IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

vs.

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

Defendants.

MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT
(with Certificate of Compliance with Local Rule 7.1)

PLAINTIFFS **EDWARD J. KERBER** and **NELSON B. PHELPS** by and through their counsel, move for permission to file a Second Amended Complaint, and state:

1. The original Complaint was amended and corrected prior to service upon any of the named Defendants. That amendment caused no prejudice to any party.

2. To date, there has been no responsive pleading filed by Defendants.

3. The Court has directed that motions to amend the pleadings shall be filed no later than Tuesday, November 1, 2005 (Scheduling Order, ¶ 7(a) at page 11). This motion is timely.

4. <u>Compliance with Local Rule 7.1</u>. More than two months ago and before defense counsel filed a motion to dismiss, the undersigned counsel gave defense counsel notice that Plaintiffs intended to file an Amended Complaint to include new allegations supporting

Plaintiffs'claim that there was vesting of the Pension Death Benefits. Defense counsel was advised that the new allegations concern vesting of the Pension Death Benefits due to the PLAN sponsors' transfer during 1998-2001 of almost $400 million of pension assets to pay retiree medical benefits, which expenses would otherwise have been paid out of ordinary operating revenues. (August 8, 2005 email from Curtis L. Kennedy to Beth Kiovsky). In response, on August 12, 2005, Defendants' counsel verbally stated it was her opinion that the proposed amendment was not necessary but, she never stated any basis for an objection by any of the named Defendants. At the end of that same day, defense counsel proceeded with filing a motion to dismiss, notwithstanding Defendants were on prior notice that Plaintiffs intended to amend the pending claims.

On October 14, 2005, a draft of this motion for leave to amend was faxed and emailed to Defendant's counsel. In that draft, defense counsel was provided significant detail regarding the new allegations. On October 18, 2005, Defendants' counsel requested a copy of the proposed Second Amended Complaint which was not yet in final form. Defendants state they will need to review the proposed Second Amended Complaint to determine whether an objection is appropriate.

5. Plaintiffs tender herewith as Exhibit A their proposed Second Amended Complaint which includes a new claim concerning the 1998-2001 Internal Revenue Code Section 420 transfers of pension monies and the affect of vesting the Pension Death Benefit, since it was an accrued benefit. Several new named plaintiffs wish to join in this action and they contend a PLAN amendment made effective January 1, 2004 to eliminate the Pension Death

Benefit is null and void. Violations of ERISA are being challenged herein by three additional named plaintiffs adversely affected by the challenged PLAN Amendment 2003-5.

6. Among other new relief, Named Plaintiffs seek an order reforming the PLAN to strike PLAN Amendment 2003-5 which purported to eliminate the Pension Death Benefit for persons retiring on or after January 1, 2004. As alleged in this proposed Second Amended Complaint, there is no effective internal administrative claims process to challenge the PLAN amendment and such action would be futile, a meaningless exercise only serving to delay this legal proceeding.

7. The proposed Second Amended Complaint is based upon the same nucleus of operative facts upon which the current Amended Complaint is based, i.e., claims that the Pension Death Benefit is vested, not a take-away benefit.

8. The proposed Second Amended Complaint with the aforesaid additional allegations and claims concerning the I.R.C. § 420 transfers will be dispositive in Plaintiffs' favor and streamline this case rather than complicate it. There can be dispute about the several Section 420 transfers of almost $400 million and the PLAN's adoption of the requirements and conditions of vesting rights arising due to those transfers. [1]

9. The proposed Second Amended Complaint include three additional named Plaintiffs, all Qwest retirees adversely affected by the January 1, 2004 PLAN Amendment which

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[1] There has been no formal discovery. Magistrate Judge Coan ordered there need not be any Rule 26 disclosures before October 15, 2005. The proposed Second Amended Complaint being submitted less a mere 10 days after Defendants' initial disclosures will not prejudice the discovery process which is only beginning.

amendment illegally eliminated the Pension Death Benefit for persons retiring after January 1, 2004.

10. There are no new defendant parties.

11. Rule 15(a) of the Federal Rules of Civil Procedure provides that "a party may amend the party's pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a).

12. The Supreme Court has identified several factors to be considered when applying Rule 15(a):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claims on the merits. In the absence of any apparent declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiences by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962). As the Supreme Court noted, "the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Id*.

13. In evaluating challenges to the denial of opportunity to amend the Tenth Circuit Court of Appeals has held consistently that leave to amend should be granted freely." <u>See</u> *Frank v. U S WEST, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993) (citing cases).

14. In this instance, there is no basis for a finding of either undue delay, undue prejudice or futility. Indeed, Plaintiffs have not acted in bad faith. Defendants were on notice that Plaintiffs intended to amend and it would have been more reasonable to hold off fling the unnecessary and erstwhile motion to dismiss which was filed after defense counsel was fairly notified that Named Plaintiffs were planning to submit an amended complaint.

WHEREFORE, pursuant to Rule 15(a), Fed.R.Civ.P., Plaintiffs EDWARD J. KERBER and NELSON B. PHELPS request this Court grant this Motion to file the proposed Second Amended Complaint which document is tendered herewith as Exhibit A.

Respectfully submitted this 25th day of October, 2005.

Curtis L. Kennedy

/s Curtis L. Kennedy
8405 East Princeton Avenue
Denver, CO 80237-1741
Telephone: 303-770-0440
Facsimile: 303-843-0360
e-mail CurtisLKennedy@aol.com
Attorney for Plaintiffs
Edward J. Kerber
Nelson B. Phelps

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of October, 2005, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system. I also certified that on this 25th day of October, 2005, a true and correct copy of the above and foregoing document was emailed to Defendants' counsel of record as follows:

Elizabeth I. Kiovsky, Esq.
BAIRD & KIOVSKY, LLC
2036 E. 17th Ave.
Denver, CO 80206-1106
Tele: 303-813-4500
Fax: 303-813-4501
BethK@bairdkiovsky.com (Beth Kiovsky, Esq.)

Also, copy of the same was delivered via email to Plaintiffs as follows:

Edward J. Kerber
33302 Neacoxie Lane
Warrenton, OR 97146
Tele: 503-717-0662
EJKMAK@aol.com (Edward J. Kerber)

Nelson B. Phelps
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nbphelps@woldnet.att.net (Nelson B. Phelps)

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Attorney for Plaintiffs

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

Defendants.

SECOND AMENDED COMPLAINT
for PROPOSED CLASS ACTION RELIEF UNDER ERISA

PLAINTIFFS **EDWARD J. KERBER, NELSON B. PHELPS**, **JOANNE WEST**, **NANCY A. MEISTER** and **THOMAS J. INGEMANN, JR.**, by and through their counsel, Curtis L. Kennedy, file this Second Amended Complaint:

PRELIMINARY STATEMENT

1. For many decades, a stable feature of the Qwest Pension Plan (and predecessor plans) has been a " Pension Death Benefit" funded in the pension plan and payable as an entitlement upon the death of a retiree receiving a service pension and delivered to his or her surviving spouse or dependent beneficiaries.

Exhibit A

Qwest and its predecessors have a long history of treating the Pension Death Benefit as an "accrued" or protected pension benefit payable from trust fund assets. However, in September 2003, Qwest formally announced that "Qwest is considering eliminating the death benefit for all retirees regardless of their retirement date." Qwest prepared a signed letter dated September 2, 2003 ready to send to retirees to report the Pension Death Benefit would be eliminated effective October 1, 2003. Accordingly, on September 23, 2003 a claim was submitted on behalf of all retirees and sent to Qwest seeking a resolution that the Pension Death Benefit is a protected pension benefit and would neither be eliminated nor reduced. Qwest formally denied the request and confirmed that all administrative remedies under the Qwest Pension Plan have been exhausted and that an action under ERISA § 502)(a) may be commenced.

Meanwhile, Qwest went ahead and amended the Qwest Pension Plan so as to eliminate the Pension Death Benefit for persons retiring on or after January 1, 2004. An actual controversy exists between Defendants, on the one hand, and PLAN Participants, including Named Plaintiffs, on the other hand, as to whether the PLAN amendment is illegal and whether the Pension Death Benefit should be treated as a vested, protected or accrued defined pension benefit under the PLAN. Defendants contend the Pension Death Benefit is at-risk and can be taken away, pursuant to the present reservation of rights language which language was set forth in the PLAN *after* Named Plaintiffs KERBER and PHELPS and tens of thousands of PLAN participants retired, and PLAN participants contend otherwise. Therefore, this is an action asserting claims for relief under ERISA, including ERISA § 502)(a)(1)(B), 29 U.S.C. §

1132(a)(1)(B) to clarify Qwest Pension Plan participants' rights to future Pension Death Benefits under the terms of the plan and for other declaratory, injunctive and appropriate equitable relief.

JURISDICTION AND VENUE

2. The Court has jurisdiction of the claims for Relief based upon the civil enforcement provisions of ERISA, 29 U.S.C. §§ 1132(a)(1)(B), 1132(a)(2), 1132(a)(3), 1132(e)(1), and 1132(f), and upon 28 U.S.C. §§ 1331 and 1337.

3. Relief is also sought under 28 U.S.C. §§ 2201 and 2202, granting any district court of the United States, in a case of actual controversy within its jurisdiction, the power to declare the rights and other legal relations of any interested party seeking such declaration and to grant further necessary or proper relief based upon a declaratory judgment or decree.

4. Venue of this action lies in the District of Colorado, pursuant to 28 U.S.C. § 1391(b) and 29 U.S.C. § 1132(e)(2), in that acts complained of herein occurred within this District and the subject employee benefit plan is administered in this District.

THE PARTIES

5. Named Plaintiff EDWARD J. KERBER is a United States citizen and resident of Astoria, Oregon. He was formerly employed as a "District Manager" within the Human Resources Department at U S WEST, Inc. He retired after at least 30 years of service from U S WEST, Inc. effective February 28, 1990. He is a retiree receiving a service pension annuity from the Qwest Pension Plan.

6. KERBER is a "participant," as defined by ERISA § 3(7), 29 U.S.C. § 1002(7), of the Qwest Pension Plan and he receives a service pension in the form of a monthly annuity.

KERBER has a “mandatory beneficiary” for the Pension Death Benefit payable from the Qwest Pension Plan.

