

No. 10-1349

**United States Court of Appeals
for the Tenth Circuit**

Edward J. Kerber, et al.,

Plaintiffs-Appellants,

v.

Qwest Group Life Insurance Plan, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
Case No. 07-cv-00644
Hon. Walker D. Miller, Presiding

RESPONSE BRIEF OF DEFENDANTS-APPELLEES

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Oral Argument Not Requested

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

Appellee Qwest Communications International Inc. (“QCII”) is a publicly held corporation that has no parent company. No publicly held corporation owns more than 10 percent of QCII’s stock.

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I. INTRODUCTION

Plaintiffs-appellants (“plaintiffs”) brought this lawsuit in response to changes made effective January 1, 2006 and January 1, 2007 to a life insurance benefit under the Plan.¹ Plaintiffs appeal the district court’s orders dismissing or granting summary judgment in favor of defendants-appellees (“Qwest”) on four categories of claims seeking to negate those changes: (1) the “contractual vesting” claim (“Contractual Vesting Claim”) in plaintiffs’ Amended Complaint (“First Amended Complaint”); (2) the equitable estoppel claim in that same complaint (“Equitable Estoppel Claim”); (3) the Third, Fourth, Fifth and Sixth Claims in plaintiffs’ Second Amended Complaint, which asserted that certain Plan amendments were ineffective (“Ineffective Plan Amendment Claims”); and (4) the Second Claim in plaintiffs’ Second Amended Complaint, which alleged that Qwest breached its fiduciary duties under ERISA (“Fiduciary Breach Claim”). Plaintiffs do not challenge the court’s orders dismissing the Second Amended Complaint’s First, Seventh and Eighth Claims.

The district court’s orders disposing of plaintiffs’ claims should be affirmed. Those orders are based on a straightforward application of Supreme Court and Tenth Circuit precedent, especially *Curtiss-Wright Corp. v. Schoonejongen*, 514

¹ Qwest will use the same naming conventions used in plaintiffs’ opening brief (“Br.”), unless otherwise noted. Citations to plaintiffs’ Appendix begin with the number of the Appendix volume, followed by “A” and the Appendix page number (*e.g.*, “1A at 204”).

U.S. 73 (1995), and *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996). Plaintiffs' 57-page opening brief does not even mention *Curtiss-Wright*, does not distinguish *Chiles*, and does not cite a single case in which a court has upheld a contractual vesting, equitable estoppel, or fiduciary breach claim, or has declared plan amendments to be ineffective, under facts resembling those presented here.

The district court correctly found that the Plan unambiguously gave Qwest the right to make the very changes challenged by plaintiffs. Qwest cannot be faulted for exercising its right to make those changes, and it made those changes in a manner that satisfied the Plan's requirements. The district court's judgment in Qwest's favor should therefore be affirmed in its entirety.

II. STATEMENT OF RELATED CASES

This case has not previously been before this Court, and no related cases are pending before this Court. However, five of the seven plaintiffs in this lawsuit previously brought suit against three of the four defendants in this lawsuit (together with a fourth defendant) asserting that defendants eliminated another retiree benefit, the so-called "death benefit," in violation of ERISA. In 2009, this Court affirmed the district court's judgment in Qwest's favor on all of plaintiffs' claims in that case. *See Kerber v. Qwest Pension Plan*, 572 F.3d 1135 (10th Cir. 2009).

III. STATEMENT OF FACTS

A. The Parties

The Plan is an ERISA welfare benefit plan that provides a life insurance benefit payable to the estate or beneficiaries of Plan participants who retired from QCII or its predecessor companies, including U S WEST, Inc. (“US West”), after becoming eligible for a service or disability pension. QCII is the Plan sponsor, and the PDC is the entity to which QCII delegated certain authority to amend the Plan. The EBC is a “fiduciary” and “administrator” of the Plan. 12A at 2548-49 ¶¶ C-F; 1A at 37 ¶ 24 & 5A at 859 ¶ 24.

Plan participants were either “management” (*i.e.*, salaried) or “occupational” (*i.e.*, union) employees of QCII or its predecessors prior to their retirement. 6A at 1217 ¶ 3. Five of the seven plaintiffs—Edward Kerber, Nelson Phelps, Joanne West, Nancy Meister and Thomas Ingemann—were management employees who retired from QCII or US West between 1990 and 2005. Plaintiff Samuel Strizich is the surviving spouse of Plan participant Sharon Strizich, a management employee who retired from US West in 1990 and died in 2007. Plaintiff Martha Lensink is the surviving spouse of Plan participant Joseph Lensink, an occupational employee who retired from US West in 1997 and died in 2006. 5A at 961-63 ¶¶ 4-10 & 1028-30 ¶¶ 4-10.

B. 1990 Early Retirement Program

Plaintiffs Kerber and Phelps began their employment with QCII predecessor Mountain Bell in the 1960s. *See* 1A at 32-33 ¶¶ 10-11, 8A at 1638 ¶ 3 & 10A at 2092 ¶ 3. Summary Plan Descriptions (“SPDs”) issued by Mountain Bell and US West expressly provided that the companies reserved the right to amend or terminate the Plan. For example, Mountain Bell’s 1977 and 1982 SPDs, and US West’s 1986 SPD, stated that although the company intended to continue the life insurance program indefinitely, it “reserves the right to end or amend it.” 1A at 175, 2A at 428 & 3A at 483.

US West’s 1987 SPD was in effect when Kerber and Phelps retired from US West in 1990. It stated that the basic life insurance benefit under the Plan equaled approximately the employee’s annual salary upon retirement, and would be reduced following the retiree’s 66th birthday by 10% each year until it reached 50% of the original amount by age 70. *Id.* at 489. The SPD’s reservation of rights provision stated that US West “reserves the right to terminate or amend [the Plan] at any time, subject to applicable limitations of the law or any applicable collective bargaining agreements.” *Id.* at 495.

In December 1989, US West sent Kerber and Phelps a letter with enclosures (the “5+5 Packet”) that described a so-called “5+5” early retirement opportunity consisting of enhanced benefits under US West’s Pension Plan (the “5+5 Option”).

9A at 1770-71 ¶¶ 2-5 & 1775-1843. The 5+5 Packet included an Insurance Plan Description that summarized the Life Plan and other insurance plans for which employees were eligible upon retirement. *Id.* at 1797-98. The following language appears in bold at the beginning of that document:

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.

Id. at 1797 (emphasis in original).

During the month preceding the January 31, 1990 deadline for responding to the 5+5 Option, US West made available for viewing a video conference designed to answer questions about that option (the “Video Conference”). The Video Conference included the following statement by a US West spokesman regarding the sentence in bold above:

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.

Id. at 1771-72 ¶¶ 5-6 (emphasis added); *see also* 10A at 2090 (DVD).

A response form included in the 5+5 Packet stated: “I have reviewed the materials in the Early Retirement (‘5/5’) Opportunity Information package sent to

me.” Kerber and Phelps signed and returned this form in late January 1990, and elected therein to accept the 5+5 Option. 9A at 1772-73 ¶¶ 7-8, 1792, 1852 & 1858. They retired from US West effective February 28, 1990. 5A at 961-62 ¶¶ 4-5 & 1028-29 ¶¶ 4-5.

In March 1990, US West sent Kerber and Phelps a letter describing how and when they would receive their pension checks (the “Letter”). The Letter included a single reference to the Life Plan: It said that a so-called “death benefit” for retirees “is paid in addition to benefits paid under the Group Life Insurance Program.” *See* 8A at 1667 ¶ 13 & 9A at 1773 ¶ 9 & 1869.

In 1996, US West agreed to memorialize a commitment to guaranteed benefit coverage under its health care plan (the “Health Plan”)—as distinguished from the Life Plan—for Pre-1991 Retirees. This commitment limited the company’s ability to discontinue the Health Plan for Pre-1991 Retirees, but had no impact on the Life Plan. *See id.* at 1767 ¶ 9 & 1881.

Each year between 2000 (when QCII and US West merged) and 2003, QCII sent Kerber and Phelps Confirmation Statements (the “Confirmation Statements”) that summarized their benefit elections under both the Health Plan and the Life Plan. *Id.* at 1730-42. The statements included the following sentences:

This Statement contains only a general description of Company-sponsored benefit plans. The exact details of these plans are included in the legal plan documents that govern them. *If there’s a*

discrepancy between this worksheet and the plan documents, the plan documents will govern.

The Company . . . reserves the right to amend, suspend, or discontinue [the plans] at any time, except for those who retired before 1991 and where prohibited by collective bargaining agreements.

Id. at 1732, 1736, 1739 & 1742 (emphasis added). With respect to the Life Plan, the “plan documents” to which these statements referred expressly reserved Qwest’s right to amend or terminate that Plan as to all retirees. *See, e.g.*, 8A at 1721.

Kerber and Phelps received the March 1990 Letters and the 2000-03 Confirmation Statements *after* their February 28, 1990 retirement date. When asked how they had detrimentally relied on, *inter alia*, the allegedly misleading statements in those documents, Kerber and Phelps identified just one form of reliance: They asserted that because of the alleged misstatements, “they saw no need to investigate whether to obtain alternative life insurance coverage to replace the promised U S WEST life insurance and, to their detriment, they took no such action.” 9A at 1745 ¶ 16.

Plaintiffs’ counsel has conceded that plaintiffs don’t allege any “intent to lie when US WEST made the assurances [in 1990] and when Qwest sent the confirming notices [in 2000-03].” *Id.* at 1762. To the contrary, plaintiffs’ counsel has acknowledged that “we don’t have evidence of a deliberate intent to deceive

the retirees and we can't honestly claim there was a deliberate intent to act fraudulently." *Id.*

C. 1998 Master Plan Document

Prior to 1997, the Plan's benefit formula did not provide that the minimum life insurance benefit payable to eligible Pre-1997 Retirees and Post-1996 Retirees was \$20,000 and \$30,000, respectively. *See* 3A at 579-80, 589 & 595. But in 1998, US West created a Master Plan Document that included such a provision. *Id.* at 611-47. The benefit formula in that document stated:

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 shall not be reduced below certain minimum amounts set forth in Appendix 7

Id. at 624 § 2.6(a). Appendix 7 stated that the amount of basic life insurance "shall not be reduced" below \$20,000 for Pre-1997 Retirees or \$30,000 for Post-1996 Retirees. *Id.* at 647.

