IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF TEXAS
DALLAS DIVISION

PHILIP A. MURPHY, Jr., SANDRA R. NOE, and CLAIRE M. PALMER, Individually, and as Representatives of plan participants and plan beneficiaries of VERIZON's PENSION PLANS involuntarily re-classified and treated as transferred into SuperMedia's PENSION PLANS, Plaintiffs, vs. VERIZON COMMUNICATIONS INC., VERIZON CORPORATE SERVICES GROUP INC., VERIZON EMPLOYEE BENEFITS COMMITTEE, VERIZON PENSION PLAN FOR NEW YORK AND NEW ENGLAND ASSOCIATES, VERIZON MANAGEMENT PENSION PLAN, VERIZON ENTERPRISES MANAGEMENT PENSION PLAN, VERIZON PENSION PLAN FOR MID-ATLANTIC ASSOCIATES, SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, Defendants.	§ §	CIVIL ACTION NO. **3:09-cv-2262-G** ECF

PLAINTIFFS' RESPONSE IN OPPOSITION TO (Docket 77)
VERIZON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs PHILIP A. MURPHY, JR., SANDRA R. NOE, and CLAIRE M. PALMER, by and through their counsel, file their Response in Opposition to (Docket 77) Verizon Defendants' Motion for Summary Judgment. Plaintiffs incorporate their memorandum brief filed concurrently herewith. Plaintiffs also incorporate their Appendix ("App".) containing pages 1-503 filed as Docket 85 on August 26, 2011, together with their Supplemental Appendix ("Supp. App.") containing pages 504-581 filed concurrently herewith.

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I. BACKGROUND AND SUMMARY

On November 25, 2009, Philip A. Murphy, Jr., Sandra R. Noe and Claire M. Palmer (Collectively, "Plaintiffs"), filed this civil action against the named Defendants on behalf of themselves and others similarly situated, alleging that the suit should be certified as a class action. On March 3, 2011, the Court class certified this case and set forth in the order a Fed.R.Civ.Proc Rule 23(c)(1)(B) description of the claims as, *inter alia*, "[w]hether plaintiffs and the class are entitled to 'other appropriate equitable relief' under ERISA § 502(a)(3) as a result of the transfer of plaintiffs and class members to Idearc pension plans.'" (Docket 55, Order at p. 2). On June 21, 2011, plaintiffs filed their "Second Amended Complaint for Proposed Class Action Relief Under ERISA." (Docket No. 64).

Plaintiffs' claims arise out of actions by Verizon Communications Inc. ("Verizon") and the Verizon Employee Benefits Committee ("Verizon EBC") (hereinafter collectively referred to as "Verizon Defendants") during November and December 2006 to involuntarily transfer Plaintiffs and Class members out of Verizon's long established pension plans into pension plans of a newly formed, highly leveraged spin-off company, Idearc Inc. (hereinafter the "Spin-off Transaction" or Spin-off"). Idearc Inc. is now known as SuperMedia Inc.[1] As a result, SuperMedia Employee Benefits Committee ("SuperMedia EBC") became the plan administrator of Plaintiffs' and Class members' pension and retiree welfare benefits. The involuntary transfer of Plaintiffs and Class members proved to be a huge economic detriment to the retirees and their

[1] On March 31, 2009, Idearc, Inc. and its domestic subsidiaries filed within the Dallas Division of this District voluntary petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code. As of January 4, 2010, Idearc, Inc. emerged from Chapter 11 bankruptcy proceedings and changed its name to SuperMedia, Inc. (Docket No. 64, Second Amended Complaint ¶ 29).

beneficiaries. After they were transferred, the retirees suffered significant loss of retiree welfare benefits or OPEBs [2] not suffered by tens of thousands of retirees who remained enrolled in Verizon's sponsored pension and welfare benefit plans.