7. Named Plaintiff NELSON B. PHELPS is a United States citizen and resident of Aurora, Colorado. He was formerly employed as an “Executive Director” within the Human Resources Department at U S WEST, Inc. He retired after 24 years of service from U S WEST, Inc. effective February 28, 1990. He is a retiree receiving a service pension annuity from the Qwest Pension Plan.

8. PHELPS is a "participant," as defined by ERISA § 3(7), 29 U.S.C. § 1002(7), of the Qwest Pension Plan and he receives a service pension in the form of a monthly annuity. PHELPS has a “mandatory beneficiary” for the Pension Death Benefit payable from the Qwest Pension Plan.

9. Named Plaintiff JOANNE WEST is a United States citizen and resident of South Jordan, Utah. She was formerly employed as an “Senior Process Specialist” within the Wholesale Markets Department at Qwest. She retired after almost 35 years of service from QWEST effective February 11, 2004. She received a lump sum service pension from the Qwest Pension Plan which payment did not include the value of her entitlement to the “Pension Death Benefit.”

10. WEST is a "participant," as defined by ERISA § 3(7), 29 U.S.C. § 1002(7), of the Qwest Pension Plan who has not yet received all the benefits to which she is entitled. WEST has a “mandatory beneficiary” for the Pension Death Benefit payable from the Qwest Pension Plan.

11. Named Plaintiff NANCY A. MEISTER is a United States citizen and resident of Plymouth, Minnesota. She was formerly employed as an "Lead Project Analyst" at Qwest. She retired after over 25 years of service from QWEST effective February 11, 2004. She received a lump sum service pension from the Qwest Pension Plan which payment did not include the value of her entitlement to the "Pension Death Benefit."

12. MEISTER is a "participant," as defined by ERISA § 3(7), 29 U.S.C. § 1002(7), of the Qwest Pension Plan who has not yet received all the benefits to which she is entitled. WEST has a "mandatory beneficiary" for the Pension Death Benefit payable from the Qwest Pension Plan.

13. Named Plaintiff THOMAS J. INGEMANN, Jr., is a United States citizen and resident of Newport, Minnesota. He was formerly employed as an "Account Consultant" in the National Accounts Department at QWEST. He retired after almost 40 years service from QWEST effective March 2, 2005. He is a retiree receiving a service pension annuity from the Qwest Pension Plan.

14. INGEMANN is a "participant," as defined by ERISA § 3(7), 29 U.S.C. § 1002(7), of the Qwest Pension Plan and he receives a service pension in the form of a monthly annuity. INGEMANN has a "mandatory beneficiary" for the Pension Death Benefit payable from the Qwest Pension Plan.

15. U S WEST, Inc., was at all times relevant to this complaint: an "employer" as defined by ERISA § 3(5), 29 U.S.C. § 1002(5); a "fiduciary" of the Qwest Pension Plan (formally called U S WEST Pension Plan), pursuant to ERISA § 3(21), 29 U.S.C. § 1002(21); a "plan administrator" and "plan sponsor" of the pension plan, pursuant to ERISA § 3(16)(A)(i) &

(B), 29 U.S.C. § 1002(16)(A)(i) & (B); and, a corporation qualified to do business in Colorado. U S WEST, INC.'s principle place of business was within the District of Colorado.

16. In July 2000, U S WEST, Inc. merged with QWEST COMMUNICATIONS INTERNATIONAL, Inc., the surviving corporation.

17. Defendant QWEST COMMUNICATIONS INTERNATIONAL, Inc. ("QWEST") is, an "employer," as defined by ERISA § 3(5), 29 U.S.C. § 1002(5); a "fiduciary" of the Qwest Pension Plan, pursuant to ERISA § 3(21), 29 U.S.C. § 1002(21); a "plan administrator" and "plan sponsor" of the Qwest Pension Plan, pursuant to ERISA § 3(16)(A)(I) & (B), 29 U.S.C. § 1002(16)(A)(I) & (B); and a Delaware corporation qualified to do business in Colorado. QWEST's principle place of business is within the District of Colorado.

18. Defendant QWEST PENSION PLAN (as restated) is the successor in interest to the following defined pension plans, beginning with the pension plans first sponsored by AT&T before the mandated break-up of that corporation:

AT&T Pension Plan;
AT&T Management Pension Plan;
U S WEST Pension Plan;
U S WEST Management Pension Plan;
U S WEST Pension Plan (as restated – several times); and
Qwest Pension Plan (as restated – several times).

19. QWEST PENSION PLAN ("PLAN") is an "employee pension benefit plan," pursuant to ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A). The PLAN is named as a party defendant pursuant to Rule 19(a), Fed.R.Civ.P.

20. The PLAN provides a "Pension Death Benefit" to the mandatory beneficiaries of PLAN participants who retired with a service or disability pension annuity before January 1, 2004.

21. The PLAN provides that for participants who retired before March 1, 1993 there is a Pension Death Benefit in the same dollar amount as the PLAN participant's base annual salary on the date of employment termination.

22. The PLAN provides that for participants who retired after March 1, 1993 and before January 1, 2004 there is a Pension Death Benefit in the same dollar amount as the PLAN participant's base annual salary as of March 1, 1993.

23. The PLAN provides that *only* PLAN Participants have a reversionary interest. The PLAN does not give QWEST or any other participating company a reversionary interest.

24. The PLAN's current Summary Plan Description (SPD) dated January 1, 2001 and distributed to PLAN Participants in year 2002 contains the following text:

> "The current provisions of the Plan state that if there are any remaining assets after provisions for the payment of all benefits earned to the date of termination to all participants and others provided for in the Plan upon its termination, plus making provisions for future possible death benefits, such remaining assets are to be applied solely for pension purposes in an equitable manner consistent with the purposes of the Plan."

25. If the PLAN terminates with a surplus, the surplus may **not** be distributed to QWEST or any participating company.

26. Defendant QWEST EMPLOYEES' BENEFIT COMMITTEE (hereinafter "COMMITTEE") is, pursuant to ERISA §§ 3(21) and 3(16), 29 U.S.C. §§ 1002(21) and 1002(16), a named "fiduciary" and "administrator" of the PLAN. The COMMITTEE is comprised of QWEST officers (at least one person, but not more than seven persons). The COMMITTEE's principle place of business is Denver, Colorado, the locale from which it administers the PLAN. The COMMITTEE is a body appointed by QWEST which body performs certain designated fiduciary and administrative functions under the PLAN.

27. U S WEST Employees Benefit Committee was the named fiduciary and PLAN administrator during January 1984 through June 2000.

28. The COMMITTEE is the successor named fiduciary and PLAN administrator.

29. Defendant QWEST PENSION PLAN DESIGN COMMITTEE is the entity to which the Qwest Board of Directors has delegated certain authority to amend the PLAN.

30. At all times mentioned herein, PLAN administrators were the agents of the COMMITTEE, and the COMMITTEE has ratified and approved the acts of the PLAN administrators.

FACTS

A. Exhaustion of Available Administrative Procedures

31. The only administrative procedure established under the PLAN is a written procedure for processing a claim for payment of benefits.

32. Defendants prepared a September 2, 2003 letter signed and ready to mail out to thousands Qwest retirees with the following text:

> September 2, 2003
>
> Dear Qwest Retiree:
>
> As part of our commitment to ensure you a valuable package of benefits, we continually review our benefit plans. Recently, we determined that certain retired employees are eligible for a death benefit from both the Pension Plan and the Qwest Group Life Insurance Plan (outside of the Pension Plan). As a business, it is our responsibility to wisely steward our financial resources, and in these cases, the company is paying twice for the same benefit. Therefore, it made financial sense for us to delete one of the duplicate benefits.
>
> Effective October 1, 2003, we will eliminate the Sickness Death Benefit from the Pension Plan. As you recall, the Sickness Death Benefit was paid upon the death of a retired participant who was hired prior to March 1, 1993, and was receiving, or eligible to receive a service pension from the Plan and who had a surviving dependent.
>
> Please note that these changes do not affect the survivor benefits that may be payable under the form of pension you elected or any life insurance benefits provided through the Qwest Group Life Insurance Plan.

If you have any questions, please contact the Qwest Service Center at 800-729-7526, select option 3 (other), then option 3 (pension), then *0 to speak with a representative.

Regards,

s/______________
Jill R. Sanford
Vice President of Human Resources

33. Named Plaintiff PHELPS submitted several written demands for a declaration of his rights to the Pension Death Benefit which demands were treated as internal claims under the claims procedure provisions of the PLAN.

34**.** On September 26, 2003, PHELPS faxed, emailed and regular mailed a demand letter to Defendants, and the complete text of his letter is reproduced below:

September 26, 2003

(Via Fax, Email and First Class Mail)

Barry Allen, Senior Vice President HR
QWEST COMMUNICATIONS INTERNATIONAL, INC.
1801 California Street, 52nd Floor
Denver, CO 80202
Tele: 303-992-2020
Fax: 303-296-0520
Barry.Allen@qwest.com

Margie Dobis, Plan Administrator
QWEST PENSION PLAN
c/o Felicity O'Herron, Esq., Senior Director, Employee Benefits
1801 California St., Suite 4590
Denver, CO 80202-2645
Tele: 303-992-6153
Fax: 303-672-2757
Felicity.o'herron@qwest.com

Re: QWEST PENSION PLAN – Death Benefits
REQUEST FOR INTERPRETATION / DETERMINATION

Mr. Allen and Qwest Pension Plan Administrators:

Recently, you had a meeting with Nelson Phelps and certain board members of the Association of U S WEST Retirees during which meeting you told everyone present that company leadership was planning to discontinue providing death benefits to beneficiaries of service pension retirees. You stated the change might take effect October 1, 2003. However, several days later, you reported back to Mr. Phelps and others stating that the decision was being delayed.

It is the position of Mr. Phelps and thousands of other former U S WEST retirees that death benefits paid from the Qwest Pension Plan (formerly the U S WEST Pension Plan) have been treated, interpreted, and considered the same as accrued benefits and that Qwest, as plan sponsor and plan fiduciary, should not eliminate those benefits. Indeed, for decades, the company promised such benefits to its service pension eligible retirees. The retirees seek assurances that the company will not eliminate the death benefits and will, in fact, memorialize a promise in new language to be placed in the governing plan documents.