Plaintiffs' Contractual Vesting Claim asserted that the preceding language "forbid[s] Qwest from reducing such coverage below stated minimums." *See* Br. at 10. But the Master Plan Document also includes a reservation of rights provision that expressly authorizes Qwest to reduce or eliminate such coverage at any time:

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.* * * * Any . . . 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.

3A at 638 § 10.1 (emphasis added). Notably, at the time the four Pre-1997 Retiree Participants (Kerber, Phelps, Lensink and Strizich) retired, the minimum benefit amount of \$20,000 for such retirees, as to which those plaintiffs now claim a contractually vested right, did not exist.

D. Oct. 2005 Resolutions

Plaintiffs Joanne West and Nancy Meister retired from QCII in 2004, and Plaintiff Thomas Ingemann retired from QCII in 2005. 5A at 962 ¶¶ 6-8 & 1029 ¶¶ 6-8. At the time they retired, the Plan's SPD stated that QCII "reserves the right to terminate or amend [the Plan] at any time," and that if the Plan "is ended or changed . . . you will not be vested in any plan benefits." See 4A at 735.

Under QCII's collective bargaining agreement with the Communications Workers of America and another union (collectively, the "CWA"), QCII was entitled to implement "caps," or maximums, effective January 1, 2006 on the amount QCII would contribute towards the cost of providing Health Plan benefits to post-1990 retirees who had been occupational employees ("Post-1990

Occupational Retirees”). Because the CWA wanted QCII to postpone implementing the Health Plan caps for both employees and retirees for three years, QCII entered into letter agreements with the CWA in August 2005 stating that: (1) “no retired employee shall be required to pay any contribution toward [Health] Plan costs for coverage prior to January 1, 2009”; and (2) “beginning January 1, 2006, the Basic Life Insurance benefit . . . [for] current eligible retirees will be reduced to a flat ten thousand dollar (\$10,000) benefit.” 6A at 1217 ¶¶ 4-5 & 1222-24.

QCII implemented its letter agreements with the CWA. On October 14, 2005, the PDC considered, approved, and executed a document entitled “Minutes and Resolutions October 14, 2005—Qwest Group Life Insurance Plan” (the “Oct. 2005 Resolutions”). *Id.* at 1225. The Oct. 2005 Resolutions described the life insurance benefit for which Post-1990 Occupational Retirees were currently eligible, and then stated:

Recommendation: That the Director, Employee Benefits, Health Life & Disability, Human Resources, or his delegate, be authorized to take all actions appropriate to implement for the 2006 plan year: * * * *Change the Basic Life Insurance Benefit for Post-1990 Occupational Retirees to reduce to a fixed \$10,000 benefit effective January 1, 2006.*

* * *

RESOLVED, that the Qwest Group Life Insurance Plan be and hereby is amended and restated to incorporate the design changes approved.

Id. (emphasis added).

Plaintiffs assert that the Oct. 2005 resolutions did not have the effect of amending the Plan. But all three PDC members stated in uncontroverted affidavits that they intended to amend the Plan by means of, and in accordance with, these resolutions. 6A at 1218 ¶ 7; 7A at 1346-47 ¶ 3 & 1350 ¶ 5. And immediately after those resolutions were approved, QCII took numerous steps to implement the amendment described therein. For example, in October 2005 it sent all Post-1990 Occupational Retirees: (1) a letter stating that “[e]ffective Jan. 1, 2006, the basic life insurance benefit will be reduced to a fixed amount of \$10,000 for eligible Occupational Post-1990 Retirees”; (2) an Occupational Benefit Program Guide stating that it was “intended to serve as a ‘Summary of Material Modifications’” (“SMM”) and that “[e]ffective Jan. 1, 2006, the Basic Life Insurance benefit for . . . retirees who retire on or after Jan. 1, 1991 will be reduced” to \$10,000; and (3) a Benefit Enrollment Statement providing this same information. *See id.* at 1352, 1356 ¶ 2, 1357 ¶¶ 3-5, 1359, 1366-67, 1417-18 ¶¶ 3-4 & 1420-22.

Also in October 2005, QCII sent the Association of U S West Retirees (“AUSWR”) a letter stating that it was delaying for three years implementation of the Health Plan caps for Post-1990 Occupational Retirees, and that to “offset the

cost” of this delay, “[e]ffective Jan. 1, 2006, the basic life insurance benefit will be reduced to a fixed amount of \$10,000 for eligible occupational post-1990 retirees.” *Id.* at 1353-54. The CWA itself trumpeted the fact that occupational retirees would “maintain their employer-paid health care, with some offsetting changes to the company-paid life insurance coverage for those who retired after 1990.” 6A at 1221 ¶ 19 & 7A at 1291-92.

In October 2005, QCII notified Prudential Insurance Company of America (“Prudential”), which had issued a group insurance policy on the lives of Plan participants, of the amendment approved in the Oct. 2005 Resolutions. Effective January 1, 2006, a Restated Group Contract was issued reflecting that amendment, *i.e.*, providing for a \$10,000 life insurance benefit for Post-1990 Occupational Retirees. Prudential has administered the Plan in accordance with that amendment ever since. 6A at 1219 ¶¶ 10-11; 10A at 1997-98 ¶¶ 3-5 & 2008; 11A at 2181 ¶ 4.

E. Sept. 2006 Resolutions

On September 14, 2006, the PDC considered, approved, and executed a document entitled “Minutes and Resolutions September 14, 2006—Qwest Group Life Insurance Plan” (the “Sept. 2006 Resolutions”). 10A at 1959-60. The Sept. 2006 Resolutions described the existing life insurance benefit provided to Management Post-1990 Retirees, all Pre-1991 Retirees, and so-called “ERO-1992” Retirees (collectively, the “Additional Retirees”), and then stated:

Recommendation: That the Director, Employee Benefits, Health Life & Disability, Human Resources, or his delegate, be authorized to take all actions appropriate to implement for the 2007 plan year:

- *Change the Basic Life Insurance Benefit for the Management Post-1990 Retirees * * * Pre-1991 Retirees * * * [and]ERO-1992 Retirees to reduce it to a fixed \$10,000 benefit effective January 1, 2007. * * **

RESOLVED, that the Plan Design Committee approves of the proposed plan design recommendations for the 2007 plan year.

*RESOLVED, that the Qwest Group Life Insurance Plan **be and hereby is amended** to incorporate the design changes approved.*

Id. at 1959 (emphasis added).

One of plaintiffs' Ineffective Plan Amendment Claims asserts that the Sept. 2006 Resolutions did not have the effect of amending the Plan. 5A at 983-84 ¶¶ 97-99. But all three PDC members stated in uncontroverted affidavits that they intended to amend the Plan by means of, and in accordance with, those resolutions. 9A at 1909-10 ¶ 3, 1913-14 ¶ 7 & 1921 ¶ 5. And immediately after the resolutions were approved, QCII took numerous steps to implement the amendment described therein. For example, in September 2006 it sent the Additional Retirees: (1) an SMM stating that effective Jan. 1, 2007, their Basic Life Insurance Benefit would be reduced to a flat \$10,000 benefit; (2) a Benefit Program Guide providing this same information; and (3) Benefit Enrollment Statements providing this same information. 10A at 2048-49, 2053, 2069-70 & 2023-24 (Resp. to RFA 2-4).

In late 2006, Qwest and Prudential agreed to amend the Restated Group Contract to reflect the amendment approved in the Sept. 2006 Resolutions, *i.e.*, to change the benefit payable for Additional Retirees to \$10,000 effective January 1, 2007. Prudential subsequently executed a rider stating that the life insurance benefit for Additional Retirees was \$10,000 effective January 1, 2007, and it has administered the Plan in accordance with that amendment at all times thereafter. *See* 11A at 2182-83 ¶ 6 & 2200-01; 10A at 1998-99 ¶¶ 6-7 & 2016-17; 9A at 1921-22 ¶ 6.

F. Dec. 2006 and June 2007 Resolutions

As discussed above, the Oct. 2005 and Sept. 2006 Resolutions (the “Two Resolutions”) stated that the Plan “be and hereby is amended and restated” to reduce the life insurance benefit for two different groups of retirees effective January 1, 2006 and January 1, 2007. The Two Resolutions authorized, but did not require, a Qwest official to “approve and execute the final form of such restatement.” 6A at 1225 & 10A at 1960.

When the Two Resolutions were executed, PDC member Erik Ammidown, who typically handled logistical issues relating to restatements and amendments of Plan documents, contemplated that the lengthy Master Plan Document would be restated in its entirety, and that the new Plan document would incorporate the amended terms set forth in the Two Resolutions. But after the Resolutions were

executed, Mr. Ammidown decided against creating an entirely new Plan document. Instead, the PDC approved and executed resolutions: (1) on December 13, 2006 stating that the Plan “was amended to incorporate changes to retiree coverage which are effective January 1, 2006” for Post-1990 Occupational Retirees, and restating the amended terms rather than the entire Plan (the “Dec. 2006 Resolutions”); and (2) on June 13, 2007 stating that the PDC had “previously amended the Life Plan . . . to reduce such benefit to a fixed \$10,000 benefit effective January 1, 2007” for the Additional Retirees, and restating the amended terms rather than the entire Plan (the “June 2007 Resolutions”). All three PDC members understood that one purpose and effect of the Dec. 2006 and June 2007 Resolutions was to restate the amendments they had previously approved and enacted by means of the Two Resolutions. 6A at 1219-20 ¶¶ 12-14; 7A at 1264, 1347 ¶ 4 & 1350-51 ¶¶ 6 & 8; 9A 1922-23 ¶¶ 7-9; 10A at 1965.