The uncontroverted evidence establishes that Plaintiffs and Class members were simply transferred to Idearc Inc. without their knowledge or consent. They were given no explanation, there were not asked for permission, and they were not even informed of the transfer until several months after the fact. In their Second Amended Complaint ("SAC") (Docket 64), Plaintiffs assert seven claims for relief, all governed by a single federal law, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. All claims will be tried to the Court.

On August 26, 2011, Plaintiffs moved for partial summary judgment as to their Second, Third, Fourth and Sixth Claims for Relief asserted in the Second Amended Complaint. (See Docket 81). Also, on August 26, 2011, the Verizon Defendants moved for summary judgment as to the six claims asserted against them. (Docket 77).

In Count One of the SAC, Plaintiffs claim the Verizon EBC failed to give Plaintiffs a full and fair review of their administrative claim. Plaintiffs' undisputed material facts set forth below, together with their arguments and authorities set forth in their memorandum brief filed herewith, establish that there was a violation of ERISA Section 503(2), and the Court, accordingly, should deny the Verizon EBC a summary judgment on the First Claim for Relief.

In Count Two of the SAC, Plaintiffs contend the SuperMedia EBC failed to comply with

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[2] "OPEBs" are other post employment benefits, such as retirement health care, dental and life insurance coverage.

its statutory duties imposed by ERISA Section 102(b), 29 U.S.C. § 1022(b) and applicable Department of Labor regulations, since the retirees were not timely told that a corporate spinoff transaction could result in loss, forfeiture or offset of their continued participation in Verizon sponsored pension plans. Plaintiffs' undisputed material facts set forth below, together with their arguments and authorities set forth in their memorandum brief filed herewith, establish that there was a violation of ERISA Section 102(b)(2), and the Court, accordingly, should deny the Verizon EBC a summary judgment for Plaintiffs on the Second Claim for Relief.

In Count Three of the SAC, Plaintiffs contend that the Verizon EBC violated ERISA Sections 406(b)(2) and (b)(3), 29 U.S.C. §§ 1106(b)(2) and (b)(3). Plaintiffs' undisputed material facts set forth below, together with their arguments and authorities set forth in their memorandum brief filed herewith, establish that there were violations of ERISA Sections 406(b)(2 and (b)(3), and the Court, accordingly, should deny the Verizon EBC a summary judgment on the Third Claim for Relief.

In Count Four of the SAC, Plaintiffs contend the Verizon EBC violated the plan documents rules set forth in ERISA Section 404(a)(1)(D), 29 U.S.C. § 1132(a)(1)(D), and breached their fiduciary duty of loyalty in violation of ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1). Plaintiffs' undisputed material facts set forth below, together with their arguments and authorities set forth in their memorandum brief filed herewith, establish that there were violations of ERISA's duty of loyalty set forth in Section 404(a)(1) and ERISA's plan documents rules set forth in Section 404(a)(1)(D), and the Court, accordingly, should deny the Verizon EBC a summary judgment on the Fourth Claim for Relief.

In Count Six of the SAC, Plaintiffs contend that the Court should grant Plaintiffs and the

Class members appropriate equitable relief, as allowed under ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a) and 1132(a)(3). Plaintiffs ask the Court to enter an order requiring Defendants to restore Plaintiffs and Class members to their former status as participants in Verizon's employee benefit plans and order that Plaintiffs and Class members be made whole. Each of the required matters will be set forth in the Plaintiffs' memorandum brief filed herewith. Plaintiffs' undisputed material facts set forth below, together with their arguments and authorities set forth in their memorandum brief filed herewith, establish their entitlement to appropriate equitable relief under ERISA Sections 502(a)(2) and (a)(3), and the Court, accordingly, should deny the Verizon Defendants a summary judgment on the Sixth Claim for Relief.

