

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

Civil Action No. 04-cv-2042-LTB-OES

**NELSON B. PHELPS,**

Plaintiff,

v.

**QWEST EMPLOYEES BENEFIT  
COMMITTEE**

Defendant.

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**REPLY BRIEF**

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Defendant Qwest Employees Benefit Committee (“Qwest”), by and through undersigned counsel, hereby replies to Plaintiff’s Response to Defendant’s Motion For Summary Judgment:

**I. INTRODUCTION**

In its Opening Brief, Qwest demonstrated that the “investment guidelines” and “proxy voting policy” that Plaintiff demanded be produced are not documents that fall within the ambit of ERISA § 1024(b)(4) – a narrow and technical provision requiring disclosure of a very limited class of documents. In response, Plaintiff made three arguments. First, he tried to divert the Court’s attention away from the dry legal question of whether the requested documents fell within the narrow scope of § 1024(b)(4) by portraying Qwest as a bumbling investor and bad actor that the Court should force to turn over documents in the name of protecting the retirees’ pension fund. (See Pl.’s Br. p. 6-7, “undisputed facts” ¶¶ 2, 6 and p. 9). The truth of the matter, however, is that there was

no bumbled investment. There was no deception or sinister motive. The only issue before the court is whether the requested documents meet the narrow legal requirements of § 1024(b)(4): are the documents formal legal documents that restrict or govern a plan?

Second, Plaintiff attempted to expand this narrow disclosure obligation to include all documents that would help him evaluate whether a breach of fiduciary duty has occurred. The law simply does not support Plaintiff's bold reach. Plaintiff's final argument was to try and fit his document request within the actual scope of the § 1024(b)(4) disclosure obligation. As set forth below, that effort also falls short. The bottom line is that Qwest got it right: the requested documents do not fall within the scope of § 1024(b)(4).

## II. ARGUMENT

### A. The Underlying Transaction

The underlying transaction is actually irrelevant to the analysis of whether the documents requested by Plaintiff should be produced pursuant to § 1024(b)(4). However, in his effort to persuade the Court to require production, the Plaintiff attempts to portray Qwest as having made a poor investment decision, and then refusing to talk about it. Therefore, the record must be set straight.

Plaintiff describes the transaction this way: "a highly risky unusual \$67 million investment in 'put options' which investment lost over \$66 million in less than two months during late 2001." (See Pl.'s Br. p. 6 ¶ 2). The transaction, however, was not an "investment" seeking a stand-alone financial gain that went bad (for example, the purchase of Level 3 stock at \$100 per share that later plummeted to \$10 per share). Instead, the transaction was more akin to the purchase of an insurance premium which

protected the Pension Trust against a potentially large market decline in national and international stock markets during the extremely uncertain and instable period that followed the unprecedented terrorist attacks of September 11, 2001.

Specifically, during the weeks following the terrorist attacks, the investment community was uncertain how national and international equity (stock) markets would perform. In fact, there was a shared concern that those markets – already turning downward before the attacks – would continue their decline at an accelerated rate.<sup>1</sup> As a result, many institutional investors considered strategies to reduce that risk.

The strategy selected by Qwest Asset Management Company (“QAM”), the entity delegated investment responsibility under the Plan, was to purchase what is known as a “protective put option.” (See Ex. C: K. Frame Aff. ¶ 2). A put option is conceptually similar to homeowner’s insurance. A homeowner pays monthly insurance premiums upfront in exchange for protection against a loss, such as a fire. If a fire or other loss does not occur, the homeowner is not repaid the premiums. The same is true with the protective put purchased by QAM. Instead of protecting against a fire, however, the put was designed to protect against a catastrophic market decline in the Trust’s substantial stock portfolios. (See Ex. C: ¶ 3). It does this because a put option gains value as the market declines and, therefore, offsets stock losses that the Trust would experience in a significant market decline. In this way, the put option establishes a floor which protects the stock portfolio against market declines below a specified level. (See Ex. C: ¶ 4). An important aspect of a protective put (as opposed to other risk management tools QAM

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<sup>1</sup> As an example, a September 18, 2001 *New York Times* article entitled “A Nation Challenged: The Overview” stated “Given [investors’] first chance to buy and sell stocks, investors pushed crucial market indexes down 7 percent out of concern that world economies, fragile even before the terrorist attack, would weaken further in days ahead.”

could have utilized) is that if equity markets actually move upward, the Trust retains all the market gain. (See Ex. C: ¶ 5).