Certainly, there can be no question that U S WEST officials and pension plan fiduciaries, repeatedly, made representations to Mr. Phelps and other retirees assuring them that death benefits was an expected benefit of one eligible for a service pension. Even to this date, an eligible annuitant can choose to receive a lump sum distribution of benefits that includes the present value of death benefits. We are certain virtually all service pension eligible retirees believe their beneficiaries will be rightfully considered for the death benefits upon the passing away of the plan participant. Most spouses are counting on this financial benefit to help them when that difficult financial time arises.

Mr. Phelps and the others reasonably believe the plan administrator and the EBC are in possession of (or have direct access and privy to) many documents reflecting communications made to worker and retirees alike which communications are contrary to any intent to eliminate death benefits or a reservation of rights disclaimer set forth in the Qwest Pension Plan. All such statements and representations were material and relied upon in making individual retirement decisions. We ask that you review those materials and agree that the appropriate course of action is to grant plan-wide relief and memorialize a commitment to treat death benefits as an accrued benefit for service pension eligible pensioners payable to qualified beneficiaries.

Therefore, this claim letter is submitted on behalf of Nelson Phelps, individually and for the benefit of all participants in the Qwest Pension Plan. Since the Employee's Benefits Committee, apparently, is the <u>only</u> entity with authority to construe and interpret the terms of the Qwest Pension Plan, plan participants seek the EBC's declaration confirming death benefits will neither be eliminated nor reduced.

Mr. Phelps and the class of Qwest Pension Plan participants formally request the Plan Administrator and the EBC obtain a resolution from the Qwest Board of Directors formally acknowledging the company is contractually bound not to either reduce or eliminate death benefits for those persons eligible for a service pension. Further, Mr. Phelps and the class demand Qwest and the EBC acknowledge this obligation by amending the Qwest Pension Plan's reservation of rights disclaimer and insert language memorializing a contractual obligation for death benefits. Finally, Mr. Phelps and the class ask there be a formal notice distributed to the Qwest Pension Plan participants.

Please send me written confirmation of receipt of this claim letter stating when a full response will be provided.

Finally, this is a reminder that Mr. Phelps' request for pension plan financial information set forth in the letter dated August 15, 2003 sent to you remains outstanding. Please respond. Thank you.

Sincerely,
Curtis L. Kennedy

Reviewed and
Approved:

____

Nelson B. Phelps
1500 So. Macon St.
Aurora, CO 80012-5141
Tele: 303/743-7928

35. Defendants delayed the planned October 1, 2003 complete elimination of the Pension Death Benefit, but have continuously maintained the threat to take such action.

36. By letter dated December 22, 2003, Defendants responded and told PHELPS's "[t]he requests in the September 26, 2003 claim letter are hereby denied as outside the scope of the EBC's authority under the Pension Plan and premature for review. . . . The decision of the EBC is final. All administrative remedies under the Qwest Pension Plan have been exhausted. . . You have the right to bring a civil action under ERISA § 502(a)."

37. Remarkably, in the December 22, 2003, denial decision which Defendants deemed to be final, there was no disclosure about the fact that as of December 5, 2003, PLAN Amendment 2003-5 had been fully executed which purported to eliminate the Pension Death Benefit effective for persons retiring on or after January 1, 2004.

38. The failure to disclose within the December 22, 2003 denial letter the existence of PLAN Amendment 2003-5 constituted a breach of fiduciary duty, in violation of ERISA Section 404(a), 29 U.S.C. § 1104(a).

39. Anyhow, there is no effective internal administrative claims process to challenge any PLAN amendment and such action would be futile, a meaningless exercise.

40. In a demand letter dated March 5, 2004, Named Plaintiffs PHELPS and KERBER together renewed the prior request made by PHELPS and stated in their letter:

> "Although this request was previously made by Mr. Phelps and sardonically denied, named claimants, including Mr. Phelps and his spouse, Mr. Kerber and his spouse and the class of Qwest Pension Plan participants, <u>again</u> formally request the Plan Administrator, the EBC, the PLAN Design Committee and the Qwest Board of Directors issue a resolution formally acknowledging the company is contractually bound not to either reduce or eliminate death benefits for those persons eligible for a service pension. Further, named claimants and the class of Qwest Pension Plan participants demand Qwest, the EBC and the PLAN Design Committee acknowledge this obligation by amending the Qwest Pension Plan's reservation of rights disclaimer and insert language memorializing a contractual obligation for death benefits. Finally, claimants and the class ask there be a formal notice distributed to the Qwest Pension Plan participants."

41. By letter dated May 28, 2004, Defendants responded and reiterated the prior denial stating "the EBC's December 22, 2003 denial letter made clear that its decision was final and that all administrative remedies under the Pension Plan had been exhausted."

42. Named Plaintiffs PHELPS and KERBER fully exhausted all available internal claims procedures under the PLAN.

43. It would be folly to require any of the proposed class of PLAN participants to pursue the same requested administrative relief, as Named Plaintiffs PHELPS and KERBER gave notice that their claim should be treated as a demand on behalf of all other PLAN participants.

44. Moreover, perhaps more than a thousand retiree PLAN participants sent letters by either regular mail or electronic internet mail to QWEST officers and the Secretary of the COMMITTEE requesting QWEST formally acknowledge a commitment that the Pension Death Benefit under the PLAN will neither be eliminated nor reduced. Those letters were not given

the same formal treatment as given to PHELPS' claim, but the outcome was the same – effectively a denial of the request or claim.

45. It would be folly to require either Named Plaintiffs or any other plan participants to pursue non-existent internal claims process under the PLAN to redress any violations of ERISA's fiduciary duty provisions. *Unger v. U S WEST, Inc.*, 889 F. Supp. 419, 423 (D. Colo. Judge Babcock, 1996).

46. Similarly, it would be folly for either Named Plaintiffs or any other plan participants to make an internal claims challenge of PLAN Amendment 2003-5.

47. This action under ERISA has been timely filed.

B. <u>Description and History of the Pension Death Benefit</u>

48. Since post-World War II, AT&T and successor companies, to-wit: "Mountain Bell," "Northwestern Bell," "Pacific Northwest Bell," "U S WEST," and, now, QWEST, committed to provide a Pension Death Benefit payable out of the assets of the PLAN to the surviving spouse or dependent beneficiaries of a retired PLAN participant who dies while receiving either a service or disability pension annuity from the PLAN.

49. Prior to the January 1, 1984 effective divestiture of AT&T and creation of U S WEST, Inc. as the new holding company for Mountain Bell, Northwestern Bell and Pacific Northwest Bell, AT&T committed to provide a Pension Death Benefit payable out of the assets of its defined benefit plans to the surviving spouse or dependent beneficiaries of a PLAN participant who dies while receiving either a service or disability pension annuity from the PLAN.

50. AT&T established and maintained two defined benefit plans, the "AT&T Management Pension Plan" and the "AT&T Pension Plan," and both plans are predecessors in interest to the PLAN.

51. Each of AT&T's aforesaid defined pension plans stated it was established "**to provide for the payment** of definite amounts to [the participating companies'] respective employees when they are retired from service or **in the event of death, to their dependent relatives**, or in certain cases to their annuitants, or to former employees when they become entitled to deferred vested pension payments or in certain cases to their annuitants."

52. Each of AT&T's aforesaid defined pension plans included a Pension Death Benefit as a key element of retirement benefits. The summary plan descriptions for each defined pension plan reported that the participant's qualified beneficiaries were protected by the defined pension plan's Pension Death Benefit provision for the entire period of the participant's retirement on service or disability pension.

53. During the several years before the divestiture of AT&T, the "Baby Bell" companies – Mountain Bell, Northwestern Bell and Pacific Northwest Bell – issued to their employees a PLAN publication with the following or substantially similar language:

> "FAMILY PROTECTION BENEFITS – An important part of your financial security during retirement is provided by your Family Protection Benefits, which include Group Life Insurance, the Death Benefit, and the Survivor Annuity.
>
> DEATH BENEFIT – In addition to your Group Life Insurance, your qualified beneficiary would also receive a Death Benefit following your death during retirement. This benefit equals your annual pay as of the date you leave the Company."

54. The summary plan descriptions for AT&T's defined pension plans specifically stated that every participant who retired and received a service pension or disability pension was

entitled to have a Pension Death Benefit paid to his or her surviving spouse or to other dependent relatives.

55. The master trust agreement for AT&T's defined pension plans directed trustees to pay Pension Death Benefits out of plan assets.

56. The master trust fund for AT&T's defined pension plans was ***fully funded*** for payment of all Pension Death Benefit liabilities.

57. Each of AT&T's aforesaid defined pension plans provided that, upon termination *or partial termination* of the pension plan, plan assets were to be applied, after making the payments required by ERISA Section 4044, 29 U.S.C. § 1344, to making provisions for the payment of Pension Death Benefits "upon the death of retired employees who are on the pension roll as of the date of termination and of employees eligible as of that date for retirement of death benefits which would have been payable from the Pension Fund had the Plan not been so terminated."

58. Effective January 1, 1984, there was a federal court approved divestiture of AT&T and partial termination of AT&T's aforesaid defined pension plans.

59. Effective January 1, 1984, AT&T's aforesaid defined pension plans were split up and assets transferred to successor defined pension plans established by newly formed holding companies, including U S WEST, Inc.

60. Effective January 1, 1984, sufficient assets were transferred from AT&T's defined pension plans into U S WEST's newly created defined pension plans so as to fund PLAN participants' Pension Death Benefits.

61. As part of the federal court approved terms of the divestiture of AT&T, the newly created holding companies, including U S WEST, were required to continue providing retiree benefits, including the Pension Death Benefit, as previously committed by AT&T.

62. The partial termination of AT&T's aforesaid defined pension plans triggered AT&T's and the successor holding companies' obligation to make provision for the payment of Pension Death Benefits.

63. After the January 1, 1984 effective divestiture of AT&T and creation of U S WEST, Inc. as the new holding company for Mountain Bell, Northwestern Bell and Pacific Northwest Bell, U S WEST, Inc. committed to provide a Pension Death Benefit payable out of the assets of the PLAN to the surviving spouse or dependent beneficiaries of a PLAN participant who dies while receiving either a service or disability pension annuity from the PLAN.