In Count Seven of the SAC, an alternative claim, Plaintiffs contend the Court should grant Plaintiffs and the Class members relief pursuant to ERISA Section 502(a)(1)(B) and order payment of benefits from Verizon's employee benefit plans. Plaintiffs' undisputed material facts set forth below, together with their arguments and authorities set forth in their memorandum brief filed herewith, establish that there were violations of ERISA Sections 502(a)(1)(B), and the Court, accordingly, should deny the Verizon Defendants a summary judgment on Plaintiffs' alternative Seventh Claim for Relief.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

In an ERISA case as complicated as this one, the temptation is strong to gloss over the record and focus on abstract principles. The Verizon Defendants, regrettably, succumb to that temptation. In neither their motion nor their memorandum brief is there a section devoted to the undisputed material facts. Consequently, Plaintiffs must set the record straight with the

undisputed material facts set forth below, taken from the supporting documents, stipulations, Verizon Defendants' Answer to the Second Amended Complaint, interrogatory responses, affidavits and other materials set forth in Plaintiffs' Appendix filed as Docket 85 on August 26, 2011 and their Supplemental Appendix filed concurrently herewith:

1. Plaintiff Phillip A. Murphy is a U.S. citizen residing in Mills, Massachusetts. In December 1996, he retired from his employment with NYNEX Information Resources Company and commenced his pension in the form of a 100% joint and survivor annuity with a pop-up feature. (App. 473 ¶¶ 1-2).[3] In November 2006, he was a participant in the Verizon Pension Plan for New York and New England Associates and was transferred to an Idearc pension plan. (App. 62 ¶ 7).

2. Plaintiff Sandra R. Noe is a U.S. Citizen residing in Ipswich, Massachusetts. In April 1995, she retired from her employment with NYNEX Information Resources Company and commenced her pension in the form of a single life annuity. (App. 478 ¶¶ 1-2). In November 2006, she was a participant in the Verizon Pension Plan for New York and New England Associates and was transferred to an Idearc pension plan. (App. 62 ¶ 9).

3. Plaintiff Claire M. Palmer is a U.S. Citizen residing in West Newton, Massachusetts. In April 1995, she retired from her employment with NYNEX Information Resources Company and commenced her pension in the form of a single life annuity. (App. 482 ¶¶ 1-2). In November 2006, she was a participant in the Verizon Management Pension Plan and

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[3] Plaintiffs use the convention "App. 473 ¶¶ 1-2" to refer to Docket 85, Plaintiffs' Appendix of materials filed on August 26, 2011 and the specific page and paragraph number for either the document, Answer, stipulation or formal discovery material that supports the statement of undisputed material fact. Plaintiffs use the convention "Supp. App." to refer to their Supplemental Appendix filed concurrently herewith.

was transferred to an Idearc pension plan. (App. 63 ¶ 11).

4. The Verizon EBC and/or its chairperson is a fiduciary of and is the plan administrator for a number of Verizon pension and welfare benefit plans, including the pension plans in which Plaintiffs participated. (App. 63 ¶ 14).

5. As of the first quarter of 2006, Verizon Communication Inc. ("Verizon"), the sponsor of Plaintiffs' pension plans, was considering whether to spin-off its directories business, Verizon Information Services ("VIS"), and among the questions it considered was whether to transfer pension and/or OPEBs associated with inactive employees whose last service was with a directories business unit in the event of a spinoff. (App. 67-68 ¶ 36). (Hereinafter the proposed spinoff is referred to as the "Spin-off Transaction" or "Spin-off").

6. While it was a segment of Verizon, VIS had "underperformed its incumbent average due to the competitive nature of its markets and execution issues." (App. 284; App. 414-415, Fitzgerald Deposition Tr. 29:15-30-24). Verizon deemed VIS as having "limited opportunity for growth and value creation." (App. 284; App. 416, Fitzgerald Deposition Tr. 33:11-25; App. 423, Fitzgerald Deposition Tr. 83:3-6).

7. VIS had no separate pension or employee welfare benefit plans for either current or former workers. All of VIS's current or former workers were participating in Verizon sponsored pension and employee welfare benefit plans. (App. 2 ¶ 2.).