Since a put option provides both protection from market declines and participation in market gains, it has a cost. Here, the cost of the put (or the insurance premium) was 68.5 million dollars. (See Ex. C: ¶ 6). That amount, however, was equal to just 1.1 percent of the total market value of the equity that the Trust held at that time. (See Ex. C: ¶ 6). As it turned out, during the three months the protective put was in place, the Trust's equity portfolio actually increased by 400 million dollars. (See Ex. C: ¶ 7). Therefore, the Trust enjoyed a gain of 400 million dollars, minus the cost of the protective put. (See Ex. C: ¶ 7). In a nutshell, the 68.5 million dollars was the cost of protecting the Trust and not an investment loss as portrayed by Plaintiff.<sup>2</sup>

**B. Section 1024(b)(4) Does Not Require Production Of The Requested "Investment Guidelines."**

Defendant established that both the Derivatives Policy and the multiple, portfolio-specific investment manager guidelines – the only two remotely responsive categories of documents – are not documents that are required to be produced under ERISA § 1024(b)(4). Plaintiff does not appear to dispute that the Derivatives Policy should not be produced. Instead, Plaintiff asserts only that the portfolio-specific investment guidelines should have been produced. (See Pl.'s Br. pp. 7-14). Other than the "bad investment, bad actor" argument that was dispensed with above, Plaintiff makes two arguments in support of this assertion: (i) if § 1024(b)(4) is expanded to include all documents that might help a participant determine whether a breach of fiduciary duty occurred, the portfolio-specific investment guidelines should be produced; and (ii) the portfolio-

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<sup>2</sup> This distinction was pointed out to Plaintiff when Qwest first responded to his inquiries. (See Pl.'s Compl. ¶ 15).

specific investment guidelines fall within the true scope of § 1024(b)(4) because they “actually govern & restrict the plan’s operation.” (See Pl.’s Br. pp. 7-14). As discussed below, neither of these arguments has merit.<sup>3</sup>

**1. Plaintiff Misstates The Scope Of The Disclosure Obligation.**

Plaintiff’s first tactic is an attempt to expand the legal test for determining whether a document must be produced under § 1024(b)(4). The documents that must be produced under § 1024(b)(4) are those that are specifically listed in the statute, plus other documents similar in nature that describe the terms and conditions of the plan. See, e.g., Hughes Salaried Retirees Action Comm. v. Adm’r of the Hughes Non-Bargaining Ret. Plan, 72 F.3d 686, 689 (9<sup>th</sup> Cir. 1995); Board of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein, 107 F.3d 139, 145 (2<sup>nd</sup> Cir. 1997) (documents that “confine a plan’s operations”); Shaver v. Operating Eng. Local 428 Pension Trust Fund, 332 F.3d 1198, 1202 (9<sup>th</sup> Cir. 2003) (documents that “restrict or govern the plan’s operation”).

Plaintiff, however, appears to argue that Qwest is obligated to disclose any information that “affects beneficiaries’ material interests” (see Pl.’s Br. p. 8, citing Pegram v. Herdrich, 120 S. Ct. 2143, 2154 n. 8 (2000)) or, even more broadly, any documents that allow him to “police his pension plan, which conduct is exactly what ERISA contemplates.” (See Pl.’s Br. p. 9, citing Donovan v. Dillingham, 688 F.2d 1367, 1372 (11<sup>th</sup> Cir. 1982)). In accordance with this expanded test, Plaintiff asserts that he is requesting the portfolio-specific investment guidelines to “determine whether the October

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<sup>3</sup> Plaintiff also argues that because production of the portfolio-specific investment guidelines would have identified the specific investment managers working with each investment account, he is entitled to that information. (See Pl.’s Br. p. 8). First, it is clear that names of specific money managers do not have to be produced. See, e.g., Hickey v. Pennywitt, 2004 U.S. Dist. LEXIS 10734 \*22-23 (May 20, 2004 N.D. Ohio) (names of individual account investment managers do not need to be produced). Second, Plaintiff never requested this information.