64. Effective January 1, 1984, U S WEST established two defined pension plans, "U S WEST Management Pension Plan" and "U S WEST Pension Plan" and each mirrored the provisions of the predecessor AT&T defined pension plan.

65. From January 1, 1984 until December 29, 1994, U S WEST's defined pension plans created after transfer of assets from AT&T's defined pension plans, contained the following controlling plan terms (at Section 4.8):

> "The U S WEST Pension Fund **shall be** held by a trustee or trustees or an insurance company or companies as permitted by law **for pension and death benefit purposes** only and shall be disbursed as directed by the Company [U S WEST] or any other Participating Company, as applicable, from time to time. The Company undertakes to preserve the integrity of the U S WEST Pension Plan as a fund held in trust or by an insurance company or companies as permitted by law **to be applied solely to pension and death benefit purposes** and to take such action as may be necessary and appropriate to insure the application of the entire fund to such purposes."

66. Said PLAN terms constituted an extra-ERISA contractual commitment limiting the right of U S WEST to make PLAN changes and eliminate the Pension Death Benefit to be paid to PLAN participants' beneficiaries.

67. The aforesaid extra-ERISA contractual commitment is now binding upon QWEST, the successor in interest, the COMMITTEE and Plan fiduciaries.

68. In addition, upon information and belief, since 1984 U S WEST represented to state public utilities commissions that a rate base for U S WEST had to include the cost of funding and providing the Pension Death Benefit in the PLAN. Accordingly, the state utilities commissions in fourteen different states set charges for ratepayers that included U S WEST's costs of providing the Pension Death Benefit.

69. The master trust fund for U S WESTs defined pension plans was fully funded for payment of all Pension Death Benefit liabilities.

70. Effective January 1, 1993, U S WEST's aforesaid defined pension plans were merged to create the single "U S WEST Pension Plan." In 2001, the U S WEST Pension Plan was renamed the "Qwest Pension Plan" ("PLAN").

71. Previous to and including all of year 2001, the PLAN including an obligation for the PLAN sponsor to fund the Pension Death Benefits.

C. U S WEST Issued PLAN Publications and Summary Plan Descriptions and Representations About the Pension Death Benefit.

72. Prior to and when the Named Plaintiff's commenced their respective retirements, U S WEST, Inc. and PLAN administrators habitually made official written representations stating that a Pension Death Benefit would or **will** be payable out of the assets of the PLAN to

the surviving spouse or dependent beneficiaries of a PLAN participant who dies while receiving either a service or disability pension annuity from the PLAN.

73. In numerous versions of the Summary Plan Description (SPD) and PLAN publications issued to Named Plaintiffs and the proposed class of PLAN participants, both before and after their respective retirements had commenced, fiduciary representations were made that the Pension Death Benefit was an entitlement.

74. In 1977, a PLAN publication was issued containing the following text: "*A benefit equal to one year's pay at retirement* ***will be paid*** *to the qualified beneficiary on the death of an employee who retirees with a Service or Disability Pension.*"

75. The October 1, 1980, PLAN SPDs contained the following text: "*Your qualified beneficiaries are protected by the Plan's sickness and accident death benefit provisions for the entire period of your employment and during your retirement on a service or disability pension. . . A benefit equal to one year's pay at retirement* ***will be paid*** *to the mandatory beneficiary of an employee who dies after retirement while receiving a service or disability pension.*"

76. In December 1981, a PLAN publication was issued containing the following text: "*A benefit equal to one year's pay at retirement* ***will be paid*** *to the mandatory beneficiary of an employee who dies after retirement while receiving a service or disability pension.*"

77. The January 1, 1985 dated SPDs contained the following text: "*Your qualified beneficiaries are protected by the Plan's sickness and accident death benefit provisions for the entire period of your employment and during your retirement on a service or disability pension. . . A benefit equal to one year's pay at retirement* ***will be paid*** *to the mandatory beneficiary (if any) of an employee who dies after retirement while receiving a service or disability pension*."

78. The January 1, 1985 dated SPDs contained the following "reservation of rights": "*U S WEST may from time to time make changes in the Plan or may terminate the Plan, but future changes or termination will not affect the rights of any individual to any benefit or pension which he or she may have previously become entitled to receive. You will be notified of any material changes in the Plan in the future*."

79. U S WEST sent retirees a November 26, 1986 newsletter entitled "Benefits and Compensation News" containing the following text: "*What changes take place in my benefits when I retire? . . . DEATH BENEFITS – Your qualified beneficiaries are protected by the Plan's* ***sickness and accident benefit provisions for the entire period*** *of employment and* ***during your retirement****. A benefit equal to one year's pay at retirement* ***will be paid*** *to the mandatory beneficiary (if any) of an employee who dies after retirement while receiving a service or disability pension.*"

80. The January 1, 1987 dated SPDs contained the following text: "*Your qualified beneficiaries are protected by the Plan's sickness and accident death benefit provisions for the entire period of your employment and during your retirement on a service or disability pension. . A benefit equal to one year's pay at retirement* ***will be paid*** *to the mandatory beneficiary (if any) of an employee who dies after retirement while receiving a service or disability pension*."

81. The January 1, 1987 dated SPDs contained the following "reservation of rights:" "*U S WEST may from time to time make changes in the Plan or may terminate the Plan, but future changes or termination will not affect the rights of any individual to any benefit or pension which he or she may have previously become entitled to receive. You will be notified of any material changes in the Plan in the future*."

82. In October 1988, a PLAN publication was issued containing the following text: "*After you retire on a service or disability pension, a benefit equal to one year's pay immediately prior to your retirement **will be paid** under the Management Pension Plan to any "qualified" beneficiary(ies) you may have at the time of your death*."

83. The July 1, 1989, SPD for management retirees contained the following text: "*If you should die after retirement while receiving a service or disability pension, a benefit equal to one year's pay at retirement **will be paid** to your mandatory beneficiary (if any)*."

84. In March 1990, a PLAN publication was issued containing the following text: "*A benefit equal to one year's pay immediately prior to your retirement **will be paid** under the U S WEST Management Pension Plan to any "qualified" beneficiar[ies] you may have at the time of your death. The death benefit is paid in addition to benefits paid under the Group Life Insurance Program*."

85. The December 1, 1990, SPD for non-management retirees contained the following text: "*If you should die after retirement while receiving a service or disability pension, a benefit equal to one year's pay at retirement **will be paid** to your mandatory beneficiary (if any)*."

86. The 1991 SPDs contained the following text: "*If you should die after retirement while receiving a service or disability pension, a benefit equal to one year's pay at retirement **will be paid** to your mandatory beneficiary (if any)*."

87. In March 1993, a PLAN publication was issued containing the following text: "*If you are a participant of the U S WEST Pension Plan as of 2-28-93, **you will always remain eligible** to a death benefit to the extent an eligible beneficiary under the plan is living*."

88. In July 1993, a PLAN publication was issued containing the following text: "*Employees hired on or after March 1, 1993 are not entitled to the lump sum death benefit. If your Term of Employment [TOE] date is February 28, 1993 or earlier, at the time of your death, your eligible beneficiaries* ***are entitled*** *to this benefit.*"

89. The January 1994 SPD contained the following text: "*The plan may pay your qualified beneficiaries a death benefit which is equal to one year's pay for your death due to sickness or accident. Effective February 28, 1993, the death benefit for active employees was frozen based on their eligible pay as of that date. If you were hired on or after March 1, 1993, you are not entitled to the lump-sum death benefit. However, if you were rehired on or after March 1, 1993 with prior service and a service bridge adjusts your TOE to February 28, 1993 or earlier, your eligible beneficiaries* ***will be eligible*** *to the death benefit. As a retiree with a TOE date of February 28, 1993 or earlier, your eligible beneficiaries are eligible for this benefit. If your TOE date is February 28, 1993 or earlier, your eligible beneficiaries* ***are entitled*** *to this benefit.*"

90. The January 1996 SPD contained the following text: "*The plan may pay your qualified beneficiaries a death benefit which is equal to one year's pay for your death due to sickness or accident. Effective February 28, 1993, the death benefit for active employees was frozen based on their eligible pay as of that date. If you were hired on or after March 1, 1993, you are not entitled to the lump-sum death benefit. However, if you were rehired on or after March 1, 1993 with prior service and a service bridge adjusts your TOE to February 28, 1993 or earlier, your eligible beneficiaries* ***will be eligible*** *to the death benefit. As a retiree with a TOE date of February 28, 1993 or earlier, your eligible beneficiaries are eligible to receive this*

benefit.   If your TOE date is February 28, 1993 or earlier, your eligible beneficiaries ***are entitled*** *to this benefit.*"

91. From 1984 to July 2000, U S WEST, Inc. used the aforementioned PLAN publications and SPDs as the primary informational documents issued to its retirees to inform them of their rights and obligations for Pension Death Benefits under the PLAN.

92. All of the written representations in the PLAN publications and SPDs issued by AT&T (and Baby Bells - Mountain Bell, Northwestern Bell, Pacific Northwest Bell) and U S WEST were part of a common course of conduct designed to impress upon Named Plaintiffs and the proposed class of PLAN participants that the Pension Death Benefit was a funded, vested, protected accrued defined pension benefit, and there was a legally enforceable commitment that the Pension Death Benefit would be made payable to mandatory beneficiaries.

93. In **none** of the PLAN publications and SPDs that AT&T (Baby Bells) and U S WEST issued to Named Plaintiffs and the proposed class of PLAN participants were there statements and disclosures to advise PLAN participants that the sponsoring company reserved the right to reduce or eliminate the Pension Death Benefit after a PLAN participant had retired, in the absence of a PLAN termination.

94. Certainly, in **none** of the PLAN publications and SPDs that AT&T (Baby Bells) and U S WEST issued to Named Plaintiffs and PLAN participants were there statements and disclosures, **easily understood by a reasonable person**, to advise PLAN participants that the sponsoring company reserved the right to reduce or eliminate the Pension Death Benefit after a PLAN participant had retired, in the absence of a PLAN termination.

95. To the extent that any or all of the PLAN publications and SPDs that AT&T (Baby Bells) and U S WEST issued to Named Plaintiffs and PLAN participants included any statement of "reservation of rights," there was an **ambiguity** about whether the sponsoring company also reserved the right to eliminate the Pension Death Benefit, absent a plan termination.