8. In mid-March 2006, VIS sent to Verizon a proposal with a recommendation that should Verizon spin-off VIS, Verizon should retain obligations for all management and union retirees' pension and OPEBs. (App. 223; App. 380-386, Hartnett depo 62:14-66:11).

9. There was no final decision regarding whether to transfer pension and/or OPEB

assets and/or liabilities associated with inactive employees whose last service was with a directories business unit at any time between January 2006 and early October 2006. (App. 68 ¶ 39).

10. Verizon planned for the spin-off entity to acquire about $9.1 billion of Verizon's debt. (App. 413, Fitzgerald Deposition Tr. 23:19-22). Verizon planned for the spin-off entity to have a debt over the amount of the current year estimated cash flow ratio of 5.8 to 1 and Verizon knew the spin-off entity had a limited opportunity for growth and value creation. Verizon planned to be left with a much better debt to annual cash flow ratio of 2 to 1. (App. 293; App. 421-423, Fitzgerald Deposition Tr. 81:14-83:6).

11. Within several weeks before the planned completion date of the Spin-off, VIS received a memorandum from an outside consulting and actuarial firm. (App. 3 ¶ 5; App. 7-8). VIS's consultant was performing due diligence on behalf of VIS. (App. 469, Gist Deposition Tr. 109:11-18). VIS's consultant concluded that "Overall, Verizon is in a better overall position to continue covering the retirees under their programs". (App. 8; App. 445-446, Gist Deposition Tr. 37:19-38:10; App. 448, Gist Deposition Tr. 40:18-25).

12. Within several weeks before the planned completion date of the Spin-off, VIS executives sought to have the better financed Verizon maintain responsibility for Plaintiffs and Class members, including the planned treatment of retiree OPEB liability. (App. 3 ¶ 6). In response to VIS executives' request, Verizon CEO Ivan Seidenberg wrote in an October 7, 2006 dated email that he spoke with VIS CEO and President Kathy Harless and told her "this is a dead on arrival" and he "advised her to stay out of the way and allow Andy and Mueller to deal with us." (App. 291; App. 418-419, Fitzgerald Deposition Tr. 53:9-54:20).

13. When VIS executives advocated that Verizon should not transfer the retirees, VIS was experiencing a steady decline in its yellow pages telephone directory business. VIS revenues from its yellow pages or "print products" decreased by $169 million between 2005 and 2006 alone. (Supp. App. 511).

14. Verizon's position when VIS executives advocated their position was that Verizon would not even consider keeping the retiree liabilities. (App. 288; App. 397, Hartnett Deposition Tr. 139:5-17). Therefore, VIS's request went no further. (App. 394, Hartnett Deposition Tr. 135:7-12 "And, of course, then I got the response from my boss [Verizon Executive Vice President John Diercksen] that no, we're not going to consider that. And, therefore it never went any further, other than me telling Bill [Gist] we're not considering it").

15. On or about October 18, 2006, Verizon publicly announced that its Board of Directors had approved the proposed spin-off of VIS to its stockholders as a separate, publicly traded company named Idearc Inc. (App. 294-302; App. 69 ¶ 41). Verizon's October 18, 2006 public disclosure and filing with the United States Securities Exchange Commission did not state that Verizon intended to transfer pension plan assets and liabilities, and/or OPEB liabilities, associated with inactive employees whose last service was with a directories business unit to Idearc or an Idearc pension plan as part of the spinoff transaction. (App. 69 ¶ 43). Verizon's official announcement did not mention retirees. (App. 303-304; App. 400, Hartnett Deposition Tr. 154:2-9).

16. When the October 2006 announcement was made, Plaintiffs were each previously retired from a Verizon sponsored pension plan and each was receiving pension benefits, welfare benefits and other incidental retiree benefits provided by Verizon. (App. 69 ¶ 42).