2001 \$67 million put option investment . . . was in accordance with the governing investment rules and restrictions”, (see Pl.’s Br. p. 9), and to determine “whether there has been any breach of investment fiduciary duty.” (See Pl.’s Aff., Ex. 1 ¶ 8, Pl.’s Br. p. 16).

This position has been expressly rejected by a number of courts. In Sam v. Creare, Inc., the Plaintiff specifically argued that he should be able to “use [ERISA]’s disclosure requirements to determine whether [Defendant]’s officers and directors have . . . violated their fiduciary duties.” 1994 U.S. Dist. LEXIS 12142 at \*5 (1994). The Court rejected that position in that it brought the question of what documents should be produced back to the statutory language: “rather than granting participants an unqualified right to discovery, ERISA specifies the form, content and timing of the disclosures to which participants are entitled.” Id. at \*8. As a result, the Court ordered the Defendant to produce the plan’s annual report (as specifically listed in § 1024(b)(4)) but denied the Plaintiff’s request for records of actions and meetings of the plan’s trustees, dividend records and employer financial statements. Id. at \*9-10; see also Weinstein, 107 F.3d at 145 (“[Section 1024(b)(4)] is not sufficiently broad to require disclosure of any and all ‘documents that would assist participants and beneficiaries . . . in determining whether a plan is being properly administered’”); Gray v. Briggs, 1998 U.S. Dist. LEXIS 10057 \* 16 (July 7, 1998 S.D.N.Y.) (even though documents “directing or authorizing trades, investments, [and] sales” of plan assets might help Plaintiff challenge the propriety of two specific investment decisions, the narrow scope of § 1024(b)(4) did not reach such documents).<sup>4</sup>

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<sup>4</sup> Plaintiff’s citations to Pegram v. Herdich and Donovan v. Dillingham in support of this broader disclosure obligation are taken out of context. Neither of these cases ever address § 1024(b)(4). In Pegram, the Court

Plaintiff simply cannot escape the fact that the legal test for whether a document should be disclosed under § 1024(b)(4) is whether it explains the plan and allows a participant to know his rights. See Hughes, 72 F.3d at 690. In other words, it is a document that governs, restricts or confines the plan's operations (see Defs.' Br. pp. 6-8' Pl.'s Br. pp. 10-11) and not whether it can help determine the propriety of a specific investment decision. ERISA § 1024(b)(4) – with its attendant potential penalties – simply is not a vehicle allowing every participant the opportunity to second guess the myriad investment decisions made by the plan fiduciaries. This, of course, does not mean that any such aggrieved participant is without a remedy. A participant, on behalf of a plan, may sue for breach of fiduciary duty and obtain discovery with regard to that claim pursuant to other provisions of ERISA, including those provisions governing fiduciary responsibilities. See, e.g., 29 U.S.C. §§ 1102-1104.

**2. Under The Correctly Stated § 1024(b)(4) Standard, Portfolio-Specific Investment Guidelines Are Not Subject To Production.**

Plaintiff's secondary argument acknowledges the correct standard under § 1024(b)(4), but incorrectly asserts that the portfolio-specific investment guidelines fall within the narrow scope of that statutory disclosure obligation. Specifically, Plaintiff correctly acknowledges that the documents that must be produced under §1024(b)(4) are those that "restrict or govern the plan's operation." (See Pl.'s Br. pp. 10-11). Plaintiff, then incorrectly asserts that the portfolio-specific investment guidelines "actually govern and restrict the plan's operations" here. (See Pl.'s Br. p. 11). Plaintiff bases this

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was discussing the scope of the fiduciary duty obligation set forth in ERISA § 1104 and noting that a fiduciary might have to disclose to a beneficiary information affecting his or her pecuniary interests in order to be in compliance with its fiduciary responsibilities. Id. at 2154 n. 8. Similarly, the quotation from Donovan is merely a general reference to the overall purposes of ERISA, not to the disclosure obligation under § 1024(b)(4). 688 F.2d 1367, 1372 (11<sup>th</sup> Cir. 1982).

argument on (i) the fact the Pension Trust Agreement anticipates that such portfolio-specific guidelines will be in place, and (ii) the conclusions of the Department of Labor's Interpretive Bulletin 94-2 and the Faircloth v. Lundy decision. Plaintiff's arguments do not withstand scrutiny.

