

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 05-cv-00711-LTB-MJW

MARLYS RATHBUN,

Plaintiff,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC., et al.,

Defendant(s).

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO MOTION TO INTERVENE**

Plaintiff respectfully submits this memorandum in opposition to the motion to intervene filed by the Association of U.S. West Retirees ("AUSWR") and its president, Mimi Hull.¹

BACKGROUND

This is a putative class action brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., against Defendant Qwest Communications International, Inc. ("Qwest") alleging that (1) the Telephone Concession Benefit which was promised and/or provided by Qwest (and its predecessors such as U.S. West Communications) to its employees after retirement as it was administered in December 2003 (the "Retiree Telephone Concession Benefit")

^{1/} In the event that Proposed Intervenors' motion is granted, Plaintiff requests that she be entitled to respond to these "objections" to class certification at the time that she files her reply in support of class certification.

constitutes a defined benefit pension plan under ERISA, and that (2) Qwest violated nearly every provision of ERISA governing defined benefit plans by failing to comply with ERISA. Compl. ¶¶ 1- 3. The Amended Motion for Class Certification, filed on December 15, 2005, seeks certification of a class on behalf of a class of retired employees and active employees who were promised or were provided the Telephone Concession Benefit after retirement as well as their spousal beneficiaries. Pl. Class Cert. Mot. (D.E. # 26).

Proposed Intervenors are the AUSWR, an umbrella organization for other U.S. West retiree organizations whose members include U.S. West retirees who pay a \$12-20 per person annual membership fee, and the president of the AUSWR, Mimi Hull, who claims to be a retiree of U.S. West receiving the Telephone Concession Benefit and whose telephone service is provided by Qwest (i.e. an “in-service-area” retiree). Interven. Mem. ¶ 3; *see also* <http://www.uswestretiree.org/membership2.htm>. In March 2004, the AUSWR (with the involvement of its president, Ms. Hull) financed litigation by its long-standing and current counsel, Curtis Kennedy, who filed a complaint in Colorado State Court on March 2004 on behalf of Wesley Colvin, a U.S. West retiree who received the Telephone Concession Benefit, but whose telephone service was provided by another telephone service provider (i.e. an “out-of-service-area” retiree). Interven. Mem. Ex. 2 at Finding of Fact ¶ 1; Barton Decl. Ex. A. In that litigation, the AUSWR (through its nominal plaintiff Colvin) challenged Qwest’s attempt to eliminate the Telephone Concession Benefit provided to out-of-service area retirees by alleging contractual and quasi-contractual claims. *Id.* After conducting no depositions, propounding no interrogatories and receiving minimal document discovery (less than a

box of documents from Qwest), the AUSWR, Ms. Hull and their counsel, Mr. Kennedy, began to negotiate a settlement with Qwest in that case. Interven. Mem. Ex. 2 at Finding of Fact ¶ 1 (describing the limited discovery); Declaration of R. Joseph Barton (“Barton Decl.”) ¶ 3 & Ex. B.²

Prior to the time that a settlement was reached in or filed with the Colorado State Court in that case, Plaintiff Rathbun filed the instant action in the United States District Court for the District of Arizona (and this action was subsequently transferred to this Court). D.E. # 1. Shortly after this action was filed, the AUSWR’s “longstanding” counsel, Mr. Kennedy, with the knowledge, support and involvement of Ms. Hull (acting on behalf of the AUSWR) entered into a settlement agreement on behalf of a portion of the class (as then-defined) in this case,³ which provided a one-time cash payment of \$300.00 to each retiree who submitted a proof of claim purporting to release all claims against Qwest for its termination of the Telephone Concession Benefit (as well as Mr. Kennedy’s attorneys’ fees). Barton Decl. Ex. C ¶ 3.1, 5.1.1⁴ As 2,765 retirees submitted claim forms in *Colvin*, payment of \$300.00 equals a cash value of merely \$829,500.00 to the entire *Colvin* settlement class, an amount that, by Intervenor’s counsel’s own admission, is the less than the value of *six months* of what the Telephone Concession Benefit provided to *those* retirees. Barton Decl. Ex. D ¶ 43. In other words, the price

^{2/} Indeed, Mr. Colvin’s fee affidavit indicates he first discussed a mediation in July 2004, merely 4 months after filing the case.

³ The class definition has been subsequently modified to exclude any persons who submitted a proof of claim and release in *Colvin*.