17. An email dated October 26, 2006 reflects that Verizon decided to retain management classified retirees who had earned rights to deferred vested pensions. (App. 305; App. 449-451, Gist Deposition Tr. 45:22-47:4). Verizon decided to retain responsibility for benefit obligations to management deferred vested pensioners in order to meet the requirements of what is known as the "3% de minimus rule" of the Pension Benefit Guaranty Corporation and, thus, avoid having to give the spinoff company, Idearc Inc., about $400 million which was the proportionate share of the surplus assets in the Verizon Enterprises Management Pension Plan. (App. 310; App. 209 "Generally, if assets and liabilities are spun-off to a plan while part of Verizon, the spun off plan must receive a proportionate share of surplus assets to meet its objectives"; App. 367-368, Hartnett Depo. Tr. 47:10-48:10; App. 401-402, Hartnett Depo. Tr. 156:20-21).

18. In a letter dated November 1, 2006, from Verizon CEO Ivan Seidenberg to Verizon's stockholders, there is information about the formation of Idearc with no mention of retirees being transferred to the new company. (App. 309; App. 452-453, Gist Deposition Tr. 48:19-49:16).

19. As of November 16, 2006, there were more than 100,000 participants in the Verizon sponsored pension plans in the aggregate. (App. 73 ¶ 62). Prior to the November 17, 2006 Spin-off, Plaintiffs and Class members were each previously retired from employment and each was participating in Verizon sponsored pension plans. (App. 2 ¶ 3). In November 2006, Class members comprised less than 3% of the total Verizon pension plan participant population, as there are 2,559 identified Class members. (App. 503 ¶ 6).

20. The Verizon EBC did not obtain a written opinion from independent counsel

regarding the advisability of transferring Plaintiffs and Class members to the spin-off entity. (App. 97 ¶ 204). The Verizon EBC did not have the proposed Spin-off Transaction reviewed and opined by an independent fiduciary as to the advisability of transferring Plaintiffs and Class members to the spin-off entity. (App. 97 ¶ 206).

21. No final decision regarding whether to transfer pension and/or OPEB assets or to transfer Plaintiffs and Class members was made by Verizon until November 17, 2006. (App. 69 ¶ 45).

22. On November 17, 2006, the final date of the Spin-off, Verizon and Idearc Inc. entered into an Employee Matters Agreement ("EMA"), executed by Verizon Executive Vice President John W. Diercksen and Idearc Inc. President Kathy Harless. (App. 3 ¶ 7; App. 44-45).

23. The EMA constituted Verizon's final decision to transfer the Plaintiffs and Class members from Verizon sponsored pension plans to the spin-off entity sponsored pension plans. (App. 70 ¶ 47).

24. The EMA is not a pension plan document and there are no terms within the Verizon pension plans expressly making the EMA part of any Verizon pension plan. (App. 70 ¶ 48).

25. The Spin-off was completed on November 17, 2006. (App. 3 ¶ 8).

26. Idearc Inc. began operations as an independent publicly traded corporation on November 17, 2006 when it was spun-off from Verizon. (App. 3 ¶ 9). Idearc is neither a "participating company" to Verizon's pension plans nor a Verizon affiliate. (App. 65 ¶ 21, App. 66 ¶ 26; App. ¶138).

27. Verizon gave the Verizon EBC, the fiduciary of Verizon's pension plans, ultimate responsibility for implementing Verizon's decision to transfer Plaintiffs and Class members out of Verizon sponsored pension plans to Idearc sponsored pension plans. (App. 88-89 ¶¶ 159 and 161). "Members of the Verizon Employee Benefits Committee were the Verizon personnel with principal responsibility for implementing the decision of Verizon, as settlor of the Verizon Pension Plans, to transfer assets and obligations relating to the pension benefits of former VIS employees to Idearc's pension plans in connection with the November 2006 Idearc spin-off transaction." (App. 112-113).