The portfolio-specific investment guidelines, by their very nature, simply do not govern, restrict, confine or establish the plan's operations. They are significantly more limited in that they reach only one of many individual investment accounts (portfolios) and govern only the conduct of one of many investment managers. (See Def.'s Br. pp. 8-9). These guidelines differ from account to account because they are tailored to the type of asset held in each account and that asset's relative degree of investment risk (futures, U.S. equities, emerging international equities, bonds, etc.). They also differ from account to account because they are tailored to the investment experience of the portfolio or fund manager (large-cap, mid-cap and small-cap specialists, bond experts, etc.). Account-specific documents such as these do not explain the terms of a plan to a participant or govern or restrict a plan – they simply operate at a substantially lower level. Instead, these documents are much more akin to the day-to-day operating documents of a plan that specifically do not need to be produced under §1024(b)(4). See, e.g., Brown v. American Life Holdings, 190 F.3d 856, 861 (8<sup>th</sup> Cir. 1999) (written communications between plan administrator and trustee relating to investments are not “instruments under which a plan is operated” but are documents “which simply evidence its operation”). None of the documents specifically listed in § 1024(b)(4) reach down to the portfolio level. They are plan wide documents. These portfolio-specific investment guidelines are different and do not need to be produced.

Although noted in Qwest's Opening Brief, it bears repeating here: Hickey v. Pennywitt is exactly on point. In that case, the plaintiff sought portfolio-specific investment guidelines that described (i) "the classes of assets that may comprise the investment portfolio"; (ii) "the risk and return characteristics of such Fund; and (iii) "the name of the investment manager" of the fund. 2004 U.S. Dist. LEXIS 10734 \*22-23 (May 20, 2004 N.D. Ohio). This is exactly the type of information contained in the portfolio-specific investment guidelines at issue here. (See Defs.' Br. p. 4 ¶ 11). The Court in Hickey specifically held that the portfolio-specific investment guidelines were not "documents which provide a plan participant with information concerning how the plan is operated" and, therefore, did not need to be produced pursuant to §1024(b)(4). *Id.* at \*23. This case, while not binding, definitively puts this issue to rest. Plaintiff attempted to distinguish this persuasive case by arguing that because the plaintiff in Hickey wanted this information for personal investment reasons, the case was not on point. (See Pl.'s Br. pp. 13-14). The reasons a plaintiff wants a document, however, are irrelevant to the analysis. The only relevant question – answered decidedly in Hickey – is what type of documents are required to be produced. Portfolio or fund-specific investment guidelines, because they are not plan wide documents, do not govern or confine a plan's operations and are outside the scope of the ERISA § 1024(b)(4) disclosure obligation.

Plaintiff's arguments do not require a different conclusion. First, Plaintiff's reliance on the DOL Interpretive Bulletin is misplaced. The entire focus of the cited Bulletin is to provide guidance to plan fiduciaries on whether maintaining a "statement of investment policy" or a "proxy voting policy" could impact the fiduciary responsibilities

for investment and other plan fiduciaries that are set forth in ERISA §§ 1102 through 1104. For example, the Bulletin notes that fiduciaries must comply with a Statement of Investment Policy, if one is in place, unless to do so in a given situation would not be prudent. In other words, unwavering compliance with such a policy does not protect against claims for breach of fiduciary duty. (See Pl.'s Br. Ex. 4, p. 6). The Bulletin simply has nothing to do with the much more narrow and specific question of what documents must be produced pursuant to § 1024(b)(4). That statutory section is not mentioned once. The reference to "documents and instruments governing the plan" is simply a reference to the fact that ERISA § 1104 requires a plan fiduciary to be in compliance with plan documents. (See Pl.'s Br. Ex. 4). This Bulletin does not trump the clear law under § 1024(b)(4) that documents relating to specific funds or specific transactions are not required to be produced.