Shortly before filing this lawsuit, plaintiffs’ attorney prepared an article distributed to AUSWR members that stated:

There is Little Chance of Successful Legal Challenge For Persons Retiring After June 1987. * * * [I]n view of numerous court decisions, AUSWR predicts that any federal judge asked to make a decision about this dispute will, applying ERISA federal law, rule there has been an enforceable ‘reservation of rights’ clause in the SPDs at least since June 1987 to the present, which gives either U S WEST or Qwest the right to takeaway or reduce the basic life insurance benefit.

7A at 1331; *see also id.* at 1309 ¶ 37. All seven participants in this case—Joseph Lensink and Sharon Strizich (the deceased spouses of plaintiffs Martha Lensink Samuel Strizich, respectively) and plaintiffs Phelps, Kerber, West, Meister and Ingemann—retired after June 1987. 5A at 961-63 ¶¶ 4-10 & 1028-30 ¶¶ 4-10.

G. Disposition of Plaintiffs' Claims

Contractual Vesting and Equitable Estoppel Claims. The Contractual Vesting Claim in plaintiffs' First Amended Complaint asked the district court to declare that Pre-1996 Retirees and Post-1997 Retirees were entitled to an irreducible life insurance benefit of at least \$20,000 and \$30,000, respectively. *See* 1A at 61-62 ¶¶ 119-121.² That complaint's Equitable Estoppel Claim asserted that Qwest was equitably estopped from reducing the life insurance benefit below these amounts. *See id.* at 57-59 ¶¶ 99-109.

² Plaintiffs' opening brief states that the Contractual Vesting Claim is part of "Claim 1" of the First Amended Complaint. Br. at 8-11. But the subheading of that claim is "Breach of Fiduciary Duty and Equitable Estoppel." 1A at 57. By contrast, that complaint's Third Claim alleged that Qwest "violat[ed] the terms of the private anti-amendment provision prohibiting a reduction below minimum Basic Life Insurance Coverage," and sought a declaration that Plan participants are entitled to receive a minimum life insurance benefit of at least \$20,000 or \$30,000. *Id.* at 62 ¶¶ 120-21. The Second Claim made similar allegations and sought similar relief. *See id.* at 60-61 ¶¶ 112 & 118. For this reason, Qwest's Motion to Dismiss sought "dismissal of all claims in Plaintiffs' Amended Complaint . . . asserting that the Plan's language bars Defendants from reducing Plaintiffs' life insurance benefits to \$10,000." *Id.* at 104. The court's Dismissal Order so provided. 4A at 852.

In February 2008, the district court entered a 17-page order granting Qwest's motion to dismiss these claims. 4A at 836-52 ("Dismissal Order"). In dismissing the Contractual Vesting Claim, the court declared that "this situation is exactly analogous to the situation in *Chiles* in which the Tenth Circuit determined that the sponsor retained the ability to modify long term disability benefits." 4A at 842. The court held that "as a matter of law, the Plan unambiguously reserves Qwest's right to amend the Plan including reducing the amount of life insurance benefits for retired employees." *Id.* at 847.

With respect to plaintiffs' Equitable Estoppel Claim, the court noted that the Tenth Circuit has not recognized such a claim in the ERISA context. *Id.* at 848. The court then held that plaintiffs' Equitable Estoppel Claim was subject to dismissal in any event because: (1) such a claim would be viable only if the Plan's terms were ambiguous and "the terms of the Plan are unambiguous as a matter of law"; and (2) plaintiffs had not identified "any 'lies, fraud, or an intent to deceive' to demonstrate the 'limited, extraordinary circumstances' necessary to support an estoppel claim." *Id.* at 849, quoting *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992).

Ineffective Plan Amendment Claims. On April 3, 2008, after receipt of the Dismissal Order, Plaintiffs filed a Second Amended Complaint. The Third through

Sixth Claims of the Second Amended Complaint are referred to herein as the Ineffective Plan Amendment Claims.

The Second Amended Complaint's Third, Fourth and Fifth Claims concerned only Post-1990 Occupational Retirees. The Third Claim sought a declaration that the Oct. 2005 Resolutions, which stated that the Plan "be and hereby is amended" to reduce those retirees' life insurance benefit to \$10,000, were not effective to amend the Plan. 5A at 980-81. The Fourth Claim sought a declaration that the Dec. 2006 Resolutions were likewise not effective to amend the Plan. *Id.* at 981-82. The Fifth Claim alleged in the alternative that even if the Dec. 2006 Resolutions amended the Plan, the resulting Plan amendment did not become effective until December 13, 2006, and hence did not reduce benefits for Post-1990 Occupational Retirees who died between January 1 and December 12, 2006. *Id.* at 982-83.

The Second Amended Complaint's Sixth Claim concerned only the Additional Retirees. It sought a declaration that the Sept. 2006 Resolutions, which stated that the Plan "be and hereby is amended" to reduce the life insurance benefit for the Additional Retirees, were not effective to amend the Plan. *Id.* at 983-84.

In March 2009, the district court entered a 17-page order granting Qwest's motion for summary judgment on, *inter alia*, plaintiffs' Third, Fourth, and Fifth Claims concerning Post-1990 Occupational Retirees. 13A at 2607-2623 ("First

Summary Judgment Order”). The court noted that under *Curtiss-Wright*, 514 U.S. at 85, a company need only “sufficiently manifest its intention to amend” in order to effectuate a plan amendment. 13A at 2616. The court held that Qwest had amended the Plan by means of the Oct. 2005 Resolutions, stating: “There is no dispute that the PDC had authority to amend the Plan, effectuated the 2005 Resolutions, reduced the Plan benefits in the Group Policy pursuant to the 2005 Resolutions, notified the affected Plan Participants of the change in benefits via a formal SMM, and conducted itself as if the 2005 Resolutions constituted an amendment to the Plan.” *Id.* at 2617. The court held in the alternative that the amendment became effective through ratification, stating: “[E]ven if the 2005 Resolutions were deficient as an amendment, I conclude that the same actions by Defendants which manifested their intent to amend the Plan also served to ratify the amendment to the Plan.” *Id.* at 2618-19.

In August 2009, the district court entered a 32-page order granting Qwest’s motion for summary judgment on, *inter alia*, plaintiffs’ Sixth Claim concerning the Additional Retirees. 13A at 2697-2728 (“Second Summary Judgment Order”). The court held that Qwest was entitled to summary judgment on that claim because: (1) Qwest sufficiently manifested its intention to amend the Plan by means of the Sept. 2006 Resolutions; and (2) even if those resolutions

were deficient as an amendment, the same actions by which Qwest manifested its intention to amend the Plan served to ratify the amendment. *Id.* at 2720-21.

Fiduciary Breach Claim. Plaintiffs based their Fiduciary Breach Claim under 29 U.S.C. § 1132(a)(1) on alleged misstatements in the January 1990 Video Conference, the March 1990 Letters, and the 2000-03 Confirmation Statements. 5A at 968-69 & 979-80. The court's Second Summary Judgment Order granted Qwest's motion for summary judgment on this claim, stating: "Review of each of these statements . . . reveals that either the statement was not a misrepresentation, the misrepresentation was not material, or Plaintiffs did not rely on the statement." 13A at 2709.

IV. **SUMMARY OF ARGUMENT**

The district court properly dismissed plaintiffs' Contractual Vesting Claim. Because life insurance benefits are welfare benefits, Qwest could reduce those benefits at any time unless the Master Plan Document clearly and expressly barred it from doing so. That document in fact clearly and expressly *authorized* Qwest to reduce those benefits: It states that Qwest may "amend the Plan at any time, in any manner, including . . . to reduce, change, eliminate, or modify the type or amount of Benefits." As the district court found, this Court's decision in *Chiles*, which construed similar plan language in a similar context, compels dismissal of plaintiffs' Contractual Vesting Claim. But that claim would also be subject to

dismissal under the law of every other circuit (and there are seven) that has addressed the issue presented here.

The district court also properly dismissed plaintiffs' Equitable Estoppel Claim. This Court has never recognized such a claim in the ERISA context, and it should not do so here. But even if it were to do so, plaintiffs' First Amended Complaint failed to state such a claim for two reasons. First, it failed plausibly to allege any intentionally deceptive conduct by Qwest. Second, where (as here) the Plan document unambiguously authorizes an employer to reduce welfare benefits, a claim alleging that informal communications estop the employer from reducing those benefits fails as a matter of law, both because plaintiffs could not reasonably have relied on such communications and because plaintiffs cannot use estoppel to override the clear terms of plan documents and obtain benefits beyond those provided under such documents.

The district court properly granted summary judgment to Qwest on plaintiffs' Ineffective Plan Amendment Claims. Under the Supreme Court's holding in *Curtiss-Wright*, the Plan amendments challenged by plaintiffs were effective if the PDC sufficiently manifested its intention to so amend the Plan. The PDC could not have manifested its intention to so amend the Plan more clearly: It executed resolutions stating that the Plan "be and hereby is amended" to reduce the life insurance benefit to \$10,000. If that weren't sufficient, Qwest promptly gave

notice of the amendments to all affected retirees, to the retiree organization of which many of those retirees were members, to the union that formerly represented many of those retirees, and to the insurance company whose policy funded the life insurance benefit. Under *Curtiss-Wright*, these same actions sufficed to render the amendments effective through ratification. In light of the prominent role *Curtiss-Wright* played in the district court's rejection of plaintiffs' Ineffective Plan Amendment Claims, plaintiffs' failure even to mention that case in their opening brief is telling.