D. Language Restricting U S WEST's Power to Amend The Plan.

96. From January 1, 1984 until at least December 29, 1994, both the U S WEST Management Pension Plan and the U S WEST Pension Plan contained an identically worded provision entitled "CHANGE IN PLAN", stating: "*The Committee, with the consent of the Chairman of the Board. . . may from time to time make changes in the Plan as set forth in the document, and the Company may terminate said Plan, but* ***such changes*** *or termination* ***shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder****.*"

97. The aforesaid "CHANGE IN PLAN" provision precluded an amendment without the consent of PLAN participants that would allow U S WEST, Inc. to affect the rights of PLAN participants to promised "Pension Death Benefits." [1]

E. U S WEST Fiduciary Representations When Offering Certain Named Plaintiffs a Special Retirement Incentive.

98. From time to time, U S WEST offered a special retirement incentive as part of an effort to reduce its workforce through voluntary retirements. For example, in 1990 U S WEST

[1] Prior to the end of year 1994, the "benefits" protected from changes was not limited to mean only "accrued benefits", as set forth in either ERISA § 3(23), 29 U.S.C. § 1002(23), I.R.C. § 411(a)(7) or 26 C.F.R. § 1.411-7(a). Thus, protected "benefits" included the Pension Death Benefit.

provided a special retirement incentive to several thousand employees, including Named Plaintiffs KERBER and PHELPS. During the 1990 special retirement "window," U S WEST and PLAN administrators issued a letter dated March 26, 1990 to Named Plaintiffs KERBER and PHELPS containing the following text: *"A benefit equal to one year's pay immediately prior to your retirement* ***will be paid*** *under the U S WEST Management Pension Plan to any "qualified" beneficiar(ies) you may have at the time of your death. The death benefit is paid in addition to benefits paid under the Group Life Insurance Program."*

99. Because of the representations and provisions for the Pension Death Benefit, PHELPS declined the survivor annuity option for the payment of his service pension and the election became irrevocable upon retirement.

100. Because of the representations and provisions for the Pension Death Benefit, both KERBER and PHELPS declined the option to take a lump sum distribution of their respective service pensions and their respective elections became irrevocable upon retirement.

101. By virtue of these and other similar representations and promises, PLAN administrators, acting with the approval of the then existing COMMITTEE, effectively interpreted the Pension Death Benefit to be a vested, protected or accrued defined pension benefit under the PLAN.

102. PLAN fiduciaries, including past members of the COMMITTEE have acknowledged the aforesaid representations and commitments were made to Named Plaintiffs and PLAN participants when they were making retirement decisions and choosing between receiving a lump sum distribution or monthly annuity.

F. <u>The PLAN Sponsor's and COMMITTEE's Prior Actions Served As An Interpretation Making the Pension Death Benefit A Vested, Protected or Accrued Defined Pension Benefit Under the Existing Terms of the PLAN</u>.

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

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

105. On December 29, 1994, U S WEST executed a restated PLAN document.

106. The December 29, 1994 restated PLAN document contained the following text in Section 7.11: "*Individuals who have a Term of Employment that includes any period prior to March 1, 1993, including individuals who are re-employed on or after March 1, 1993 and whose Term of Employment is bridged so that it includes periods before March 1, 1993, **shall be entitled** to a frozen [death] benefit under this Article VII as of February 28, 1993*."

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

107. Whenever a PLAN participant elected to receive a lump sum distribution of accrued benefits, PLAN administrators would calculate the present value of the Pension Death Benefit and include that amount in the distribution paid to the PLAN participant.

108. After U S WEST's merger with QWEST and up until January 2004, PLAN administrators continued to treat the Pension Death Benefit under the PLAN to be an accrued benefit.

109. The COMMITTEE and PLAN Administrators have distributed a lump sum present value Pension Death Benefit to over 10,000 ***living*** participants in the PLAN without regard to whether or not the participants had "mandatory beneficiaries."

110. The PLAN states in Article 13.7 "Uniformity of Application. The provisions of the Plan shall be applied in a uniform and non-discriminatory manner in accordance with rules adopted by the Committee which shall be systematically followed and consistently applied so that all persons similarly situated shall be treated alike."

111. During 1999, in prior litigation in this District, U S WEST argued its position that no PLAN "participant's life insurance or death benefits have been reduced or diminished, nor does U S WEST claim the right to diminish those benefits after they have become 'accrued.'" *Jarvis v. U S WEST, Inc.*, Civil Action 97-N-2189 (D. Colo., Judge Nottingham). Therefore, QWEST, as successor to U S WEST, should be judicially estopped to assert otherwise.

112. By their reoccurring written representations and actions through at least year 1997, the PLAN sponsor, COMMITTEE and PLAN administrators intended and interpreted the Pension Death Benefit to be a vested, protected or accrued defined pension benefit that cannot be reduced or eliminated in the absence of a PLAN termination.

G. <u>Undisclosed Material Modifications Made In An Attempt To Impermissibly Bootstrap Power to Reclassify and Declare the Pension Death Benefit To Not Be An 'Accrued Benefit</u>.'

113. Section 11.4 of the December 29, 1994 executed PLAN document contained revised "reservation of rights" language as follows:

> "<u>11.4 Amendment by the Company</u>. U S WEST expects this Plan to be permanent, but as future conditions cannot be foreseen it reserves the right to amend the Plan at any time, without prior notice to anyone. The Plan may be amended by a writing approved by U S WEST's Board of Directors and signed on behalf of U S WEST by an officer of U S WEST duly authorized by the Board of Directors. The Plan may also be amended in writing by the Committee to the extent authority to amend the Plan has been delegated to the Committee by the Board of Directors. Each amendment shall be effective on such date as U S WEST or its delegee may determine. Nor amendment or modification that affects the rights, powers, privileges, immunities or obligations of the Trustee may be made without the consent of the Trustee. **Amendments may modify the rights and interests of** Employees who are **Participants in the Plan** at the time thereof as well as future Participants **but amendments may not diminish the accrued benefit of any Participant as of the effective date of such amendment** or divert any funds in the Trust to purposes other than for the exclusive benefit of Participants and their beneficiaries."

114. The December 29, 1994 "reservation of rights" language constituted unfair surprise. The December 29, 1994, "reservation of right" language was not inserted in either the PLAN publications or SPDs given to Named Plaintiffs and members of the proposed class.

115. Neither the December 29, 1994 restated PLAN document nor prior governing PLAN documents defined "accrued benefit" so as to exclude the "Pension Death Benefit."

116. On or about January 25, 1998, U S WEST executed a restated PLAN document.

117. Section 1.0 of the January 25, 1998 executed PLAN document included a revised definition of "Accrued Benefit" that reads in part: ". . .**Accrued Benefits shall not include any**

benefits under Article VII [Death Benefits], under Appendix J [Long Term Disability Benefits], . . .or any benefit that is not an accrued benefit under Section 411(d)(6) of the Code."

118. Section 11.4 of the January 25, 1998 executed PLAN document contained revised "reservation of rights" language as follows:

> "11.4 Amendment by the Company. The Company expects this Plan to be permanent, but as future conditions cannot be foreseen it reserves the right to amend the Plan at any time, without prior notice to anyone. The Plan may be amended by a writing approved by the Company's Board of Directors and signed on behalf of the Company by an officer of the Company duly authorized by the Board of Directors. The Plan may also be amended in writing by the Committee to the extent authority to amend the Plan has been delegated to the Committee by the Board of Directors. Each amendment shall be effective on such date as the Company or its delegee may determine. Nor amendment or modification that affects the rights, powers, privileges, immunities or obligations of the Trustee may be made without the consent of the Trustee. **Amendments may modify the rights and interests of** Employees who are **Participants in the Plan** at the time thereof as well as future Participants **but amendments may not diminish the accrued benefit** (as defined in Section 411(d)(6) of the Code) **of any Participant as of the effective date of such amendment**."

119. On or about June 12, 1998, U S WEST executed another restated PLAN document.

120. The restated PLAN document executed on June 12, 1998 contained the same aforesaid language as appeared in Section 1.0 and Section 11.4 of the January 25, 1998 restated PLAN document.

121. By unilaterally changing the PLAN's "reservation of rights" language during 1998 so as to no longer classify the Pension Death Benefit as either an "entitlement", "accrued" or "defined pension benefit", U S WEST was impermissibly attempting to bootstrap itself with rights and powers it had previously **not** reserved vis a vis Named Plaintiffs and members of the proposed class of PLAN participants.

122. Neither of the 1998 restated PLAN documents was distributed to Named Plaintiffs who never had any reason to ask for the documents as they were told to rely upon the SPDs issued to them. AT&T, U S WEST and QWEST consistently told PLAN participants to rely upon the SPD issued to them at the time of their respective retirements.

123. Neither of the 1998 restated PLAN documents was distributed to PLAN participants in general.

124. The January 25, 1998 and June 12, 1998 revised "reservation of rights" PLAN language constituted unfair surprise. The January 25, 1998 and June 12, 1998 "reservation of rights" language was not inserted in either the PLAN publications or SPDs given to Named Plaintiffs and members of the proposed class

125. The January 25, 1998 and June 12, 1998 adopted PLAN language stating the Pension Death Benefit was not an accrued benefit was a material modification of PLAN terms and was **not timely disclosed** in a summary of material modifications (SMM) distributed to either Named Plaintiffs or any other PLAN Participant.

126. The January 25, 1998 and June 12, 1998 adopted PLAN language stating the Pension Death Benefit was not an accrued benefit was a material modification of PLAN terms and was **never disclosed** in a SMM distributed to either Named Plaintiffs or any other PLAN Participant.

127. Defendants and PLAN administrators are required to furnish Named Plaintiffs and PLAN participants with a summary of any material modifications written in a manner calculated to be understood by the average PLAN participant. See ERISA Section 102(a), 29 U.S.C. § 1022(a); 29 C.F.R. § 2520.104b-1(b)(1).

128. Defendants and PLAN administrators breached an ERISA fiduciary duty and did not comply with applicable Department of Labor regulations when they failed to give Named Plaintiffs and the proposed class of PLAN participants either a SPD or SMM disclosing the aforesaid January 25, 1998 and June 12, 1998 adopted PLAN language.