Plaintiff's other two arguments are similarly unpersuasive. The Faircloth v. Lundy decision does note that investment and funding policies should have been produced in that case. 91 F.3d 648, 656 (4<sup>th</sup> Cir. 1996). The Court, however, gives no indication whatsoever of what type of investment policy was in play (a broad and formal Statement of Investment Policy or a portfolio-specific guidelines?). Id. As a result, the decision is not helpful in determining on these facts whether portfolio-specific investment guidelines must be produced. Nor does the fact that the Pension Plan Trust Agreement contemplates that QAM might hire investment managers and give them investment parameters have any bearing on whether such an underlying document should be produced pursuant to ERISA § 1024(b)(4).

The Plaintiff is trying to put a square peg in a round hole. It doesn't fit. The requested investment guidelines are not documents that are required to be disclosed pursuant to §1024(b)(4).

**C. Nor Has Plaintiff Shown That § 1024(b)(4) Requires Production Of Proxy Voting Guidelines Here.**

As set forth in its Opening Brief, Qwest discontinued the "US West Trust Investment Proxy Voting Policy" sought by Plaintiff. Now, Qwest's only "policy" is that it delegates its authority to vote proxies to external investment advisors or, in the case of internally managed portfolios, to the Plan Trustee, Mellon Trust of New England, NA ("Mellon"). (See Def.'s Br. p. 5 ¶ 15-16). Only Mellon, and the individual investment managers to whom proxy voting has been delegated, issue a Proxy Voting Policy by which proxy voting activity, as well as record-keeping and reporting of proxy votes, is controlled. (See Def.'s Br. p. 5 ¶ 15-16). While Qwest may require those entities to have proxy voting policies in place in order to hold or manage Pension Plan assets, these independent third-party policies do not fall within the scope of § 1024(b)(4) because they do not restrict or govern the Pension Plan's operations. Instead, they govern the conduct of third-party investment experts as they deal with all of their client's assets, not just the Qwest Pension Plan. (See Def.'s Br. p. 13).

Plaintiff's response was two-fold. First, Plaintiff argued that he is entitled to either the non-existent Qwest policy or the independent third party policies because those documents would allow him to "police" the pension plan and "determine whether proxy voting has been conducted in the best interest of the plans' participants and to guard against breaches of fiduciary duty." (See Pl.'s Br. p. 16). As discussed above, this is not the test for document production under § 1024(b)(4).

Second, Plaintiff argued that because DOL Interpretive Bulletin 94-2 requires an investment fiduciary like QAM to periodically monitor proxy voting activity of those to whom proxy voting has been delegated in order to meet its fiduciary duties under ERISA, Qwest must produce a Proxy Voting Policy to him. (See Pl.'s Br. p. 16). Not only is this argument non-sensical, but it completely ignores the facts outlined for the second time above. The fact that Interpretive Bulletin 94-2 suggests Qwest has a fiduciary duty to periodically review the Trustee's and individual managers' proxy voting practices simply does not change the underlying fact that Qwest no longer promulgates the requested policy. Again, the Bulletin, a guidance on meeting fiduciary responsibilities under ERISA §§ 1102-1104, simply has no bearing on whether a proxy voting policy – either of a named fiduciary or its proxy delegate – should be produced under § 1024(b)(4). Plaintiff's argument misses the mark entirely.

**D. If Qwest Has Misjudged Its ERISA Disclosure Obligations – Which It Has Not – The Court Should Forego Imposition Of A Financial Penalty.**

Plaintiff suggests that he will be requesting a financial penalty against Qwest in this case. (See Pl.'s Br. p. 13). Penalties are subject to ERISA §1132(c)(1), which provides as follows:

Any administrator . . . who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) . . . within 30 days after such request *may in the court's discretion* be personally liable to such participant or beneficiary in the amount of up to \$110 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S. §1132(c)(1) (emphasis supplied).