^{4/} Qwest also agreed to provide long distance service to those who agreed to have Qwest as their provider, but this has questionable value as many class members did not sign up. Moreover, there is no guarantee that this service will continue if Qwest exits the long distance market or goes bankrupt, a not unlikely possibility given Qwest’s still precarious financial situation. Barton Decl. Ex. G. By contrast, if the Telephone Concession is an ERISA pension plan, Qwest would have to fund its promise to provide such benefits.

which Qwest obtained releases from these retirees cost them less than what they had *already* saved at the time the settlement was negotiated by terminating this benefit – not to mention the more than \$150,000.00 they would save *per month* for the rest of the retirees lives, plus two months after their death (the term of the Telephone Concession Benefit as of December 2003). Proposed Intervenors suggest that the high participation rate by class members shows their overwhelming approval of the settlement, but their counsel neglects to tell the court that Qwest, with the authorization of AUSWR’s counsel, accomplished this by engaging in a telephone campaign to encourage class members to file proof of claims, extending the time to file claims and neglecting to tell any class members that this litigation was ongoing or that they had a choice other than, in the words of one opt-out, “sell all [their] rights for a one-time payment of 300 dollars.” Barton Decl. Ex. E, F, L.⁵

Only after the settlement was reached and after Plaintiff Rathbun filed this putative class action case, did AUSWR’s counsel bother to file a motion for class certification. Interven. Mem. Ex. 2 at Finding of Fact ¶ 11. The reason why no motion for class certification prior to settlement in that case is explained in Qwest’s memoranda in support of preliminary approval of the settlement – Colvin’s *contract* and quasi-contractual claims would have been unmanageable and unsuitable for class certification. Barton Decl. at Ex. H. Likewise, only after this ERISA litigation was filed and the AUWSR had reached a settlement with Qwest, AUSWR’s counsel moved to amend the

⁵ The only motivation for Qwest to extend the time for class members to submit claims and to encourage them to do so in a claims-made settlement such as *Colvin* where the amount of money that defendant must pay is dependent on the number of claims filed is in order to obtain the releases which on their face include a release of claims in this litigation. Thus, the existence of this litigation has likely increased Qwest’s willingness to pay claims in *Colvin* in order to reduce the size of the class and therefore the magnitude of any decision in this case.

complaint to add a single ERISA claim for benefits against a Telephone Concession Plan (which was alleged not be an ERISA pension plan and which the Plan was never properly joined as a party to that action). Interven. Mem. Ex. 2 at Finding of Fact ¶ 5, 7.

Shortly after learning that Colvin's counsel had reached a settlement in the Colorado action, Plaintiff Rathbun filed a motion to intervene in that action. Interven. Mem. Ex. 2 at Finding of Fact ¶ 7. Plaintiff's motion to intervene was denied because the court determined that Ms. Rathbun was unable to make a "compelling showing" that Colvin's representation was inadequate by showing any collusion between Colvin and Qwest and because the court found that Ms. Rathbun's intervention would delay the proceedings. Interven. Mem. Ex. 2 at Concl. Law ¶¶ 7, 8 & 12. Despite the current suggestion by Proposed Intervenors' that Plaintiff Rathbun is inadequate, the *Colvin* court concluded that "Mr. Colvin's and Ms. Rathbun's interests ... were identical: to obtain the maximum recovery from Qwest for its alleged improper handling of the Telephone Concession Benefits." Interven. Mem. Ex. 2 at Concl. Law ¶ 7. That is precisely what Ms. Rathbun is attempting to do here on behalf of a class of persons who were not included in (or did not participate in) the *Colvin* case.

Now, the AUSWR (and its president) seeks to do in this case precisely what its own counsel successfully argued in *Colvin* was premature for Ms. Rathbun to do in that case – intervene prior to the time that a class had been certified. Interven. Mem. Ex. 2 at Finding of Fact ¶ 12. Indeed, in a conversation with Proposed Intervenors' counsel on January 27, 2006, Plaintiff's counsel advised Proposed Intervenors' counsel that Plaintiff would not oppose intervention so long as intervention was limited to objecting to class certification and their untimely intervention would not unduly delay the case. Barton

Decl. ¶ 4. Proposed Intervenor's counsel, however, refused to state whether intervention would be limited to opposing class certification, what information Proposed Intervenor would seek if permitted to intervene, whether Proposed Intervenor would seek any additional discovery or how much time Proposed Intervenor would require in order to file any opposition to class certification. *Id.* ¶ 4. In the course of that telephone call, the intent of Proposed Intervenor to delay and impede this litigation was revealed by Proposed Intervenor's counsel refusing to negotiate any schedule concerning intervention and simply stating that they intended to do whatever necessary to prevent certification of a class in this case. *Id.* ¶ 4. As such, Proposed Intervenor's untimely intervention should not be permitted as it will unnecessarily further delay this litigation and their interests in opposing class certification will be adequately represented by the existing parties.