129. By not making the required disclosure in either a SPD or SMM, Defendants caused harm to Named Plaintiffs and the proposed class of PLAN participants and they have been prejudiced, because for over 5 years they have been unaware of this material PLAN change, and they have lost opportunity to take action to protect their retirement financial and estate planning.

130. Principles of equitable estoppel, now, forbid Defendants and successors from ever altering, modifying, eliminating or terminating the Pension Death Benefit with respect to Named Plaintiffs and retired PLAN participants in the absence of a PLAN termination.

H. <u>The *New* COMMITTEE's Position on the Status of the Pension Death Benefit With Respect to Named Plaintiffs and All Retired PLAN Participants</u>."

131. In July 2000, QWEST took over as PLAN sponsor.

132. Soon after becoming PLAN sponsor, QWEST began looking for ways to decrease liabilities of the PLAN so as to be able to avoid or limit its PLAN funding obligation with operating revenues.

133. Effective January 1, 2001, the PLAN was renamed the QWEST PENSION PLAN. It was also amended to provide an account balance program for management employees and to limit the application of a higher payout formula for certain management employees.

134. On December 19, 2002, QWEST executed a restated PLAN document.

135. Section 1.0B of the December 19, 2002 executed PLAN document included the definition of "Accrued Benefit" that was set forth in the 1998 restated PLAN documents that reads in part: ". . .**Accrued Benefits shall not include any benefits under Article VII [Death Benefits]**, under Appendix J [Long Term Disability Benefits], . . .or any benefit that is not an accrued benefit under Section 411(d)(6) of the Code."

136. Section 11.4 of the December 19, 2002 executed PLAN document included the substantially the same "reservation of rights" language that was set forth in the 1998 restated PLAN documents as follows:

> "<u>11.4 Amendment by the Company</u>. The Company expects this Plan to be permanent, but as future conditions cannot be foreseen it reserves the right to amend the Plan at any time, without prior notice to anyone. The Plan may be amended by a writing approved by the Company's Board of Directors and signed on behalf of the Company by an officer of the Company duly authorized by the Board of Directors. The Plan may also be amended in writing by the Plan Design Committee or other persons(s) to the extent authority to amend the Plan has been delegated to the Plan Design Committee or such person(s) by the Board of Directors. Each amendment shall be effective on such date as the Company or its delegee may determine. Nor amendment or modification that affects the rights, powers, privileges, immunities or obligations of the Trustee may be made without the consent of the Trustee. **Amendments may modify the rights and interests of** Employees who are **Participants in the Plan** at the time thereof as well as future Participants **but amendments may not diminish the accrued benefit** (as defined in Section 411(d)(6) of the Code) **of any Participant as of the effective date of such amendment**."

137. On or before September 2, 2003, QWEST VP Jill Sanford signed a letter to be sent to PLAN participants which letter stated QWEST would eliminate the Pension Death Benefit as of October 1, 2003.

138. QWEST leadership shared the September 2, 2003 dated letter with Named Plaintiffs PHELPS and KERBER and other PLAN participants during a special meeting.

139. The September 2, 2003 letter which came as a surprise to those PLAN participants in attendance at the meeting was, then, shared with numerous other PLAN participants.

140. Naturally, this surprise information caused great consternation to Named Plaintiffs PHELPS and KERBER and thousands of PLAN participants and their beneficiaries, many of whom sent letters and email asking QWEST leadership to memorialize a commitment to continue the Pension Death Benefit under the PLAN.

141. Defendants refused and will continue to refuse to incorporate into the governing PLAN document and the SPD a commitment to provide the Pension Death Benefit for Named Plaintiffs' and the proposed class of PLAN participants' mandatory beneficiaries.

142. The *present* COMMITTEE has refused and continues to refuse to acknowledge that actions by past COMMITTEE members have served to interpret the Pension Death Benefit to be a vested, protected or accrued defined pension benefit under then existing terms of the PLAN.

143. The *present* COMMITTEE has refused and continues to refuse to acknowledge past breaches of ERISA fiduciary by past PLAN fiduciaries resulting from their representations about the "Pension Death Benefit," and material omissions and non-disclosure of PLAN terms.

144. The *present* COMMITTEE has refused and continues to refuse to acknowledge that due to past representations, material omissions and non-disclosure of PLAN terms by past PLAN fiduciaries, principles of equitable estoppel, now, forbid Defendants and successors from ever altering, modifying, eliminating or terminating Named Plaintiff's and the proposed class of PLAN participants' expected Pension Death Benefits in the absence of a PLAN termination.

145. The COMMITTEE and PLAN Administrators have breached their fiduciary duties under ERISA and applicable Department of Labor federal regulations by issuing and circulating to PLAN participants an incorrect and inaccurate PLAN SPD which falsely represents and mischaracterizes the Pension Death Benefit to be a *welfare* benefit subject to a general reservation of rights clause and *not* a vested, protected or accrued *defined* pension benefit, thus, causing harm to the PLAN and misleading PLAN participants.

146. An actual controversy exists between Defendants, on the one hand, and PLAN Participants, including Named Plaintiffs, on the other hand, as to whether the Pension Death Benefit should be treated as a **vested,** protected or accrued **defined** pension benefit under the PLAN. Defendants contend the Pension Death Benefits are at-risk and can be taken away, pursuant to the presently worded reservation of rights language in the PLAN, whereas PLAN participants contend otherwise.

147. Named Plaintiffs earned the Pension Death Benefit through their long years of employment service.

148. Pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B), Named Plaintiffs and the proposed class of PLAN participants are entitled to bring this action to have this Court, *inter alia*, clarify their rights to future Pension Death Benefits under the terms of the PLAN.

FIRST CLAIM FOR RELIEF
(Breach of Fiduciary Duty and Equitable Estoppel Due to Failure to Disclose Material Information; Requested Equitable and Remedial Relief)

149. Named Plaintiffs incorporate and reallege by reference the foregoing paragraphs 1 through 148, inclusive (together with the Class Action Allegations, ¶s 198-213), as if they were fully set forth herein.

150. Because of their ERISA fiduciary positions and access to internal and external legal advice about the protected or unprotected status of the Pension Death Benefit and related material PLAN information not disclosed to PLAN participants, QWEST, COMMITTEE and PLAN Administrators knew that material facts had not been disclosed and had been concealed from Named Plaintiffs and PLAN participants and that the other positive representations repeatedly made about the Pension Death Benefit were either incomplete, materially false or misleading.

151. As PLAN fiduciaries, Defendants QWEST and COMMITTEE had a duty to communicate material facts affecting the interests of Named Plaintiffs and PLAN participants. Defendants had a duty to disclose material information, including whether the Pension Death Benefit could be reduced or eliminated in the absence of a PLAN termination.

152. Prior to December 2003, neither Defendant QWEST, the COMMITTEE, nor PLAN administrators made a formal disclosure in the SPDs distributed to Named Plaintiffs and PLAN participants advising that the Pension Death Benefit was not a vested or protected benefit or that the Pension Death Benefit could either be reduced or eliminated by the sponsoring company even in the absence of a PLAN termination.

153. Defendants’ recently announced position that the Pension Death Benefit can be either reduced or eliminated by the sponsoring company even in the absence of a PLAN termination was never disclosed to either Named Plaintiffs or PLAN participants when they were

making their respective retirement choices. Indeed, Defendants' present position is completely contrary to the position taken by the COMMITTEE and PLAN administrators in the past and the written representations made to Named Plaintiffs and the proposed class of PLAN participants.

154. The COMMITTEE's and PLAN Administrator's past failure to disclose that the Pension Death Benefit could be either reduced or eliminated even in the absence of a PLAN termination was recklessness, a material omission and fiduciary misconduct, since there was a substantial likelihood that omission would mislead a reasonable employee into making an inadequately informed decision upon retirement about electing to receive an immediate distribution of the Pension Death Benefit and other PLAN benefits, or electing to receive an annuity and the Pension Death Benefit payable after death to the surviving spouse or dependent beneficiaries.

155. The COMMITTEE's and PLAN Administrator's past failure to disclose that the Pension Death Benefit could be either reduced or eliminated even in the absence of a PLAN termination was recklessness, [3] a material omission and fiduciary misconduct, since there was a substantial likelihood that omission would mislead a reasonable PLAN participant about whether or not to purchase life insurance on the market.

156. Named Plaintiffs and PLAN participants have been systematically tricked into believing the Pension Death Benefit was a funded protected benefit under the PLAN.

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

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

158. Named Plaintiffs and PLAN participants have been prejudiced from the lack of notice of material information contrary to the written representations in PLAN publications and SPDs given to them about the Pension Death Benefit.

159. Defendant's omissions and written misrepresentations and SPDs about the Pension Death Benefit were material to Named Plaintiffs and PLAN participants because a reasonable PLAN participant considered the information important in making retirement elections and decisions about whether to buy life insurance on the market.

160. Now, due to a combination of age, health condition, and meager financial factors, thousands of PLAN participants cannot possibly afford the cost of purchasing life insurance on the market so as to replace the face amount of the expected Pension Death Benefit under the PLAN.

161. The current cost of life insurance to replace the face amount of the expected Pension Death Benefit makes mitigation of damages impracticable for Named Plaintiffs and the proposed class of PLAN participants.

162. Named Plaintiffs seek an order declaring that QWEST, the COMMITTEE and PLAN administrators, by making omissions and failing to make necessary disclosures in the

SPDs, failed to discharge duties to act solely in the interests of Named Plaintiffs, PLAN participants and beneficiaries, as required by ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1).

163. Named Plaintiffs request this Court to apply principles of federal common law equitable estoppel, in as much as the PLAN publications and SPDs contained ambiguous representations about whether the Pension Death Benefit should be considered an "entitlement", or a vested protected and accrued "defined pension benefit", and COMMITTEE and PLAN Administrators have made representations which constitute an oral interpretation of the ambiguities.

164. Named Plaintiffs seek further class-wide appropriate equitable relief, including a declaration that due to the aforesaid actions by the COMMITTEE and PLAN administrators, the Pension Death Benefit is deemed under the PLAN to be a vested, protected or accrued pension benefit, not subject to reduction or elimination absent a PLAN termination.