Finally, the district court properly granted summary judgment to Qwest on plaintiffs' Fiduciary Breach Claims, which alleged that Qwest misled Kerber and Phelps into thinking their life insurance benefits would not be reduced. These claims are suspect on their face, because plaintiffs cannot point to a single allegedly misleading communication that does not expressly state that Qwest reserves the right to reduce the life insurance benefits. Moreover, plaintiffs themselves properly concede that any alleged misstatements by Qwest were unintentional. Finally, reliance on alleged representations that plan benefits will not be reduced is inherently unreasonable where, as here, plaintiffs have received plan documents unambiguously reserving the right to reduce those benefits.

V. STANDARD OF REVIEW

This Court reviews *de novo* the district court's orders dismissing plaintiffs' Contractual Vesting and Equitable Estoppel Claims. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). While the Court "must accept all the well-pleaded allegations of the complaint as true," *id.*, the "allegations must be enough that, if assumed to be true, the plaintiff plausibly (not just speculatively) has a claim for relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009).

This Court also reviews *de novo* the district court's orders granting summary judgment to Qwest on plaintiffs' Ineffective Plan Amendment and Fiduciary Breach Claims. The movant "bears the initial burden of presenting evidence to show the absence of a genuine issue of material fact"; if this burden is met, it then becomes the responsibility of the non-moving party "to set forth specific facts showing there is a genuine issue for trial." *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976, 979 (10th Cir. 2002). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "The mere existence of a scintilla of evidence in support of the

plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

This Court may affirm for any reason stated by the court below or on any basis supported by the record, even though not relied upon by the district court. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 665 n. 11 (10th Cir. 2004).

VI. ARGUMENT

A. The District Court Properly Dismissed the Contractual Vesting Claim.

The question presented by plaintiffs' Contractual Vesting Claim is whether an ERISA welfare benefits plan document can be held to state in "clear and express language" that participants are entitled to a minimum level of benefits, when the plan document expressly states that the employer can reduce or eliminate those benefits. The answer, as *Chiles* and every other court to consider the question has held, is no.

Plaintiffs concede that the Plan is a welfare benefits plan. Br. at 18. Such plans are specifically exempted from the vesting requirements to which pension plans are subject. 29 U.S.C. § 1051(1). As a result, employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright*, 514 U.S. at 78.

In *Chiles*, this Court declared: “Because welfare benefits do not statutorily vest under the terms of ERISA, plaintiffs carry the burden of showing an agreement or other demonstration of employer intent to have [such benefits] vest under the plan.” 95 F.3d at 1511. This Court further stated that contractual vesting is a “narrow doctrine,” and that any such vesting “must be stated in clear and express language.” *Id.* at 1513 (quotation marks and citation omitted). Finally, this Court stated that a district court must “examine the plan documents as a whole and, if unambiguous . . . construe them as a matter of law.” *Id.* at 1511.

The district court correctly held that *Chiles* is dispositive of plaintiffs’ Contractual Vesting Claim. The plaintiffs in *Chiles* contended that a plan document’s explicit promise to provide a particular welfare benefit (health benefit premium payments) for so long as an employee was disabled was inconsistent with the document’s reservation of rights provision, and that the former provision trumped the latter. *Id.* The Tenth Circuit rejected this claim as a matter of law, holding that by virtue of the document’s reservation of rights provision—which was substantially identical to the provision in the Master Plan Document (*see id.* at 1509)—plaintiffs’ health benefit premium payments did not vest once plaintiffs qualified for long-term disability.

As the court below noted (4A at 844-45), three factors present in *Chiles*, all of which are present here, compel rejection of plaintiffs’ Contractual Vesting

Claim. First, the reservation of rights provision in *Chiles* included an exception to the language authorizing the employer to change benefits: “[I]f on the date of [Plan] 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.” 95 F.3d at 1512. Here too, the reservation of rights provision 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.” 3A at 638. And here as in *Chiles*, “the interpretive maxim of *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—properly applies to this case. By explicitly listing a qualification to [the plan sponsor’s] ability to change the . . . plan, it is proper to infer that the right to make other changes to . . . participants’ benefits was reserved.” 95 F.3d at 1512 (citation omitted).

Second, this Court’s holding in *Chiles* was supported by “language in the LTD master plan stating that all ‘participants’ are bound by amendments,” and defining “participants” to include disabled employees. *Id.* at 1512-13. Here too, the Master Plan Document states that each Participant is “deemed conclusively to have assented to . . . all amendments,” and defines “Participant” to include “Eligible Retiree.” 3A at 615, 618 & 626 § 2.8.

Finally, this Court stated in *Chiles* that “plaintiffs’ reading of the plan would render the termination exception superfluous; under plaintiffs’ interpretation,

Control Data may not alter the benefits of disabled participants under any condition.” 95 F.3d at 1513. Here too, under plaintiffs’ reading of the Plan, Qwest would be powerless to reduce life insurance benefits below the minimum amounts described in Appendix 7 even though the Plan expressly empowered it to reduce, and indeed eliminate, those benefits.

This Court held in *Chiles* that the plan documents unambiguously entitled the plan sponsor to reduce plaintiffs’ benefits while the plan was in operation. *Id.* at 1514. Its analysis compels a holding here that the Master Plan Document unambiguously entitled Qwest to reduce retirees’ life insurance benefits.

Plaintiffs’ arguments challenging the dismissal of their Contractual Vesting Claim are without merit. First, plaintiffs assert that Qwest’s brief seeking dismissal of that claim “incorrectly quot[ed]” and “misreport[ed]” a statement in plaintiffs’ class certification brief, thereby misleading the district court. Br. at 11-12. The accusation is unfounded. *Cf.* 1A at 73 *with id.* at 106.

Second, plaintiffs argue that the “rules” in Appendix 7 constituted a second “exception” to the Plan document’s reservation of rights provision, albeit one not found anywhere in that provision. Br. at 15-16. This argument ignores *Chiles*, which held that the express statement of a limitation within a reservation of rights provision demonstrated that no other limitation arose from language found elsewhere in the plan document. 95 F.3d at 1512. If the Master Plan Document’s

reservation of rights provision meant what plaintiffs claim, it would have included the following italicized (rather than merely the non-italicized) language: “provided, however, that no amendment shall reduce (1) *the minimum benefits for Participants specified in Appendix 7*; or (2) the benefits of any Participant with respect to a loss incurred prior to the date such amendment is adopted.” As *Chiles* makes clear, the absence of the italicized text in the reservation of rights provision is fatal to plaintiffs’ claim.

Third, plaintiffs try to distinguish cases by *seven* other courts of appeal holding that a reservation of rights provision like that contained in the Master Plan Document suffices to allow an employer to reduce retiree benefits even in the face of language expressly promising “lifetime” benefits (benefits not promised here). Br. at 17. But the cases are in fact on point, and provide further support for the Dismissal Order. *See Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 99 (2^d Cir. 2001) (“Because the same document that potentially provided the ‘lifetime’ benefits also clearly informed employees that these benefits were subject to modification, we conclude that the language contained in the 1987 SPD is not susceptible to an interpretation that promises vested lifetime life insurance benefits.”); *In re Unisys Corp. Retiree Med. Benefit ERISA Lit.*, 58 F.3d 896, 904 (3rd Cir. 1995) (“An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan under which those benefits were

provided, has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist.”) (emphasis in original); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 856 (4th Cir. 1994) (holding that the “express reservation of the company’s right to modify or terminate the participants’ benefits is plainly inconsistent with any alleged intent to vest those benefits,” and that “the modification clause, standing alone, is more than sufficient to defeat plaintiffs’ claim that the company provided vested benefits”); *Spacek v. Maritime Ass’n*, 134 F.3d 283, 293 (5th Cir. 1998), *abrogated on other grounds*, *Central Laborers-Pension Fund v. Heinz*, 541 U.S. 739 (2004) (stating that “[t]he strong weight of authority throughout the circuits indicates that, in the area of welfare benefits . . . a general amendment provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually”); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998) (en banc) (“We see no ambiguity in a summary plan description that tells participants both that the terms of the current plan entitle them to health insurance at no cost throughout retirement and that the terms of the current plan are subject to change.”); *Barnett v. Ameren Corp.*, 436 F.3d 830, 833 (7th Cir. 2006) (“when ‘lifetime’ benefits are granted by the same contract that reserves the right to change or terminate the benefits, the ‘lifetime’ benefits are not vested”) (internal quotation marks and citation omitted);

Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aerospace Workers, 501 F.3d 912, 918 (8th Cir. 2007) (“the following blanket reservation of rights . . . is fatal to any vesting argument: ‘Continental hopes and expects to continue the Plan indefinitely, but reserves the right to change or terminate it in the future’”).

Fourth, plaintiffs argue at length that the district court erred in dismissing their Contractual Vesting Claim because the Master Plan Document allegedly included an Appendix 8 as well as Appendix 7. Br. at 20-24. Plaintiffs never made this argument to the district court. Although plaintiffs try to excuse this failure by suggesting they did not obtain a version of the Master Plan Document containing both appendices until five months after the court issued its Dismissal Order (*see* Br. at 20), they in fact received such a version three months before they filed this lawsuit. *See* 6A at 1219 ¶ 12, 1221 ¶ 17 & 1226-63. They nevertheless elected to stipulate, and to represent to the district court in their response to Qwest’s motion to dismiss the Contractual Vesting Claim, that the Master Plan Document included Appendix 7, but not Appendix 8. *See* 4A at 756 n. 4, 771-72 & 774 ¶ 19; 3A at 611-47. Indeed, plaintiffs expressly asked that Appendix 8 be excluded from the Master Plan Document for purposes of the parties’ stipulation. *See* 11A at 2259.

After the district court issued its Dismissal Order, plaintiffs filed both a Motion for Reconsideration and a Motion to Alter or Amend Judgment. *See* 13A at 2624-32 & 2735-40. Neither motion asked the court to reconsider its Dismissal

Order, or even mentioned Appendix 8. *See id.* Under these circumstances, plaintiffs have waived the argument that the district court erred in dismissing the Contractual Vesting Claim because the Master Plan Document allegedly included Appendix 8 as well as Appendix 7. *See, e.g., Wilburn v. Mid-South Health Development, Inc.*, 343 F.3d 1274, 1280 (10th Cir. 2003) (“An issue is waived if it was not raised below in the district court.”); *North Tex. Prod. Credit Ass’n v. McCurtain County Nat’l Bank*, 222 F.3d 800, 812 (10th Cir. 2000) (“[a]s a general rule, we do not consider issues not passed on below”).

