. Rathbun's motion to intervene permissively under Rule 24(b) raises an issue within the discretion of this Court.**
11. **In deciding whether to exercise its discretion the court must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.**
12. **The evidence here is that this intervention would unduly delay the proceedings.**
13. **For this reason the Court denies the request for permissive intervention by Ms. Rathbun.**

DATED: April 7, 2005.

BY THE COURT:


District Court Judge

CC: Plaintiff's Attorney; Defendant's Attorney and Ms. Rathbun's Attorney

DISTRICT COURT, OTERO COUNTY, COLORADO Otero County Courthouse 13 W. 3rd Street, Room 207 La Junta, CO 81050-1536	FILED IN COMBINED COURT OTERO COUNTY, COLO. APR - 7 2005 ▲ COURT USE ONLY ▲ Case Number: 04CV39 Div./Ctrm.: B
Plaintiff: WESLEY COLVIN v. Defendant: QWEST COMMUNICATIONS INTERNATIONAL, INC.	
ORDER REGARDING CONDITIONAL SETTLEMENT CLASS CERTIFICATION AND PRELIMINARY SETTLEMENT APPROVAL	

This matter comes before the Court upon the joint application of counsel for Plaintiff and counsel for Defendant: (1) for preliminary approval of the proposed settlement in this action (the "Action"); (2) for approval of notice to the proposed Settlement Class of the proposed settlement; and (3) to set a hearing date to determine the fairness of that proposed settlement. The Court has considered the Settlement Agreement between the parties dated October 18, 2004, with all attachments thereto (the "Settlement Agreement"), and for good cause shown makes the following findings:

1. The parties have applied for an Order approving the settlement of the Action (the "Settlement") in accordance with the Settlement Agreement, which together with the exhibits annexed thereto, sets forth the terms and conditions for a proposed Settlement of the Action and for dismissal of the Action with prejudice;

2. The proposed Settlement reached during a mediation before former Colorado Supreme Court Chief Justice William Neighbors attended by Plaintiff, Defendant, counsel for the respective parties, management retiree representatives and representatives of the Communications Workers of America, appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to Settlement Class representatives or segments of the Settlement Class, and falls within the range of possible approval; and

3. It is necessary and appropriate to submit the proposed Settlement of the Action to the members of the Settlement Class and to convene a hearing for the purpose of determining on a final basis the fairness, reasonableness, and adequacy of the proposed Settlement and award of attorneys' fees and reimbursement of expenses to class counsel.

NOW, THEREFORE IT IS HEREBY ORDERED:

4. A Hearing on Final Approval of the Settlement ("Settlement Approval Hearing") shall be held ^{SET WITH} before this Court ~~on~~ within 15 days ~~of~~, ~~200~~ ~~xx~~ ~~xx~~ ~~xxxxxx~~ to determine whether the proposed Settlement of the Action on the terms and conditions provided in the Settlement Agreement is fair, reasonable and adequate and should be given final approval by the Court; whether a Final Judgment as provided in the Settlement Agreement should be entered herein; to consider Class Counsel's request for an award of fees and expenses; to identify those Settlement Class members who have requested exclusion from the Settlement Class (opted out); to identify those Settlement Class members who have objected to the Settlement and afford them an opportunity to assert their objections; and to ascertain those Settlement Class members to be bound by the Settlement.

5. For purposes of the proposed Settlement only, the Court preliminarily certifies a "Settlement Class" consisting of all individuals who: (a) retired as employees of Qwest Communications International, Inc., US WEST Communications, Inc. (including these two entities' parents, subsidiaries and affiliates), Mountain Bell, Pacific Northwest Bell, Northwestern Bell, or US WEST Business Resources, Inc.; (b) live outside of Qwest's local service areas as of the date of this Settlement Agreement and were receiving reimbursement for amounts paid for telephone services provided by carriers other than Qwest as of December 31, 2003; and (c) received a letter from Qwest dated December 9, 2003 notifying them that such reimbursements would be discontinued in January 2004.

6. For purposes of the proposed Settlement only, the Court approves Plaintiff Wesley Colvin as class representative and Curtis L. Kennedy as Settlement Class counsel ("Class Counsel").

7. The Court preliminarily approves the Settlement Agreement as being fair, reasonable and adequate and in the best interests of the Settlement Class as a whole.

8. The Court approves, as to form and content, the Notice of Proposed Settlement in the form attached as Exhibit D to the Settlement Agreement. The Court finds that the Notice of Proposed Settlement meets the requirements of Colo. R. Civ.