165. This Court should apply principles of equitable estoppel, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and issue an order forbidding Defendants and successors from ever altering, modifying, eliminating or terminating Named Plaintiffs' and the proposed class of PLAN participants' expected Pension Death Benefits in the absence of a PLAN termination.

SECOND CLAIM FOR RELIEF
(Violations Due to Illegal Elimination of Pension Death Benefit)

166. Named Plaintiffs incorporate and reallege by reference the foregoing paragraphs 1 through 165, inclusive (together with the Class Action Allegations, ¶s 198-213, as if they were fully set forth herein.

167. Beginning in 1998, the Plan sponsor acted to take advantage of the provisions of Section 401(h) and 420 of the Internal Revenue Code, 26 U.S.C. §§ 401(h), 420, which enable sponsors of defined benefit plans, under certain strictly defined circumstances, to make a "qualified transfer" and use certain "excess assets" in the pension plan to fund retiree medical benefits for persons who are retired participants in the same pension plan.

168. Among the conditions and limitations imposed by Section 401(h) and 420 of the Internal Revenue Code are the requirements that pension plan assets may be subject to such a transfer only if, *inter alia*, the then existing funding level of the plan exceeds, and the funding level thereafter will remain in excess of, 125% of full funding as defined by the Internal Revenue Code.

169. Another mandatory requirement imposed by Section 420(c)(2) of the Internal Revenue Code is that the pension benefits of all participants and beneficiaries which were accrued under the PLAN before the date of transfer must become vested and nonforfeitable, just as they would in the event that the PLAN had terminated immediately before the transfer.

170. The PLAN sponsor made several consecutive Section 420 transfers of pension assets in the PLAN as follows: in December 1998 approximately $60 million; in November-December 1999 approximately $120 million; in December 2000 approximately $111 million; and in December 2001 approximately $120 million.

171. Each time the PLAN witnessed a transfer of pension assets pursuant to IRC § 420, the PLAN required (in Section 11.2(b)(ii)) that, upon termination or partial termination of the PLAN, plan assets are to be applied, after making the payments required by ERISA Section 4044, 29 U.S.C. § 1344, "to make provision for the payment of death benefits attributable to

deaths occurring prior to the date of termination which would have been payable from the Trust Fund, and for the payment, upon the deaths of retired employees who are on the pension roll as of the date of termination and of employees eligible as of that date for retirement, of death benefits which would have been payable from the Trust Fund, had the Plan not been so terminated." The PLAN *next* required (in Sections 11.2(b)(iii), (iv), (v) and (vi)) that plan assets be applied for the payment of deferred vested pensions starting at age sixty-five and continuing until the death of the former employee.

172. In short, the PLAN's provisions at the time of each I.R.C. Section 420 transfer assigned at termination of the PLAN a <u>higher</u> priority to the payment of Pension Death Benefits than payment of deferred vested pension benefits. This provision was a standard feature of the PLAN and it reflects unambiguous PLAN sponsor intent to treat the Pension Death Benefit as an accrued nonforfeitable benefit when a participant retired or was eligible for retirement with a service pension.

173. In accordance with the requirements of IRC § 420, and applicable federal regulations, each time the PLAN witnessed the IRC § 420 transfer, Named Plaintiffs' and proposed class members' pension benefits, including the Pension Death Benefit, became nonforfeitable in the same manner which would have been required if the PLAN had been terminated immediately before each IRC § 420 transfer.

174. In conformity with the requirements of IRC § 420, the PLAN included provisions that vested all accrued benefits as of the date of each Section 420 transfer.

175. Since the first I.R.C. § 420 transfer in December 1998, the PLAN has provided at Section 14.4 (a) that "[t]he Accrued Benefit of each Participant who had not terminated

employment with the Company and all Participant Companies as of the date of a Qualified Transfer shall become Vested and nonforfeitable in the same manner which would be required if the Plan had terminated immediately before such Qualified Transfer."

176. By virtue of the combined operation of IRC § 420 and the aforesaid governing PLAN language, due to the IRC § 420 transfers, the Pension Death Benefit should be deemed an accrued nonforfeitable vested benefit.

177. Notwithstanding the Pension Death Benefits became vested and nonforfeitable, effective December 1, 2003, the PLAN sponsor adopted PLAN Amendment 2003-5 which amended the PLAN at Section 7.3 to eliminate the Pension Death Benefit for any PLAN participant who retired on or after January 1, 2004. [4] Named Plaintiffs have not consented and do not consent to this termination of the Pension Death Benefit.

178. PLAN Amendment 2003-5 was created so as to remove millions of dollars of liabilities for Pension Death Benefits and allow QWEST to show a curtailment income gain for corporate income reporting purposes.

179. The actions by Defendants were inconsistent with the fully vested nature of the Pension Death Benefits and constituted a violation of 26 U.S.C. § 420, the terms of which were expressly incorporated into the governing PLAN document.

180. PLAN Amendment 2003-5 concerning Section 7.3 conflicts with the PLAN's prior provisions and commitments. Said PLAN amendment is null and void as to all persons who were PLAN participants when the I.R.C. § 420 transfers occurred. This PLAN amendment

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[4] PLAN Amendment 2003-5 changed Section 7.3, *inter alia*, as follows: ". . . no Death Benefits shall be made under Section 7.3(a), (b), or (d) with respect to a Former Participant who Terminates on or after January 1, 2004. . . . "no lump sum payments shall be made under Section 7.3(c) on or after January 1, 2004, except to the extent the Participant Terminates prior to January 1, 2004. . . "

violates the anti-cutback provisions of ERISA Section 204(g), 29 U.S.C. § 1054(g), since accrued benefits have been reduced or eliminated.

181. The actions by Defendants were a violation of the PLAN provisions which expressly provided for the full vesting of all benefits under the PLAN which were accrued as of each I.R.C. § 420 transfer of pension assets, therefore, constituting a violation of ERISA Section 404(a), 29 U.S.C. § 1104(a).

182. The actions by Defendants constituted an unlawful inurement of PLAN assets to the PLAN sponsor in violation of ERISA Section 403(c)(1), 29 U.S.C. § 1103(c)(1) and (2).

183. Since January 1, 2004, PLAN administrators have refused to comply with the requirements of I.R.C. § 420 and PLAN Section 14.4, and they have wrongfully withheld payment of Pension Death Benefits for PLAN participants who retired on or after January 1, 2004 and their beneficiaries affected by PLAN Amendment 2003-5.

184. Plaintiffs seek an order reforming the PLAN, striking PLAN Amendment 2003-5 which purported to eliminate the Pension Death Benefit for persons retiring on or after January 1, 2004.

185. Further, Plaintiffs seek an order requiring the PLAN to notify and make payment of the correct amount of the Pension Death Benefit, together with prejudgment and post-judgment interest, to each PLAN participant and qualified mandatory beneficiary to whom the Pension Death Benefit became payable after January 1, 2004.

186. Since the PLAN sponsor amended the PLAN at Section 7.3, no person retiring on or after January 1, 2004 has any legitimate administrative claims avenue to pursue in order to make a claim for the Pension Death Benefit. Indeed, it would be futile for any such person to

make a claim for the Pension Death Benefit as the PLAN administrators have committed themselves to an adverse position and they uniformly deny such claims on the basis that Section 7.3 has been amended and they cannot make a decision contrary to PLAN Amendment 2003-5.

187. Indeed, PLAN administrators consistently tell each and every person retiring after January 1, 2004 who seeks the Pension Death Benefit that, since his or her retirement was after January 1, 2004, he or she is not eligible to receive the Pension Death Benefit.

188. The PLAN provides no effective recourse for persons retiring on or after January 1, 2004 to seek the Pension Death Benefit. Hence, there is no requirement to exhaust administrative remedies, a pointless exercise.

THIRD CLAIM FOR RELIEF
(ERISA Section 502(a)(1)(B) Claim to Clarify Future Rights to the Pension Death Benefit)

189. Named Plaintiffs incorporate and reallege by reference the foregoing paragraphs 1 through 188, inclusive (together with the Class Action Allegations, ¶s 199-214, as if they were fully set forth herein.

190. Pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B), Named Plaintiffs and the proposed class of PLAN participants are entitled to bring this action and they request this Court to clarify their rights to future Pension Death Benefits under the terms of the PLAN.

191. Named Plaintiffs seek a declaration that those persons receiving a monthly pension annuity and their mandatory beneficiaries, to the extent there are any at time of death, are entitled to the Pension Death Benefit payable from the PLAN.

192. Named Plaintiffs seek a declaration that all persons who retired on or after January 1, 2004 and received a lump sum distribution are entitled to an additional lump sum payment representing the unpaid Pension Death Benefit, plus interest.

FOURTH CLAIM FOR RELIEF
(ERISA Section 502(a)(2) Claim to Correct Faulty PLAN Documents, Including SPD)

193. Named Plaintiffs incorporate and reallege by reference the foregoing paragraphs 1 through 192, inclusive (together with the Class Action Allegations, ¶s 199-214, as if they were fully set forth herein.

194. ERISA Section 102, 29 U.S.C. § 1022 provides in pertinent part that a summary plan description (SPD) must contain "the plan's requirements respecting eligibility for participation and benefits . . . [and] circumstances which may result in disqualification, ineligibility, or denial or loss of benefits. . . ." [5]

195. Named Plaintiffs have standing to assert a claim for breach of fiduciary duty and to insure that plan documents are accurate.

196. There has been a breach of fiduciary duty to comply with ERISA Section 102 and applicable regulations as the current plan documents contain faulty language and must be reformed to accurately reflect past fiduciary commitments about the Pension Death Benefit.

197. QWEST has issued a current SPD which falsely states the Pension Death Benefit is a welfare benefit, subject to reduction or elimination at any time. Pursuant to ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), Named Plaintiffs seek equitable and remedial relief for the benefit of the PLAN as a whole including an order requiring the QWEST PENSION PLAN

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

DESIGN COMMITTEE, COMMITTEE and PLAN administrators and QWEST, as plan sponsor, to correct the current faulty language in the PLAN's current SPD and issue a corrected SPD with language disclosing the Pension Death Benefit is a vested, protected or accrued defined pension benefit, not subject to reduction or elimination absent a PLAN termination.