Plaintiffs’ attempt to inject Appendix 8 into this case is unfathomable in any event, because that appendix is identical in all material respects to Appendix 7. *See* 6A at 1262-63.³ As a result, the alleged inclusion of both appendices in the Plan document could not possibly affect the outcome of this case. *See Anderson*, 477 U.S. at 249 (a fact is material only if it might affect the outcome of the case under governing law). Moreover, the Two Resolutions stated that the Plan as a whole, rather than merely any appendix thereto, was amended to reduce the life insurance benefit to \$10,000. *See* 6A at 1225 & 10A at 1959. This language sufficed to amend both Appendix 7 and Appendix 8.

³ As Magistrate Judge Kirsten Mix found in an order resolving a discovery dispute relating to Appendix 8, substantial evidence indicates that Appendix 8 was a draft of Appendix 7 that was attached to the Master Plan Document by mistake. *See* 11A at 2256-61.

Plaintiffs' arguments challenging dismissal of their Contractual Vesting Claim are remarkable in three respects. First, plaintiffs do not cite a single case holding that a plan sponsor is contractually barred from reducing a welfare benefit where the plan document contains a reservation of rights provision.

Second, Plaintiffs concede that Qwest can reduce benefits, but only so long as it does so by 100%—by terminating the Plan. *See* Br. at 12 (acknowledging that “the sponsor may . . . terminate the Plan”). A more illogical argument is hard to imagine.

Finally, the rule plaintiffs urge this Court to adopt would not only harm the interests of employees and retirees generally; it would have harmed the interests of the very retirees whom plaintiffs purport to represent. As the court stated in *Frahm v. Equitable Life Assurance Society of the U.S.*, 137 F.3d 955, 962 (7th Cir. 1998), “knowledge that plans may be changed encourages employers to make better offers to their labor force,” because “[i]f employers knew that they were locked in, they would be more conservative in making promises, to the potential detriment of the workers.” For example, US West elected in 1997 to “raise the minimum retiree basic life insurance benefit to \$20,000 for Pre-1996 Retirees,” which represented “an increase for more than 80% of our current retirees.” 3A at 610. If the rule plaintiffs urge this Court to adopt (*i.e.*, a rule barring Qwest from reducing the life insurance benefit even though the Plan document expressly authorized such

reduction) had been in place in 1997, US West would not have instituted the very minimum benefit that plaintiffs now claim is inviolate.

Moreover, the 2006 reduction in Plan benefits for Post-1990 Occupational Retirees was instigated by the CWA, which wanted QCII to postpone implementing caps on Health Plan benefits and was willing to reduce Life Plan benefits to achieve this goal. 6A at 1217-18 ¶¶ 4-9 & 1222-24. The CWA's goal would have been thwarted under the rule espoused by plaintiffs, because Qwest would never have delayed implementing the Health Plan caps had it been barred from reducing the Life Plan benefit. *Id.* at 1218 ¶ 8. For all these reasons, the district court properly dismissed the Contractual Vesting Claim.

B. The District Court Properly Dismissed the Equitable Estoppel Claim.

As the district court noted, the Tenth Circuit has never recognized a claim for equitable estoppel in the ERISA context. *See* 4A at 848, *citing Callery v. U.S. Life Ins. Co. of N.Y.*, 392 F.3d 401, 407 (10th Cir. 2004). The district court correctly held that, even if such a claim were cognizable in this circuit, plaintiffs' Amended Complaint failed to state such a claim because: (1) the Plan terms that plaintiffs sought to circumvent by means of their Equitable Estoppel Claim were unambiguous; and (2) plaintiffs did not identify "any 'lies, fraud, or an intent to deceive' to demonstrate the 'limited, extraordinary circumstances' necessary to support an estoppel claim." 4A at 849, *quoting Miller*, 978 F.2d at 625.

1. **The Equitable Estoppel Claim Fails Because the Plan Terms Plaintiffs Sought to Circumvent by Means of That Claim Were Unambiguous.**

The Tenth Circuit has stated that if it were to recognize an ERISA estoppel claim, it would do so only “where the terms of a plan are ambiguous and the employer’s communications constituted an interpretation of that ambiguity.” *Averhart v. U.S. West Management Pension Plan*, 46 F.3d 1480, 1486 (10th Cir. 1994) (quotation marks, brackets and citation omitted). This is consistent with the views of other circuits. *See In re Unisys Corp.*, 58 F.3d at 907-08 (3rd Cir.); *Moore v. LaFayette Life Ins. Co.*, 458 F.3d 416, 429 (6th Cir. 2006); *Slice v. Sons of Norway*, 34 F.3d 630, 634-35 (8th Cir. 1994); *Pisciotta v. Teledyne Industries, Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996); *Novak v. Irwin Yacht & Marine Corp.*, 986 F.2d 468, 472 (11th Cir. 1993).

Under *Averhart*, plaintiffs’ Equitable Estoppel Claim fails for the same reason their Contractual Vesting Claim fails: because the Plan unambiguously authorized Qwest to reduce or eliminate the life insurance benefit. The district court correctly so held. 4A at 849-50; *see also Crosby v. Rohm & Hass Co.*, 480 F.3d 423, 431 (6th Cir. 2007) (equitable estoppel claim based on language in an enrollment worksheet failed as a matter of law where the plan documents were unambiguous; “[o]therwise, we would be permitting estoppel to override the clear terms of plan documents and in the end would be permitting the party to enforce

something other than the plan documents themselves, which ERISA prohibits”) (internal quotations and citation omitted); *Alday v. Container Corp. of America*, 906 F.2d 660, 665-66 (11th Cir. 1990) (equitable estoppel claim based on language in, *inter alia*, a “Summary of Personal Benefits” failed as a matter of law where the plan documents were unambiguous); *Sprague*, 133 F.3d at 404 (“to allow estoppel to override the clear terms of plan documents would be to enforce something other than the plan documents themselves” and “would not be consistent with ERISA”).

2. The Equitable Estoppel Claim Fails Because Plaintiffs Did Not Allege the Extraordinary Circumstances Required to State Such a Claim.

The Tenth Circuit has also indicated that if it were to recognize an ERISA estoppel claim, it would do so only in “limited” and “egregious” circumstances, *i.e.*, circumstances involving “lies, fraud or an intent to deceive” by a fiduciary. *Callery*, 392 F.3d at 407-08. Plaintiffs alleged no such circumstances in their Amended Complaint, and none exist. Indeed, although plaintiffs now assert they were “systematically tricked into believing their minimum life insurance benefit was a protected and irrevocable benefit” (Br. at 24), plaintiffs’ attorney previously admitted that “we don’t have evidence of a deliberate intent to deceive the retirees and we can’t honestly claim there was a deliberate intent to act fraudulently” (9A at 1762). Moreover, plaintiffs’ own First Amended Complaint demonstrates the diligence with which QCII and its predecessors, far from deceiving plaintiffs

into believing that their Plan benefits were “irrevocable,” repeatedly told them that those benefits could be reduced or eliminated at any time. *See* 1A at 41-44 ¶¶ 41-55.

Plaintiffs fault the district court for dismissing their Equitable Estoppel Claim before they had an opportunity to conduct discovery. Br. at 24. But as the court noted in its Dismissal Order, plaintiffs’ First Amended Complaint “refers extensively to governing plan documents . . . and other materials relating to the Plan,” and the parties agreed that those documents “may be considered in the motion to dismiss because they are central to Plaintiffs’ claims and are referred to in” plaintiffs’ complaint. 4A at 837 n. 2. Not only did Qwest submit all such documents with its motion to dismiss (*see* 1A at 131-231, 2A at 232-436, 3A at 437-647 and 4A at 648-738), plaintiffs themselves attached a stipulation to their response to Qwest’s motion in which they agreed that all such documents were authentic and admissible (*id.* at 771-76). As the Supreme Court stated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007): “[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court” *Id.* at 558 (quotation marks, citation and ellipsis omitted).

The numerous Plan documents supporting Qwest's motion to dismiss all unambiguously reserved the right of QCII and its predecessors to reduce or eliminate Plan benefits. *See generally* 1A at 41-44 ¶¶ 41-55. Plaintiffs' Equitable Estoppel Claim is based on very few allegedly contrary informal communications. The First Amended Complaint alleged that *after* Plaintiffs Kerber and Phelps retired from US West on February 28, 1990, they received a March 26, 1990 letter stating that "[y]ou are entitled to the benefits paid under the Group Insurance Program." *See id.* at 49 ¶ 69.⁴ The complaint also alleged that *long after* Kerber and Phelps retired, they received Confirmation Statements containing the allegedly misleading statement that QCII "reserves the right to amend, suspend, or discontinue [the Health and Life Plans] at any time, *except for those who retired before 1991* and where prohibited by collective bargaining agreements." *See id.* at 50-51 ¶ 76 (emphasis added by plaintiffs). The paragraph immediately preceding

⁴ In fact, after plaintiffs filed their First Amended Complaint, Kerber and Phelps stipulated that they did *not* receive the letter containing this sentence. US West sent different letters to two different groups of retirees who accepted the 5+5 Option: (1) those who elected to receive a single lump sum pension check; and (2) those who, like Kerber and Phelps, elected to receive monthly pension checks. Although the letter sent to the first group included the sentence quoted above, the letter sent to the second group did not. Instead, it said only that a so-called "death benefit" for retirees "is paid in addition to benefits paid under the Group Life Insurance Program." *See* 8A at 1665 & 1667 ¶ 13; 9A at 1773 ¶ 9 & 1868-71. Qwest assumed the accuracy of the false allegation in paragraph 69 of the First Amended Complaint solely for purposes of its motion to dismiss.

the sentence quoted above said that “[t]he exact details of these plans are included in the legal plan documents that govern them,” and that “[i]f there’s a discrepancy between this worksheet and the plan documents, the plan documents will govern.” 4A at 689, 692, 694 & 696. The district court’s conclusion that this language “negates any claim of Qwest’s intent to deceive” (*id.* at 851), and that the complaint accordingly failed to allege the “extraordinary circumstances” required for an equitable estoppel claim, is manifestly correct.