ARGUMENT

Under Rule 24, the proposed intervener bears this burden of proof to show that the proposed intervener (1) has made a timely application for intervention, (2) has an interest in the subject of the action, (3) is situated that without intervention the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect his interest, and (4) has an interest not adequately protected by the existing parties. *Utah ex rel. Utah State Dept. of Health v. Kennecott Corp.*, 232 F.R.D. 392, 395 (D. Utah 2005). As Proposed Intervenor's authority makes clear, "[t]he failure to meet any one factor dictates denial of the petition." *Reich v. ABC/York- Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995).

I. Proposed Intervenor's Motion Is Not Timely And Their Untimely Intervention Will Unduly Delay This Litigation

As Proposed Intervenors themselves recognize, “[a]s a threshold issue, an intervenor’s motion must be timely.” Interv. Mem. ¶ 10. Proposed Intervenors then assert, without any factual support only that one of them,⁶ Hull, did not personally learn of “her interest” in this litigation until *Intervenor’s counsel* “accidentally discovered” the class certification motion using PACER. Interv. Mem. ¶ 11. Not only is this bald assertion unsupported, but it is contradicted by information available on AUSWR’s own website. Moreover, their own cases do not support a finding that their intervention is timely.

Proposed Intervenors cite three cases in support of their argument that their motion to intervene is timely, but each of them are inapposite to the facts presented here. Interv. Mem. ¶ 10. In *United Nuclear Corporation v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990), the intervenor sought to intervene for a collateral purpose *after* the conclusion of the litigation. *Id.* at 1427 (noting intervention sought “for the sole purpose of challenging a protective order”). Because the dispute was settled and the intervention was solely for a collateral purpose, the Tenth Circuit concluded that timeliness was simply not a factor. *Id.* These facts do not apply here as the case is not resolved and Proposed Intervenors seek intervention into the heart of this case and not for a collateral purpose.

Next, Proposed Intervenors cite *Nissei Sangyo America, Ltd. v. United States*, 31 F.3d 435 (7th Cir. 1994) in which the Seventh Circuit concluded that three months for a

⁶ Notably, Proposed Intervenors do not submit an affidavit from Ms. Hull in support of the proposition that she was in fact ignorant of this lawsuit until several weeks ago. Indeed, Proposed Intervenors’ motion explicitly states that her counsel, not her, “accidentally discovered” the existence of the class motion by searching PACER. Interv. Mem. ¶ 11. Yet, neither of them could have been ignorant of the existence of this lawsuit given their prior involvement in the *Colvin* proceedings.

foreign company to hire an American lawyer and seek to intervene was not untimely. *Id.* at 438. Proposed Intervenors attempt to shoehorn their facts into that case by asserting (without any evidentiary support) that *only one* of the Intervenors, Ms. Hull, did not learn of the jeopardy to her interest until approximately a month ago. Interven. Mem. ¶ 11. Yet, this unsupported assertion is belied by other facts in Proposed Intervenors' motion and information available on its website.