198. In the alternative, pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), this Court should grant appropriate equitable relief – injunctive relief requiring QWEST, as plan sponsor, and the QWEST PENSION PLAN DESIGN COMMITTEE to insert language in the governing PLAN documents memorializing the Pension Death Benefit is an entitlement, a vested, protected and accrued benefit for Named Plaintiffs and the proposed class of PLAN participants, and requiring COMMITTEE and PLAN administrators to deliver a corrected PLAN SPD to PLAN participants.

CLASS ACTION ALLEGATIONS

199. **Class Definition**. Named Plaintiffs bring this action on behalf of all PLAN participants (and beneficiaries thereof) who retired and are receiving either a service pension annuity or disability pension annuity, and all those persons (and beneficiaries thereof) who retired on or after January 1, 2004 and received a lump sum distribution of their service pension annuity, minus the lump sum present value of the Pension Death Benefit.

200. This action is maintainable as a class action under Federal Rule of Civil Procedure Rule 23, subsections (a), (b)(2), and (b)(3).

201. **Class Size**. The precise size of the class is presently unknown and will be determined through discovery. However, Named Plaintiffs are informed and believe, and on that

basis allege, that the size of the class is well over twenty thousand. The class is so numerous that joinder of all the members of the class is impractical.

202. **Questions of Law and Fact Common to the Class**. This suit poses questions of law and fact which are common to and affect the rights of all putative class members. The questions presented include, but are not limited to: A) whether Defendants violated their fiduciary duties under ERISA Section 404 when making representations and providing PLAN publications and SPDs that led reasonable PLAN participants to conclude that the Pension Death Benefit was a protected or accrued pension benefit; B) whether Defendants' and predecessor's actions interpreted the Pension Death Benefit to be an entitlement, protected or accrued pension benefit; C) whether Defendants are judicially or equitably estopped to eliminate the Pension Death Benefit in the absence of PLAN termination; D) whether the Pension Death Benefit provided under the PLAN is an accrued benefit protected by ERISA Section 204(g); E) whether the January 1, 2004 elimination of the Pension Death Benefit violated the terms and conditions of I.R.C. Section 420, PLAN provisions and other provisions of ERISA; and F) whether PLAN participants are entitled to declaratory and injunctive relief and the form and extent of the relief to which they should receive.

203. **Typicality of the Claims of the Representatives**. The claims of Named Plaintiffs are typical of the claims of the proposed class of PLAN participants and beneficiaries as a whole.

204. Named Plaintiff's reliance on written representations and SPDs from different time periods than same or similar ones issued to other PLAN participants during other time periods does not undermine Named Plaintiff's ability to represent the entire class. [6]

205. **Adequacy of Representation**. Named Plaintiffs have no interest antagonistic to or in conflict with the interests of the proposed class of participants and beneficiaries. Indeed, Named Plaintiffs have the support of thousands of PLAN participants.

206. Plaintiffs' counsel Curtis L. Kennedy is experienced counsel who has served as Class counsel in ERISA cases successfully litigated in the District of Colorado, including multi-plaintiff civil actions involving the Defendants and their predecessors.

207. Defendants' issuance of faulty PLAN documents, including the current SPD, and refusal to acknowledge the Pension Death Benefit is a protected PLAN benefit makes appropriate an award of final injunctive and declaratory plan-wide and class-wide relief.

208. The PLAN sponsor's elimination of the Pension Death Benefit effective January 1, 2004 makes appropriate an award of final injunctive and declaratory plan-wide and class-wide relief.

209. Questions of law or fact common to the members of the proposed class predominate over any questions affecting only individual participants and beneficiaries. The predominant questions in this litigation concern the rights of proposed class members to receive declaratory, injunctive and equitable relief, and whether Defendants should be required to

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[6] Although this is a proposed ERISA class action, not a securities fraud class action, it is noteworthy that the Tenth Circuit has ruled that a dissimilarity of misrepresentations upon which individual members of a putative class relied does not prohibit a class action when the misrepresentations established a common course of conduct by defendants. *Esplin v. Hirschi*, 402 F.2d 94, 100-101 (10th Cir. 1968) (securities litigation); See also, *In re Intelcom Group, Inc. Sec. Litig.*, 169 F.R.D. 142, 151 (D. Colo. 1996).

memorialize in the governing PLAN documents the Pension Death Benefit is an entitlement, protected or accrued pension benefit.

210. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

211. Members of the proposed class have little interest in individually controlling the prosecution of separate actions.

212. Named Plaintiffs know of no other litigation concerning this controversy which has previously been commenced by members of the proposed class.

213. In the interests of judicial efficiency, the claims arising out of this controversy should be consolidated in this proposed class action before this Court.

214. No undue difficulties are anticipated to result from the prosecution of this proceeding as a class action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs EDWARD J. KERBER, NELSON PHELPS, JOANNE WEST, NANCY A. MEISTER and THOMAS J. INGEMANN, Jr., Individually and on behalf of the proposed class of PLAN participants and beneficiaries and for the benefit of the QWEST PENSION PLAN, seek orders and judgments against Defendants as follows:

A. Order this action be maintained as a class action under Fed.R.Civ.P., Rule 23(a), (b)(2) and (b)(3), that Named Plaintiffs' counsel be appointed class counsel, and require QWEST at company expense to publish and mail notification of this action to all members of the proposed class of participants and beneficiaries;

B. Declare that Defendants, when acting as PLAN fiduciaries, failed to discharge duties to act solely in the interests of the participants and beneficiaries, as required by ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1);

C. Pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), declare the Named Plaintiffs' and PLAN participants' rights to future Pension Death Benefits under the terms of the PLAN and declare the Pension Death Benefit is an accrued benefit under ERISA Section 204(g), 29 U.S.C. § 1104(g), protected from cut-backs, and that Named Plaintiffs and PLAN participants have a non-forfeitable interest in the Pension Death Benefit that cannot be eliminated by amendment of the PLAN;

D. Pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), declare that the PLAN language inserted in the January 25, 1998 and June 12, 1998 restated PLAN documents defining "Accrued Benefit" so as to exclude the Pension Death Benefit has no force and effect on Named Plaintiffs' and the proposed class of PLAN participants' rights to future Pension Death Benefits;

E. Pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), issue an order clarifying that Named Plaintiffs' and PLAN participants' "mandatory beneficiaries" at the time of death of Named Plaintiffs and PLAN participants are entitled to Pension Death Benefits payable from the PLAN;

F. Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), apply principles of federal common law equitable estoppel, and rule that in as much as the PLAN publications and SPDs contained ambiguous representations about whether the Pension Death Benefit should be considered an "entitlement", or a vested protected and accrued "defined pension benefit", and

COMMITTEE and PLAN Administrators have made representations which constitute an oral interpretation of the ambiguities, declare that Named Plaintiffs and the proposed class of PLAN participants have an "entitlement" to the Pension Death Benefit which is a vested, protected and accrued defined pension benefit;

G. Pursuant to ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2), grant equitable and remedial relief for the benefit of the PLAN as a whole including an order requiring the QWEST PENSION PLAN DESIGN COMMITTEE, COMMITTEE, PLAN administrators and QWEST, as PLAN sponsor, to correct faulty language in the PLAN's current SPD and issue a corrected SPD with language disclosing the Pension Death Benefit is a vested, protected or accrued defined pension benefit, not subject to reduction or elimination absent a PLAN termination;

H. Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), enter an order declaring PLAN Amendment 2003-5 which purported to eliminate the Pension Death Benefit as illegal, in violation of the terms and conditions of the 1998-2001 I.R.C. Section 402 transfers and order said PLAN Amendment stricken and the PLAN reformed to reinstate the Pension Death Benefit for persons retiring on or after January 1, 2004, with or without a lump sum distribution. Further, Plaintiffs seek an order requiring the PLAN to notify and make payment of the correct amount of the Pension Death Benefit, together with prejudgment and post-judgment interest, to each PLAN participant and qualified mandatory beneficiaries for whom the Pension Death Benefit became payable after January 1, 2004.

I. Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), enter an order declaring PLAN Amendment 2003-5 effective December 1, 2003 which purported to eliminate the Pension Death Benefit for persons retiring on or after January 1, 2004 as illegal, in violation of the PLAN provisions which expressly provided for the full vesting of all benefits under the PLAN which were accrued upon each I.R.C. Section 420 transfer of pension assets, therefore, constituting a violation of ERISA Section 404(a), 29 U.S.C. § 1104(a), and an unlawful inurement of PLAN assets to the PLAN sponsor in violation of ERISA Section 403(c)(1), 29 U.S.C. § 1103(c)(1) and (2). Named Plaintiffs seek removal from the COMMITTEE those persons who supported, assisted and acquiesced in and defended the PLAN sponsor's efforts to eliminate the Pension Death Benefit for persons retiring on or after January 1, 2004.

J. Pursuant to ERISA § 502(a)(3)(A) and(B), 29 U.S.C. § 1132(a)(3)(A) and (B), grant temporary, preliminary and permanent injunctive relief prohibiting QWEST and successor PLAN sponsors from eliminating or reducing the Pension Death Benefit, with respect to Named Plaintiffs and the proposed class of retired PLAN participants, absent a termination of the QWEST PENSION PLAN, and requiring the PLAN sponsor to amend the governing PLAN documents to clearly state the Pension Death Benefit cannot be eliminated or reduced absent a termination of the PLAN;

K. Pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), issue an order directing Defendants, or an appointed independent fiduciary, to distribute at Defendants' expense a corrected SPD to all PLAN participants which SPD correctly discloses the Pension Death Benefit is a vested, protected and accrued defined pension benefit which cannot be forfeited by any amendment to the PLAN by QWEST and successor PLAN sponsors;

L. Grant Plaintiffs and the proposed class members such other and further class-wide and plan-wide relief, including appropriate equitable relief allowable under ERISA § 502(a)(3), as the Court deems just and proper;

M. Order QWEST's officers, employees and agents not to retaliate against Named Plaintiffs (and their relatives) and the proposed class of PLAN participants and beneficiaries on the basis of the filing or prosecution of this action; and

N. Pursuant to ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), order Defendants to pay the reasonable value of Plaintiffs' interim and final attorney's fees for services performed, expert witness fees, accounting fees, necessary expenses of litigation, and costs of this action.

DATED this 25th day of October, 2005.

Respectfully submitted,

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