Moreover, reasonable reliance is an element of any estoppel claim, and plaintiffs could not satisfy this element as a matter of law. Plaintiffs had in hand multiple Plan and other documents unambiguously reserving Qwest’s right to reduce the life insurance benefit. *See, e.g.*, 3A at 495 & 9A at 1797. This fact, in and of itself, forecloses a successful estoppel claim. *See Sprague*, 133 F.3d at 404 (a “party’s reliance can seldom, if ever, be reasonable or justifiable if it is inconsistent with the clear and unambiguous terms of plan documents available to or furnished to the party”); *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 626 & 639-40 (7th Cir. 2004) (retirees’ estoppel claim based on employer’s representations that they would receive “lifetime” health benefits failed as a matter of law because retirees’ “reliance was unreasonable given that the general retirement plan documents . . . contained numerous, unambiguous provisions reserving CNA’s right to amend, suspend, or terminate the health care subsidy”);

In re Unisys Corp., 58 F.3d at 907 (retirees failed to state an estoppel claim because their “interpretation of the plans as providing lifetime benefits is not reasonable as a matter of law because it cannot be reconciled with the unqualified reservation of rights clauses in the plans”); *Weir v. Federal Asset Deposit Ass’n*, 123 F.3d 281, 290 (5th Cir. 1997) (“Where, as here, a plan participant is in possession of a written document notifying her of the conditional nature of benefits, her reliance on employer representations regarding benefits may never be reasonable”) (quotation marks and citation omitted); *Crosby*, 480 F.3d at 431-32 (rejecting estoppel claim alleging that plaintiff could have purchased additional insurance had he not been misled by employer’s enrollment worksheet where plan’s terms “were exceedingly clear, making [plaintiff’s] alleged reliance on contrary informal communications from the company unreasonable as a matter of law”). Plaintiffs could not reasonably rely on statements suggesting that Plan benefits *could not* be reduced when every Plan document plaintiffs ever received said that such benefits *could* be reduced.

The equitable estoppel case on which plaintiffs most heavily rely, *Pell v. E.I DuPont De Nemours & Co.*, 539 F.3d 292 (3rd Cir. 2008), bears no resemblance to this case. In *Pell*, defendant DuPont made “repeated misrepresentations over an extended course of dealings” regarding plaintiff’s “credited service date,” which determined the amount of plaintiff’s pension benefits. *Id.* at 304 (internal quotation

marks and citation omitted). Plaintiff detrimentally relied on those misrepresentations, which did not clearly contradict the Plan documents, before he retired. *Id.* at 297-98. These facts led the Third Circuit to affirm the district court's judgment in plaintiff's favor on his equitable estoppel claim. *Id.* at 300-04. By contrast, plaintiffs here alleged no "repeated misrepresentations over an extended course of dealings"; indeed, they alleged no genuine misrepresentations whatsoever. Moreover, the few purported misrepresentations alleged by plaintiffs are directly contradicted by statements in Plan documents that plaintiffs had previously received. Finally, the court in *Pell* stated that "a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision *about if and when to retire.*" *Id.* at 300 (internal quotation marks and citation omitted; emphasis added). In this case, plaintiffs decided to retire before they received the allegedly misleading March 1990 Letters and 2000-03 Confirmation Statements. In sum, the district court properly dismissed plaintiffs' Equitable Estoppel Claim.

C. The District Court Properly Granted Summary Judgment to Qwest on the Ineffective Plan Amendment Claims.

The district court held that Qwest was entitled to summary judgment on the Ineffective Plan Amendment Claims for two independent reasons: (1) because Qwest sufficiently manifested its intention to amend the Plan by means of the Two Resolutions; and (2) because even if those resolutions were deficient as Plan

amendments, Qwest ratified the amendments described therein before their effective dates. 13A at 2617-19 & 2720-21. Plaintiffs only appeal the grant of summary judgment on the first of these grounds. *See* Br. at 29-48. The court's orders granting summary judgment to Qwest on these claims must therefore be affirmed. *See Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 877 (10th Cir. 2004) (where district court granted summary judgment to defendant on both "notice" and a second ground and plaintiff appealed only the "notice" part of the court's order, appellate court "need not address the notice issue because, even if [plaintiff] were to prevail on that issue, the grant of summary judgment to [defendant] would still stand on the alternative ground which was not appealed"); *Utah ex rel. Div. of Forestry, Fire and State Lands v. United States*, 528 F.3d 712, 724 (10th Cir. 2008) (same).⁵ But even if plaintiffs had properly appealed the ratification portion of the court's order granting summary judgment to Qwest on the Ineffective Plan Amendment Claims, that order must still be affirmed, for the reasons discussed below.

⁵ Although plaintiffs' opening brief includes a few cursory references to ratification (*see* Br. at 32), those references do not suffice to avoid the conclusion that plaintiffs waived any objection to the district court's ruling on ratification. *See Bronson v. Swensen*, 500 F.3d 1099, 1104-05 (10th Cir. 2007) ("we routinely have declined to consider arguments that are . . . inadequately presented in an appellant's opening brief," and "cursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine").

1. The Two Resolutions Effectively Approved the Amendments Described Therein.

In *Curtiss-Wright*, the Supreme Court stated that whether the plan sponsor effectuated a plan amendment turned on two issues: (1) “what persons or committees within [the plan sponsor] possessed plan amendment authority, either by express delegation or impliedly”; and (2) “whether those persons or committees actually approved the new plan provision.” 514 U.S. at 85. The Court further stated that whether the relevant committee “actually approved” a plan amendment turns on whether it “sufficiently manifest[ed] its intention” to amend the plan. *Id.* at 80. Because the PDC indisputably possessed Plan amendment authority (*see* 12A at 2549 ¶ E), the dispositive issue is whether it “actually approved” the amendments described in the Two Resolutions. This in turn depends on whether the PDC “sufficiently manifest[ed] its intention” to amend the Plan by reducing the life insurance benefit to \$10,000 for two groups of retirees effective January 1, 2006 and January 1, 2007.

The PDC manifested such an intention in the most unequivocal way possible—by executing resolutions stating that the Plan “be and hereby is amended” to so reduce the life insurance benefit. 6A at 1225 & 10A at 1959. ERISA requires nothing more, especially where, as here, the Plan document states that the Plan can be amended “in any manner.” 3A at 638. *See, e.g., Haran v. Dow Jones & Co.*, 216 F.3d 1072, 2000 WL 777982 * 3 (2^d Cir. 2000) (summarily

rejecting plaintiffs' argument that resolutions "explicitly stat[ing] that the 'Dow Jones Severance Pay Plan . . . *is hereby amended*'" did not amend a plan) (emphasis in original).

If the unequivocal manifestation of intention reflected in the Two Resolutions were not sufficient, Qwest further manifested its intention to amend the Plan by: (1) sending SMMs, letters, and statements to all affected retirees stating that their life insurance benefit would be reduced to \$10,000; (2) providing this same information to Prudential; (3) entering into a Restated Group Contract with Prudential effective January 1, 2006, and a rider to that contract effective January 1, 2007, so providing; (4) administering the Plan in accordance with the amendments by providing life insurance coverage at the reduced \$10,000 level; and (5) treating the Two Resolutions as part of the Plan's governing documents by making them available for inspection and copying as required by 29 U.S.C. § 1024(b). Months before the effective dates of the two amendments, Qwest disclosed the amendments to all interested parties, including Plan participants, the union that had previously represented those retirees (CWA), the retiree organization of which a number of those retirees were members (AUSWR), and the company providing the insurance in question (Prudential). These actions more than sufficed to manifest Qwest's intention to approve the amendments. *See Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 569 (7th Cir. 1995) (employer

effectively amended welfare plan when it “clearly manifested its intent to amend the Plan” by notifying Plan participants of amended terms four months before amendments became effective).

Finally, even if the Two Resolutions did not fully comply with the Plan’s amendment procedures (which they did), they substantially complied with those procedures, which is all the Tenth Circuit requires. In *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002), this Court stated that it “recognized that the doctrine of substantial compliance may have application in ERISA cases,” and that its conclusion that the ERISA plan in that case was not amended “does not end our analysis.” Instead, the Court stated: “The possibility remains that, despite not having complied in full with the requirements of § 8.10 of the Plan, Bank One met its obligation . . . by performing substantially equivalent procedures.” *Id.* Although this Court declined to apply the substantial performance doctrine in *Allison* because Bank One did not in fact substantially comply with the terms of the plan (*id.* at 1237), the PDC *did* substantially comply with the Plan’s terms—which provided that Qwest could amend the Plan “in any manner”—by executing written resolutions stating that the Plan “be and hereby is amended” to reduce the life insurance benefit for specified retirees. Under both Tenth Circuit law and applicable trust law, no more is required. *Id.* at 1236; *Peckham v. Gem State Mut. of Utah*, 964 F.2d 1043, 1052-53 (10th Cir. 1992); *Restatement (Third) of Trusts*

§ 63 comment *i* (2003) (a settlor can exercise a power to amend the trust via a particular method “by substantial compliance with the method prescribed”).