If the Court disagrees with Qwest and determines that ERISA required Qwest to produce one or all of the requested documents to Plaintiff, and that such failure is actionable under ERISA Section 1132(c), the Court has wide discretion in deciding whether to impose a statutory penalty. See, e.g., Sullivan v. Raytheon Co., 262 F.3d 41, 52 (1<sup>st</sup> Cir. 2001) (affirming district court's decision not to impose penalties for violation of ERISA disclosure obligations); Demery v. Extebank Deferred Compensation Plan, 216 F.3d 283, 290 (2d Cir. 2000) ("we find no abuse of discretion in the district court's decision not to impose the penalties permitted by 29 U.S.C. §1132(c)"); Ames v. American Nat'l Can Co., 170 F.3d 751, 760 (7<sup>th</sup> Cir. 1999) (affirming district court's decision not to impose any financial penalty: "Fines under §1132(c)(1) are not mandatory, even if there has been a violation of §1024(b)(4).").

Likewise, if the Court decides to impose a statutory penalty, the Court has wide discretion in setting the amount of such penalty. For example, courts have imposed a penalty of *ten cents* per day. Patterson v. Ret. & Pension Plan for Officers & Employees, 2001 U.S. Dist. LEXIS 15949, \*22 (S.D.N.Y. Oct. 5, 2001). Other courts have imposed a penalty of between ten and thirty dollars per day. See, e.g., Estate of Fields v. Provident Life & Accident Ins., 2001 U.S. Dist. LEXIS 10157, \*18 (E.D. Pa. Jul. 10, 2001) (imposing a penalty of \$10 per day); Sedlack v. Braswell Servs. Group, Inc., 134 F.3d 219, 226 (4<sup>th</sup> Cir. 1998) (affirming penalty of \$20 per day); Proujansky v. Blau, 2001 U.S. Dist. LEXIS 12694, \*41 (S.D.N.Y. Aug 2, 2001) (imposing statutory penalty of \$20 per day "where the furnishing of required information was delayed for years"); Kascewicz v. Citibank N.A., 837 F.Supp. at 1312, 1323-24 (S.D.N.Y. 1993) (imposing penalty of \$25 per day where plan administrator failed to create required SPD and

“displayed complete indifference” to plaintiff’s document requests); Moothart v. Bell, 21 F. 3d 1499, 1506 (10<sup>th</sup> Cir. 1994) (affirming a penalty of \$30 per day where “defendants acted in bad faith” and adamantly fought plaintiff’s efforts to obtain documents).

Importantly, this is not a case in which an ERISA plan administrator has completely ignored its ERISA obligations to produce documents upon request. To the contrary, the record demonstrates that Qwest undertook substantial efforts to respond to Plaintiff’s requests. Specifically, Qwest copied and produced the bulk of what Plaintiff requested and provided explanations to each of Plaintiff’s questions. (See, e.g., Pl.’s Compl. ¶ 15: Qwest’s initial response to Plaintiff’s inquiry). In fact, over the past few years, Qwest has produced literally thousands of pages of documents to Mr. Phelps, Mr. Kennedy and the Qwest retiree community. The only documents Qwest did not produce here were the requested “investment guidelines” and “proxy voting policy.” Documents that might fall into these categories were held back based on the good faith legal belief that they are not required to be produced under § 1024(b)(4) and its progeny of cases.

In addition, when Plaintiff filed suit, Qwest moved for an expedited case procedure under which Qwest would make general disclosures about the documents referenced herein and then the parties could brief the unique legal issues presented by this case – quickly bringing those disputed issues to the Court for resolution. (See Proposed Case Management Order, filed 1/31/05). Plaintiff’s counsel objected to the expedited procedure on the ground that Plaintiff should not be precluded from conducting discovery in this case, specifically a Rule 30(b)(6) deposition. (See Proposed Case Management Order). After objecting to the expedited procedure, however, Plaintiff never issued any discovery (he did request copies of the “investment guidelines” and “proxy voting

policy”, the production of which is the issue at the heart of this case) or took any action on the case. The case languished until the discovery period closed six months later and Defendant immediately filed its Motion for Summary Judgment.