As Proposed Intervenors' motion acknowledges, Hull is the president of AUSWR and Proposed Intervenors' current counsel, Curtis Kennedy, has a "long standing representation of" and an "entrenched working relationship with" AUSWR. Interven. Mem. ¶¶ 3, 11 & n.2. In fact, the AUSWR website repeatedly refers to Mr. Kennedy as its "counsel." *E.g.*, Ex. I (<http://www.uswestretiree.org/mission.htm>). Moreover, what Ms. Hull omits to tell the court is that she was one of the persons directly involved in the *Colvin* litigation, in which Ms. Rathbun unsuccessfully attempted to intervene. *Compare* Interven. Mem. ¶¶ 11, 19 *with* Ex. A (<http://www.uswestretiree.org/concession.htm>) and Interven. Mem. Ex. 2 at Finding of Fact ¶ 3 (noting that the settlement negotiations in *Colvin* were attended by members of US West retiree association [i.e. AUSWR]). The fact that the AUSWR, its president Ms. Hull and its counsel were aware of this litigation nearly from inception is evidenced by the Colorado State Court opinion attached as Exhibit 2 to their motion to intervene which expressly states that Ms. Rathbun had filed a separate action. Interven. Mem. Ex. 2 at Finding of Fact ¶ 2. Indeed, the Notice of Settlement in *Colvin* expressly attempts to release claims in this litigation by any overlapping class members. Ex. C (purporting to release "all claims arising under ERISA and all claims that have been asserted or that might have been asserted in the Action or in

a lawsuit entitled *Rathbun v. Qwest Communications International, Inc. and the Qwest Telephone Concession Plan*). Moreover, Proposed Intervenors concede that Plaintiff Rathbun's theory of her case – that the Telephone Concession Benefit constitutes a defined benefit pension plan under ERISA – has not changed since the “*Colvin* case settlement proceedings.” Interven. Mem. ¶ 22.⁷ As such, the facts unquestionably demonstrate that AUSWR, its president Ms. Hull and its counsel have had knowledge of this case since at least October 2004. Yet, they offer no explanation why they failed to intervene more than a year ago. Contrary to Proposed Intervenors unsupported assertion, they have not acted in a reasonably timely manner in which to attempt to intervene and their untimely motion will unnecessarily delay this litigation.

Proposed Intervenors cite to *Utah Association of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001), in which the Tenth Circuit concluded intervention should have been permitted because there was no prejudice to the existing parties, not because the Intervenor had acted in a timely manner. *See id.* at 1251. In *Clinton*, however, the case was “from ready for final disposition; no scheduling order ha[d] been issued, no trial date set, and no cut-off date for motions set.” *Id.* at 1251. That is simply not the situation here as discovery is complete and dispositive motions are due shortly.

Instead of addressing these facts, Proposed Intervenors merely baldly assert that permitting them to intervene at this late date “in order to object to the pending motion for class certification ... will not unduly delay or prejudice the original parties.” Interven. Mem. ¶ 13. In a conversation with Plaintiff's counsel, however, Proposed Intervenor's

^{7/} Contrary to Proposed Intervenors' statement that an outdated complaint is posted on Plaintiff's Counsel's website, the exact same complaint filed in the District of Arizona is still the operative complaint in this litigation and is the Complaint posted on Plaintiff's counsel's website. http://www.cmht.com/cases_qwest.php.

counsel refused to provide any estimation of the length of time which they would require to file any opposition to class certification, refused to respond as to whether they would seek access to any of the discovery in this case or whether they would attempt to seek any additional discovery. Barton Decl. ¶ 4. Indeed, a substantial amount of additional discovery has taken place in this case as compared to the minimal discovery exchanged in the *Colvin* litigation: In contrast to the single box of documents produced by Qwest in *Colvin* (which Qwest also produced in this case), Defendants have produced nearly three times the amount of documents in this litigation concerning the Telephone Concession (not including the proof of claims in *Colvin*). Barton Decl. ¶ 3. Likewise, in contrast to the *Colvin* litigation, in which not a single deposition was taken, Plaintiff has taken depositions of 5 persons (and Defendants also took the deposition of Ms. Rathbun). *Id.* Plaintiff and Defendant have also propounded interrogatories, requests for admission and negotiated stipulations regarding the admissibility of evidence in this case. *Id.* Discovery in this case is now closed and dispositive motions are due in less than a month. D.E. # 49, #57. To permit intervention now, as compared to months ago (or even a year ago) when Proposed Intervenors had the same information about this case as they did then, would unduly delay this case and prejudice the resolution of this litigation -- which has been delayed awaiting final resolution of the *Colvin* case.

Proposed Intervenors do not suggest that their tardiness should be excused because they will be prejudiced if they are denied intervention to opposed class certification. Their sole object appears to be to oppose class certification on one of the same grounds advanced by Defendants. *Compare* Def. Class Cert Mem. at 16-17 *with* Interven. Mem. at ¶ 21-25. Indeed, Proposed Intervenors did not file their own pleading,

but merely attach another copy of Defendants' answer to the complaint (which was filed over a year ago) and adopt verbatim Defendants' position that a class should not be certified in this action. Interven. Mem. ¶ 5. Quite simply, Proposed Intervenors will not be prejudiced because they have nothing to add beyond the arguments already raised – and Proposed Intervenors arguments largely mirror some of those -- in Defendants' 51 page opposition to class certification.