The district court’s orders granting summary judgment to Qwest on plaintiffs’ Ineffective Plan Amendment Claims rely primarily, and properly, on the Supreme Court’s analysis in *Curtiss-Wright* regarding how to determine if an ERISA plan has been effectively amended. *See* 13A at 2616-18 & 2719-21. The task facing plaintiffs on appeal is thus to show that Qwest did not effectively amend the Plan under *Curtiss-Wright*. Yet plaintiffs do not so much as mention *Curtiss-Wright* in their opening brief.

Instead, in the face of the undisputed facts and dispositive law described above, plaintiffs advance five feeble arguments. First, they argue that the Two Resolutions were ineffective because they did not expressly state that the amendments had been “adopted.” Br. at 30-32 & 45. But plaintiffs concede that (1) “the Plan does not state a prescribed method for an adoption,” (2) “the Plan does not define the word ‘adopt,’” and (3) “adopt” “generally means ‘to accept[] formally and to put into effect.’” 11A at 2272 & 7A at 1335; *see also Black’s Law Dictionary* (5th ed. 1979) (“adopt” means “[t]o accept, consent to, and put into effective operation”). In the Two Resolutions, the PDC accepted and consented to amendments reducing the life insurance benefit to \$10,000 for two groups of retirees, and Qwest put those amendments into effect for those two groups

effective January 1, 2006 and January 1, 2007. By plaintiffs' own admission, nothing more was required.

Second, plaintiffs argue that the Two Resolutions were ineffective because they approved a reduction in the "Basic Life Insurance Benefit" rather than in "Basic Life Coverage," which is the term used in the Master Plan Document. Br. at 33, 36 & 45-46. Plaintiffs thought so little of this argument that they did not bother to make it to the district court—a fact that dooms it on appeal. *See Sewell v. Great Northern Ins. Co.*, 535 F.3d 1166, 1170 n. 2 (10th Cir. 2008) ("Particularly on appeal from the grant of summary judgment, we are reluctant to entertain new arguments because they have not been considered by the trial court."). The argument epitomizes the "gotcha" spirit that permeates all of plaintiffs' arguments. Plaintiffs urge this Court to rule that, even though the PDC signed resolutions stating that the Plan "be and hereby is amended," no amendment occurred because the resolutions used the term "Insurance Benefit" instead of the synonymous term "Coverage." Neither ERISA nor the courts construing it exalt form over substance in this manner.

Third, plaintiffs argue that the Two Resolutions were not effective because they did not expressly strike, and therefore allegedly left intact, the Plan's benefit formula stating that retirees would receive life insurance coverage in varying amounts substantially exceeding \$10,000. Br. at 38. But resolutions stating that

specified retirees' life insurance benefit is *reduced to \$10,000* cannot reasonably be construed to leave intact prior Plan provisions affording those same retirees a life insurance benefit that *substantially exceeds \$10,000*. See *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1202 (10th Cir. 1992) (ERISA plan language should be construed “*as a reasonable person in the position of the . . . participant . . . would have understood the words to mean*”) (emphasis in original).

Fourth, plaintiffs argue that the date on which the pertinent Plan amendments were *adopted* is both important and unclear. Br. at 29-30, 32, 37 & 45. But the Master Plan Document mandates only that there be an *effective* date for Plan amendments. See 3A at 638 (“[a]ny such amendment of the Plan shall be effective on such date as the Plan Sponsor may determine”). The date of adoption of the two amendments is in any event clear—October 14, 2005 for the first, and September 14, 2006 for the second.

Finally, plaintiffs argue that the Sept. 2006 Resolutions concerning the Additional Retirees were ineffective because Qwest did not also sign an amendment to the Restated Group Contract, which it used to fund the payment of Plan benefits.⁶ Plaintiffs' assertion that the Restated Group Contract could only be

⁶ This argument does not apply to the Oct. 2005 Resolutions concerning the Post-1990 Occupational Retirees. Qwest and Prudential did not amend their (Continued)

modified by an amendment signed by both Qwest and Prudential is baseless. Like many insurance policies, the Restated Group Contract states that it can be modified by “an endorsement on it signed by an officer of Prudential.” 10A at 1946. An “endorsement” is “[a]n amendment to an insurance policy; a rider.” *Black’s Law Dictionary* at 607 (9th ed. 2009); *see also Fidelity and Guaranty Ins. Underwriters, Inc. v. Jasam Realty Corp.*, 540 F.3d 133, 137 n. 3 (2^d Cir. 2008) (same); 1 *Couch on Insurance* § 1.3 (3rd ed. 2008) (an “endorsement” is a “written modification of the coverage of an insurance policy, usually liability or property policy (the term rider is a functional equivalent more often used regarding life or health insurance)”). Prudential’s Vice President for Contracts signed a document stating that “part of the Group Contract as of its Effective Date” is an attached “Rider” stating that the life insurance benefit payable to the Additional Retirees had been changed to \$10,000. This document is a written modification of the Restated Group Contract signed by an officer of Prudential, and both Prudential and Qwest indisputably intended and agreed that it modified their contract. 11A at 2182-83 ¶¶ 6 & 2186-87 ¶¶ 6-7 & 2200-01. Nothing more was required to amend the contract. Plaintiffs’ assertion that the Restated Group Contract had to be amended

existing group contract in connection with those resolutions, but instead entered into an entirely new Restated Group Contract effective January 1, 2006, which stated (in accordance with those resolutions) that the benefit for Post-1990 Occupational Retirees was a flat \$10,000. *See* 10A at 1997-98 ¶¶ 3-5.

to effectuate an amendment of the separate Life Plan is baseless in any event, for reasons the district court articulated. *See* 13A at 2621-22.

In sum, the district court correctly concluded that the Two Resolutions effectively amended the Plan because the PDC had the authority to amend the Plan, intended to amend the Plan by means of those resolutions, and manifested its intention to amend the Plan in multiple ways, including by informing all affected retirees of the amendments months before their effective dates.

2. Qwest Ratified the Amendments Before Their Effective Dates.

The district court held that Qwest was also entitled to summary judgment on the Ineffective Plan Amendment Claims because Qwest ratified the amendments described in the Two Resolutions in multiple ways before their effective dates. 13A at 2617-19 & 2720-21. As discussed above, by ignoring this holding in their opening brief, plaintiffs have waived their right to challenge it on appeal. The holding is manifestly correct in any event.

In *Curtiss-Wright*, the Supreme Court pointed out that a plan sponsor can render even a defective amendment effective through ratification. In remanding the case for further factual development regarding whether an attempted plan amendment was effective, the Court stated: “If the new plan provision is found not to have been properly authorized when issued, the question would then arise whether any subsequent actions, such as the executive vice president’s letters

informing [participants] of the termination, served to ratify the provision *ex post*.” 514 U.S. at 85. On remand, the district court granted the plan sponsor’s motion for summary judgment on the ground that the amendment had been ratified as a matter of law because “enforcement of the amendment by terminating plaintiffs’ benefits removes any possible doubt that it was an act of Curtiss-Wright.” *Schoonejongen v. Curtiss-Wright*, 1997 WL 34486781 * 5 (D.N.J. June 25, 1997) (emphasis added), *aff’d on other grounds*, *Schoonejongen v. Curtiss-Wright*, 143 F.3d 120 (3rd Cir. 1998). *Accord Halliburton Co. Benefits Comm. v. Graves*, 463 F.3d 360, 374 (5th Cir. 2006) (“even if the Vice President’s signature had been required . . . to amend the retiree program, Halliburton’s subsequent actions served to ratify the provision *ex post*”).

The undisputed evidence summarized at page 43 above shows that Qwest ratified the amendments before their effective dates as a matter of law. The district court’s orders so holding are thus manifestly correct.

D. The District Court Properly Granted Summary Judgment to Qwest on the Fiduciary Breach Claim.

Kerber and Phelps asserted a Fiduciary Breach Claim in connection with their acceptance of US West’s 5+5 Option in 1990 (the other plaintiffs did not accept that option). The district court properly entered summary judgment for Qwest on this claim because as a matter of law: (1) Qwest made no material

misrepresentations or omissions to Kerber and Phelps; and (2) those plaintiffs did not reasonably rely on any such misrepresentations or omissions.

1. Qwest Made No Material Misrepresentations or Omissions.

Kerber and Phelps begin their fiduciary breach argument by acknowledging that US West gave them an Insurance Plan Description that opened with the following bolded language: **“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.”** Br. at 48, *quoting* 9A at 1797. Plaintiffs argue that, in determining whether US West adequately disclosed that the Plan might be amended, US West’s explicit written disclosure that the Plan might be amended is irrelevant, because the document so stating “fails the test of an SPD.” Br. at 49. Not surprisingly, plaintiffs cite no law supporting this remarkable proposition.

Kerber and Phelps next acknowledge that the SPD in effect when they accepted the 5+5 Option likewise stated that US West “reserves the right to terminate or amend [the Plan] at any time, subject to applicable limitations in the law or any applicable collective bargaining agreement.” Br. at 49-50, *quoting* 13A at 2698-99. Plaintiffs argue that the clause “subject to applicable limitations in the law” should be construed like the clause “in conformity with applicable legislation” clause, which was deemed ambiguous in *Alexander v. Primerica*

Holdings, Inc., 967 F.2d 90, 93 (3rd Cir. 1992). But as this Court noted in *Chiles*, the clause in *Alexander* “could reasonably be read to limit plan modifications to those necessary to comply with changes in the law.” 95 F.3d at 1513. Unlike that provision, which arguably barred amendments not compelled by applicable law, US West’s reservation of the right to amend the Plan “subject to applicable limitations of the law or any applicable collective bargaining agreements” authorized any amendments not barred by applicable law/agreements. Thus, the Eighth Circuit in *Crown Cork* held that a provision reserving right to amend “subject to . . . applicable federal legislation and any outstanding contractual agreements” was unambiguous, and found that *Alexander* is “not . . . persuasive authority because of differences in language between the two clauses.” 501 F.3d at 919.