Under these circumstances, and only if the Court ultimately disagrees with Qwest’s analysis, Qwest’s good faith warrants waiver of any penalty, or at least a substantial reduction in any penalty imposed. *See, e.g., Abraham v. Exxon Corp.*, 85 F.3d 1126, 1132 ( 5<sup>th</sup> Cir. 1996) (“district court could conclude that the administrator acted in good faith when he refused to provide information and could decline to award penalties); *Paris v. Korbel & Bros., Inc.*, 751 F.Supp. 834, 840 (D. Cal. 1990) (defendant’s good faith was mitigating factor in determining \$10 per day penalty amount). Also included within the Court’s discretion would be the number of days to include in any penalty calculation. The Court could decide, for example, not to include the six month period in which Plaintiff could have moved this case forward, but to which case management structure Plaintiff needlessly objected. Finally, any fee award is also within the Court’s discretion. *See* 29 U.S.C. § 1132(g).

### **III. CONCLUSION**

For the foregoing reasons, Qwest respectfully requests that this Court issue an Order declaring that Qwest was not required to produce the documents in question to Plaintiff under ERISA § 1024(b)(4) and granting Summary Judgment in Qwest’s favor.

Dated this 16<sup>th</sup> day of September, 2005.

s/ Beth A. Doherty Quinn  
Beth A. Doherty Quinn  
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Attorneys For Defendant Qwest  
Employees Benefits Committee

**CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on September 16, 2005, I electronically filed the foregoing **Reply Brief** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address:

Curtis Kennedy, Esq. at curtislkennedy@aol.com

and, I also certify that I have mailed or served the document via electronic mail to the following non-CM/ECF participants:

Cynthia Delaney, Esq  
Qwest Communications, Corp.  
1801 California Street, Suite 900  
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/s/ Sara A. Schwenner, Paralegal  
of Baird & Kiovsky, LLC

**IN THE UNITED STATES DISTRICT COURT  
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**NELSON B. PHELPS,**

Plaintiff,

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**QWEST EMPLOYEES BENEFIT  
COMMITTEE**

Defendant.

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**AFFIDAVIT OF KAREN FRAME**

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STATE OF COLORADO )

COUNTY OF DENVER ) ss.

I, Karen Frame, being of more than 18 years of age and sound mind, and being first duly sworn upon oath, depose and state as follows:

1. I am the Chief Compliance Officer of Qwest Asset Management Company (“QAM”), the entity delegated investment responsibility under the Qwest Pension Plan.

2. In October 2001, QAM purchased what is known as a “protective put option” to protect against a possible catastrophic decline in the U.S. and international equity markets during the months following the terrorist attacks of September 11, 2001.

3. A put option is conceptually similar to homeowner’s insurance. A homeowner pays monthly insurance premiums upfront in exchange for protection against a loss, such as a fire. Even if a fire or other loss never occurs, the homeowner is not

repaid the premiums. The same is true with the protective put purchased by QAM. Instead of protecting against a fire, however, the put was designed to protect against a catastrophic market decline in the Trust's substantial stock portfolios.

4. A put option gains value as the stock market declines and therefore, offsets stock losses the Trust could experience in a significant market decline. In this way, the put option establishes a floor which protects the stock portfolio against market declines below a specified level. If the market never declines, just as if the house fire never happens, the cost of the put is not repaid.

5. An important aspect of a protective put (as opposed to other risk management tools QAM could have utilized) is that if equity markets actually move upward, the Trust retains all of the market gain.

6. Since a put option provides both protection from market declines and participation in market gains, it comes at a cost. Here, the cost of the put (or the insurance premium) was 68.5 million dollars. That amount, however, was equal to just 1.1 percent of the total market value of the equity the Trust held at that time.

7. During the three months the protective put was in place, the Trust's equity portfolio increased by 400 million dollars. Therefore, the Trust enjoyed a gain of

400 million, minus the cost of the protective put.

Further affiant sayeth not.

s/ Karen Frame  
Karen Frame

STATE OF COLORADO     )  
COUNTY OF DENVER     ) ss.

Subscribed and sworn before me this 16<sup>th</sup> day of September, 2005, by Karen Frame.

Witness my hand and official seal.

My commission expires: 02/18/07

s/ Catherine A. Robertus  
Notary Public