P. 23 and due process, and that it constitutes the best notice practicable under the circumstances, and shall constitute sufficient notice to all persons entitled thereto.

9. Within 45 days of the date of this Order, Defendant shall prepare and mail the Notice of Proposed Settlement to those individuals who are identified in Defendant's records as Settlement Class members. Defendant shall bear the costs of such Notice.

10. Defendant shall promptly file with the Court and serve on Class Counsel proof, by affidavit or declaration, of its mailing of the Notice of Preliminary Settlement Approval.

11. The Settlement Agreement, with attachments, shall be made available for inspection at the offices of the Clerk of Court, District Court, Otero County, 13 W. 3rd Street, Room 207, La Junta, CO 81050-1536.

12. Settlement Class members who wish to exclude themselves from the Settlement Class must do so in accordance with the instructions contained in the Notice of Proposed Settlement. Requests for exclusion shall not be effective if made for or on behalf of any other Settlement Class member or group of Settlement Class members unless each of those Settlement Class members has individually and specifically authorized the request as evidenced by an original signed authorization to accompany the request for exclusion. Each Settlement Class member's right to "opt out" of the Settlement Class must be exercised on an individual basis, and not on a representative, derivative, class wide, or subclass wide basis.

13. All Settlement Class members who do not exclude themselves from the Settlement shall be bound by all determinations, orders, rulings, and judgments in the Action concerning the Settlement, whether favorable or unfavorable to the Settlement Class.

14. Pending final determination of whether the Settlement should be approved, unless they have requested exclusion from the Settlement Class or are otherwise excluded from it, neither Plaintiff nor any other Settlement Class member, either directly, representatively, or in any other capacity, shall commence, prosecute, or maintain any action or proceeding in any court or tribunal asserting any of the Released Claims (as defined by the Settlement Agreement), or any claims which relate to or arise out of the Released Claims, against any of the Defendant Releasees (as defined by the Settlement Agreement).

15. Any Settlement Class member who has not requested exclusion, or who is not otherwise excluded, may appear and show cause why the proposed Settlement of the

Action should or should not be approved as fair, reasonable and adequate, why the Final Judgment Approving Settlement, Awarding Attorneys' Fees and Costs and Terminating Litigation ("Final Judgment") should or should not be entered, or why attorneys' fees and expenses to Class Counsel should or should not be awarded in the amount requested at the Settlement Approval Hearing. However, no Settlement Class member or any other person shall be heard or entitled to contest the approval of the terms and conditions of the proposed Settlement, or, if approved, the proposed Final Judgment to be entered thereon approving the same, or the attorneys' fees and expenses to be awarded to Class Counsel unless that person has served upon Class Counsel by first class mail, postmarked on or before May 6, 2005, a written objection and any supporting papers and briefs. The written objection must set forth (a) the name and case number of this lawsuit; (b) the Settlement Class member's full name, address, and telephone number; and (c) the specific reasons for the objection, and any evidence or legal authority the Settlement Class member believes supports his or her objection.

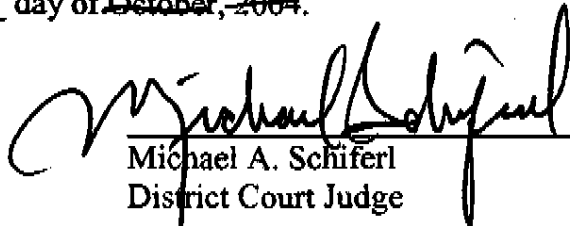
16. Any Settlement Class member wishing to appear in person or through counsel at the Settlement Approval Hearing must include with the written objection a notice of intention to appear. Any Class member who does not make his or her objections in the manner provided shall be deemed to have waived all such objections and shall forever be foreclosed from making any objection to the fairness, reasonableness, or adequacy of the proposed Settlement or to the award of attorneys' fees and reimbursement of expenses to Class Counsel, as reflected in the Settlement Agreement, unless otherwise ordered by the Court.

17. At least seven days before the Settlement Approval Hearing, Class Counsel shall: (a) file with the Court all original requests for exclusion and written objections and other papers received from Settlement Class members; and (b) serve on Defendant's counsel copies of all such requests for exclusion, objections and other papers.

18. The Court reserves the right to adjourn the date of the Settlement Approval Hearing without further notice to the Settlement Class members (except as may be served upon counsel of record and Settlement Class members who have appeared), and it retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement.

19. The parties, upon written agreement, may stipulate to non-material changes in the terms of the Settlement Agreement.

IT IS SO ORDERED this 7th day of April, 2005
~~day of October, 2004.~~



Michael A. Schiferl
District Court Judge