Numerous courts have held that where, as here, a Plan document contains an unambiguous reservation of rights provision, a fiduciary breach claim based on informal communications that allegedly contradict that provision fails as a matter of law. *See, e.g., Balestracci v. NSTAR Electric & Gas Corp.*, 449 F.3d 224, 233-34 (1st Cir. 2006) (affirming summary judgment for employer on retirees’ fiduciary breach claim based on employer’s failure to state in meetings about early retirement program that dental benefits could be amended, where employer gave retirees documents “which pointed to the underlying plan documents that

contained the reservation of rights”); *Sprague*, 133 F.3d at 405-06 (rejecting fiduciary breach claim based on General Motors’ representations that it would pay health benefits under an early retirement program “for your lifetime,” where plan documents unambiguously reserved right to amend); *Vallone*, 375 F.3d at 626 & 641-42 (affirming summary judgment for employer on retirees’ fiduciary breach claim based on employer’s representations that employees accepting early retirement package would receive “lifetime” health benefits, where there was no evidence that employer intended to mislead employees and the plan documents reserved employer’s right to amend the plan).

Kerber and Phelps nevertheless assert, as they must to prevail on their Fiduciary Breach Claim, that US West engaged in material misrepresentations. *See Daniels v. Thomas & Betts Corp.*, 263 F.3d 66, 73 (3rd Cir. 2001) (elements of claim for breach of fiduciary duty include “a misrepresentation on the part of the defendant” and “the materiality of that misrepresentation.”).⁷ In particular, they assert they were misled by statements in the January 1990 Video Conference, the March 1990 Letters, and the 2000-03 Confirmation Statements. Br. at 51-54. These assertions are not only legally insufficient for the reasons set forth above; they are factually baseless.

⁷ As the district court noted, “the Tenth Circuit has not articulated a test for analyzing a breach of fiduciary duty claim for misrepresentations.” 13A at 2707.

In the January 1990 Video Conference, US West's spokesman expressly stated that the Plan's reservation of rights provision was "intended to give the company the ability to modify the plans as circumstances and conditions change in the future." *See* 9A at 1772 ¶ 6. Kerber and Phelps nevertheless allege the spokesman tried "to conceal the potential adverse consequences" of this provision by saying that its purpose was to make the Plan more affordable "not only for the employee but for the company." Br. at 52.⁸ As the district court concluded (13A at 2714), this statement is hardly misleading. For example, the reduction of the life insurance benefit to \$10,000 *did* make the Plan more affordable for the Company (and thereby allowed it to continue providing the benefit to retirees), which was the thrust of the second point made in this statement. More importantly, the statement gave notice that US West reserved the right *either* to enhance Plan benefits (as occurred in 1997-98) *or* to reduce Plan benefits (as occurred in 2005-06). Finally, the statements made in the January 1990 Video Conference were oral, and oral representations that purport to change an ERISA plan cannot support a

⁸ To buttress this assertion, plaintiffs assert that former US West Executive Director of Benefits John Shea opined in an affidavit that the intent of this statement was to "get persons to accept the 5+5 Option so as to lock in their benefits during retirement." Br. at 52. But Mr. Shea's affidavit includes only one sentence about this statement: "Mr. Kamen correctly explained the company's position was that the ROR was really intended to allow for more meaningful and more affordable changes in the future to the benefit of both the employee and the company." 10A at 2139 ¶ 7.

fiduciary breach claim under ERISA. *See, e.g., Ladouceur v. Credit Lyonnais*, 584 F.3d 510, 512-13 (2^d Cir. 2009).

The March 1990 Letter sent to Kerber and Phelps contained a single, utterly innocuous reference to the Life Plan—a statement that a so-called death benefit “is paid in addition to benefits paid under the Group Life Insurance Program.” 9A at 1869. As the district court concluded (13A at 2715), this statement does not even remotely constitute a representation that Life Plan benefits will remain unchanged.

As plaintiffs acknowledge (Br. at 27 n. 9), the 2000-03 Confirmation Statements summarized benefits available to individual Pre-1991 Retirees under *both* the Life Plan and the Health Plan. The allegedly misleading sentence in these statements specified that QCII “reserves the right to amend, suspend, or discontinue [the Plans] at any time, except for those who retired before 1991 and where prohibited by collective bargaining agreements.” *See, e.g.,* 9A at 1732. Kerber and Phelps assert that the clause “except for those who retired before 1991”—an exception that was intended to refer only to the Health Plan, *see id.* at 1767 ¶ 9 & 1881—misled them into thinking QCII did not reserve the right to amend the Life Plan as to them. Br. at 54. But the following statement appears immediately above the quoted sentence: “The exact details of these plans are included in the legal plan documents that govern them. *If there’s a discrepancy between this worksheet and the plan documents, the plan documents will govern.*”

9A at 1732, 1736, 1739 & 1742 (emphasis added). And as noted above, every Plan document for the Life Plan reserved the company's right to amend or terminate the Plan as to *all* retirees. *See* 3A at 601 & 638; 4A at 685. In sum, the alleged misrepresentations cited by plaintiffs are not sufficient to support their Fiduciary Breach Claim.

2. Kerber and Phelps Did Not Reasonably Rely on the Alleged Misrepresentations and Omissions.

To establish their Fiduciary Breach Claim, Kerber and Phelps must also establish “detrimental reliance by the plaintiff on the misrepresentation.” *Daniels*, 263 F.3d at 73. The district court correctly held that Kerber and Phelps did not reasonably rely on any misrepresentations as a matter of law. Reliance on alleged representations that plan benefits will not be reduced is inherently unreasonable where, as here, plaintiffs have received Plan documents unambiguously reserving the right to reduce those benefits. *See, e.g., Crosby*, 480 F.3d at 431 (affirming summary judgment for employer where “[t]he terms of this plan . . . were exceedingly clear, making [plaintiff’s] alleged reliance on contrary informal communications from the company unreasonable as a matter of law”); *Mello v. Sara Lee Corp.*, 431 F.3d 440, 447-48 (5th Cir. 2005) (employee’s “reliance on the informal benefit statements and oral representations was unreasonable” as a matter of law in light of “the clear and consistent case law forbidding recognizing reasonable reliance on informal documents in the face of unambiguous Plan

terms”); *Livick v. The Gillette Co.*, 524 F.3d 24, 31 (1st Cir. 2008) (“if the provision is clear . . . an informal statement in conflict with it is in effect purporting to *modify* the plan term, rendering any reliance on it inherently unreasonable”) (emphasis in original).

Significantly, five plaintiffs in this lawsuit (Kerber, Phelps, West, Meister and Ingemann) previously brought suit against, *inter alia*, three defendants in this lawsuit (QCII, the EBC and the PDC), alleging that defendants were barred from reducing or eliminating the “death benefit” provided to retirees. *See Kerber*, 572 F.3d at 1138 & 1140-41. As in this case, plaintiffs asserted that Qwest breached its fiduciary duties by failing to advise plan participants that the death benefit could be reduced or eliminated. *Id.* at 1141; *see also* 11A at 2202 & 2231-32. After describing the factual averments supporting plaintiffs’ fiduciary duty claim, this Court affirmed the district court’s order granting summary judgment to Qwest on that claim. *See* 572 F.3d at 1150-51.

Plaintiffs do not cite a single case in which a plaintiff has been allowed to pursue a fiduciary breach claim under circumstances resembling those present here. Although plaintiffs assert that *In re Unisys Corp. Retiree Medical Benefits ERISA Lit.*, 579 F.3d 220 (3rd Cir. 2009), is such a case, the district court correctly found it “clearly distinguishable” for numerous reasons. *See* 13A at 2789-91. Among other things, the court in *Unisys* stressed that “the message that Unisys

communicated to its employees in the course of counseling them about retirement was at best a half-truth because *there was no mention of Unisys' right to amend or terminate the plan at any point in the future.*" *Id.* at 231 (emphasis added). Here, by contrast, US West expressly told its employees when it was counseling them about retirement that it had the right to amend or terminate the Plan at any point in the future. As the court below found, "no document expresses or suggests an intent to continue the Life Plan with no reduction without also including an express reservation of rights clause." 13A at 2712.

This Court has declared that "[w]here the written language of a plan is clear . . . any representation that is contrary to that language can be viewed only as a purported modification of the plan and, hence, preempted by ERISA." *Peckham*, 964 F.2d at 1050 n. 13; *accord Miller*, 978 F.2d at 624 ("An employee benefit plan cannot be modified . . . by informal communications, regardless of whether those communications are oral or written."). The holding plaintiffs urge this Court to adopt—that an ERISA plan's clear written provisions can be modified by purported contrary representations under the guise of a fiduciary breach claim—would flaunt the rule established in these cases. For this and all the others reasons

set forth above, the district court properly granted summary judgment to Qwest on plaintiffs' Fiduciary Breach Claim.⁹

VII. CONCLUSION

For the reasons set forth above, the district court's judgment in Qwest's favor should be affirmed in its entirety.

DATED: November 18, 2010.

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⁹ Because the claims that are the subject of this appeal all failed as a matter of law with respect to plaintiffs themselves, the district court properly dismissed plaintiffs' class action claims. *See Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1213 (10th Cir. 2006) ("Because we conclude the district court correctly determined that Robey failed to state a claim on his own behalf under the FDCPA, we also conclude that Robey's class-action allegations were properly dismissed.").

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATIONS, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 13,525 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman, font size 14.

Dated: November 18, 2010.

By: /s/Christopher J. Koenigs
Christopher J. Koenigs

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I hereby certify that all required privacy redactions, if any, have been made and every document submitted herewith, if any, is an exact copy of the written document filed with the Clerk; and the digital submissions have been scanned for viruses with TREND MICRO OfficeScan, version 10.5.1083, most recently updated on November 11, 2010, and according to the program are free from viruses.

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Denise S. Davis

CERTIFICATE OF SERVICE

The undersigned certifies that on this 18th day of November, 2010, she caused two copies of **RESPONSE BRIEF OF DEFENDANTS-APPELLEES** to be served upon the following by electronic mail and U.S. Mail delivery:

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