Moreover, Proposed Intervenors do not explain how an order on class certification will prejudice their interests, which purports to be preventing the Telephone Concession to be found to be a taxable benefit to in-service area retirees (as it already is taxable benefit to any out-of-service retiree as well as any in-service retiree who becomes an out-of-service area retiree by virtue of Qwest selling its telephone exchanges, as it has done on numerous occasions in the last decade). Proposed Intervenors cite two cases which they claim support an absentee class members right to intervene, but neither case supports that proposition. Interven. Mem. ¶ 6. In *Montgomery v. Aetna Plywood, Inc.*, 1996 WL 189347 (N.D. Ill. Apr. 16, 1996), the absentee class members' motion to intervene was not granted, but their objections were "considered" and rejected as the court certified the class over their objections. *Id.* at *6. Similarly, in *Corley v. Entergy Corp.*, 220 F.R.D. 478 (E.D. Tex. 2004), absentee class members' motion to intervene was *unopposed* and the class representatives were found to be typical and adequate (and did not conflict with members of the class), despite the absentee class members objections to certification. *Id.*

at 481, 483-484;⁸ *see also* Barton Decl. Ex. J. These decisions illustrate that a class may be certified even over certain class members' objections.

Moreover, even if class certification is granted, there will be no determination that the Telephone Concession constitutes an ERISA pension plan or that the Telephone Concession is a taxable benefit as the Court cannot make a merits determination on class certification. *Colorado Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 357 (D. Colo. 1999) (citing *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177-178 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.")). Thus, there is no way that Proposed Intervenors' purported interests will be prejudiced by class certification and their untimely motion reveals no real interest other than to delay this litigation.

II. Proposed Intervenors' Purported Interest in this Litigation Will Be Adequately Represented By The Present Parties and the CWA

Proposed Intervenors' claim that Plaintiff Rathbun is not adequately representing the interests of the putative class which includes Qwest retirees in this litigation because Plaintiff seeks to have the Telephone Concession Benefit provided by Qwest to its retirees declared an ERISA pension plan. Interven. Mem. ¶ 21.

Proposed Intervenors then assert, without any authority, that in order for Plaintiff to prove her claim she must prove that "the retiree concession is some sort of deferred taxable income." *Id.* ¶ 22. Neither the term "income" nor the term "retirement income" is defined anywhere in the statute of ERISA. *Musmeci v. Schwegmann Giant Super*

^{8/} Class certification was denied in *Corley* based on lack of predominance and the "fact-intensive, individualized nature of Plaintiffs' [damages]" which were "not suitable to uniform calculation," an issue that Proposed Intervenors do not claim is not met here. *Id.* at 486.

Markets, Inc., 332 F.3d 339, 344 (5th Cir. 2003) (“Neither ERISA’s statutory provisions nor the federal regulations define the term “income.”). “When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.” *Smith v. United States*, 508 U.S. 223, 228 (1993). Recently, the Tenth Circuit made clear that the same rules of statutory construction apply to interpretation of undefined words used in the ERISA statute: When “ERISA itself does not define” a term ... “as in any case of statutory construction,” the analysis begins “by looking to the plain meaning of the words used by Congress.” *In re Luna*, 406 F.3d 1192, 1199 (10th Cir. 2005) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999), an ERISA case in which the Supreme Court noted that statutory “analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well”). In fact, the Supreme Court rejected the argument that when the term “income” is not defined in a statute, that it means “taxable income.” *Lukhard v. Reed*, 481 U.S. 368, 376 (1987). Instead, the *Lukar* court explained that the undefined term “income” should be given its ordinary meaning as “a gain or recurrent benefit that is usu[ally] measured in money.” *Id.* at 375-76. Thus, Proposed Intervenor’s entire premise that Plaintiff must show that the Retiree Telephone Concession Benefit constitutes taxable income in order to show that it is an ERISA pension plan is simply incorrect.

Proposed Interveners also suggest that, despite the Fifth Circuit’s decision in *Musmeci*, there is no support for Plaintiff’s claim that the Telephone Concession Benefit constitutes a pension plan because “it has never been treated as such.” *Interven. Mem.* ¶ 22. As the Tenth Circuit has explained, “intent not to be covered by ERISA” is irrelevant as to whether a plan is governed by ERISA. *Peckham v. Gem State Mutual of Utah*, 964

F.2d 1043, 1049 n.11 (10th Cir. 1992). Moreover, another court recently concluded that plaintiffs had sufficiently alleged that a similar telephone concession benefit provided by another telephone company to its retirees constituted a pension plan under ERISA.

Stoffels v. SBC Communications, Inc., No. SA-05-CA-0233 WWJ, slip op. (W.D. Tex. Feb. 3, 2006); Barton Decl. Ex. K at 14-22. Thus, the entire basis of Proposed Intervenor's argument for intervention is unsupported.

Even assuming that Proposed Intervenor's argument has merit, Proposed Intervenor does not explain why their interest in opposing class certification will not be adequately represented by Defendant Qwest (or the Communication Workers of America, one of the unions representing Qwest employees).⁹ As the Tenth Circuit has explained, a proposed intervenor's interests are adequately represented, even if there is a difference in the "ultimate motivation" between the party and the proposed intervenor "when the objective of the applicant for intervention is identical to that of one of the parties." *City of Stilwell, Okl. v. Ozarks Rural Elec. Co-op. Corp.*, 79 F.3d 1038 (10th Cir. 1996) (citing *Bottoms v. Dresser Indus., Inc.*, 797 F.2d 869, 872 (10th Cir.1986)).¹⁰ In *Bottoms*, the Tenth Circuit made clear that a proposed intervenor's interest may be adequately represented by either the plaintiff or the defendant. *Bottoms*, 797 F.2d at 872. Here, not only do Proposed Intervenor's make the identical arguments made by Qwest in opposition to class certification, but they cite *identical cases*, including the same quotations from the same cases as Qwest. *Compare* Proposed Intervenor's Mem. ¶ 21 *with* Def. Class Cert.

^{9/} Plaintiff has not opposed the CWA's motion to intervene in this litigation because their counsel agreed to a schedule by which intervention would not delay this litigation.

^{10/} In *Stillwell*, the Tenth Circuit affirmed denial of a motion to intervene by association which would be *not directly* impacted by any outcome in the case as "an interest of this sort is too attenuated" to meet the requirements of Rule 24(a)(2). *City of Stilwell*, 79 F.3d at 1042. Likewise here, the AUSWR does not have any interest direct enough to permit intervention.

Mem. (D.E. # 60) at 17 (both citing and quoting the identical portions of *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997), *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463-64 (10th Cir. 1974) and *Dierks v. Thompson*, 414 F.2d 453, 456 (1st Cir. 1969)). Amazingly, Proposed Intervenors also utilize the identical block quotation from *Block v. First Blood Associates*, 691 F. Supp. 685, 695 (S.D.N.Y. 1988) as Qwest quotes in its opposition to class certification and the identical quotation from *Mechigian v. Art Capital Corp.*, 612 F. Supp. 1421, 1433 (S.D.N.Y. 1985). Compare Interven Mem. ¶ 25 with Def. Class Cert Mem. (D.E. # 60) at 22. Similarly, Proposed Intervenors adopt a portion of the answer asserted by Qwest. Interven. Mem. ¶ 25 & Ex. 1. To the extent that the AUSWR and its president, Ms. Hull, have an interest in opposing class certification, those interests are adequately represented by Defendant Qwest in opposing class certification as Proposed Intervenors have nothing additional to offer other than to parrot verbatim the arguments already raised by Qwest.¹¹ Thus, Proposed Intervenors' interests regarding class certification are being adequately represented in this case.

CONCLUSION

For the foregoing reasons, the motion to intervene by the AUSWR and its president should be denied or alternatively, if it is granted limited to the objections already filed regarding class certification, to which Plaintiff should be permitted to respond in her reply in support of class certification.

Dated: February 17, 2006

Respectfully submitted,

s/ R. Joseph Barton
R. Joseph Barton

^{11/} Proposed Intervenors baselessly characterize Plaintiff Rathbun's case as "an example of the tail wagging the dog." Interven. Mem. ¶ 23. It is obvious from these similar quotations between Qwest and AUSWR's brief which dog is wagging the tail of the Proposed Intervenors.

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