28. Prior to the November 17, 2006 Spin-off, each Plaintiff and Class member was participating in one of four Verizon sponsored pension plans:

> Verizon Pension Plan for New York & New England Associates (a union plan);
> Verizon Pension Plan for Mid-Atlantic Associates (a union plan);
> Verizon Management Pension Plan (a management plan); and
> Verizon Enterprises Management Plan (a management plan).

On November 17, 2006, Plaintiffs and Class members, based upon their nonmanagement or management retiree classification, were transferred into one of two Idearc sponsored pension plans:

> Idearc Pension Plan for Collectively Bargained Employees (a union plan); and
> Idearc Management Pension Plan (a management plan).

(App. 2 ¶ 3; App. 487, chart listing plans).

29. During November 2006, Verizon transferred hundreds of millions of dollars in pension assets to Idearc's master trust and pension plans. (App. 71 ¶ 52). In connection with the Spin-off in November 2006, Verizon made an initial transfer of approximately 90% of the pension assets required to be transferred by Section 414(l) of the Internal Revenue Code and the

regulations thereunder for all participants whose accrued benefits Verizon transferred to an Idearc pension plan. (App. 72 ¶ 55). The remaining approximately 10% of necessary pension assets, or $62.7 million, was not transferred until three years later, on November 20, 2009. (App. App. 490; App. 460, Gist Deposition Tr. 83:4-88:18).

30. Verizon was a party to the Spin-off transaction, the Spin-off transaction involved the Verizon pension plans and, as a result of the Spin-off transaction, Verizon distributed to all members of the Verizon EBC monetary consideration for their own personal accounts in the form of corporate stock issued by Idearc. The members of the Verizon EBC received one share of Idearc stock for every 20 shares of Verizon common stock owned. (App. 91 ¶¶ 173, 171).

31. As of November 2006, Plaintiffs and Class members were vested in one of Verizon's pension plans and Verizon did not seek their consent to their transfer or the transfer of pension assets or liabilities. (App. 73 ¶ 60). SuperMedia EBC has not identified any documents or information indicating that anyone obtained either Plaintiffs' or Class members' consent to be transferred out of Verizon sponsored pension plans into Idearc sponsored pension plans. (App. 3 ¶ 11).

32. In connection with the Spin-off transaction, Verizon transferred responsibility for Plaintiffs' and Class members' retiree benefits to Idearc. (App. 73 ¶¶ 63-64). Plaintiffs and Class members were simply transferred to Idearc without their knowledge or consent. (App. 97 ¶ 206).

33. Idearc pension plans assumed the obligations for payment of Plaintiffs' and Class members' pensions and Idearc Inc. assumed the obligation for payment of Plaintiffs' and Class members' OPEBs. The OPEBs consisted of health care, dental care and life insurance benefits

previously due from, and provided by, Verizon. (App. 4 ¶ 12).

34. Prior to the Spin-off Transaction, Verizon Defendants informed Plaintiffs and Class members by distributing summary plan descriptions ("SPDs") that stated there was a commitment by Verizon to continue paying monthly pension benefits for life:

> In general, is you are retired and receiving your monthly benefit or if you are receiving a surviving beneficiary benefit, the amount of your benefit will continue to be paid *by Verizon* without change.

(emphasis added). (App. 126, SPD for New York & New England Associates; App. 153, SPD for Mid-Atlantic Associates).

35. Prior to the Spin-off Transaction, Verizon never disclosed in a forfeiture clause included in a summary plan description issued to Plaintiffs that one manner in which a retiree's pension benefits could be reduced, lost, suspended, delayed or offset was by the plan sponsor unilaterally choosing to remove the retiree from a Verizon sponsored pension plan and transferring the retiree to a separate publicly traded corporation, as part of a spin-off. (App. 473-474, Murphy Affidavit ¶¶ 3-5; App. 478-479, Noe Affidavit ¶¶ 3-5; App. 483, Palmer Affidavit ¶¶ 3-5).

36. The word "spin-off" appears nowhere within the forfeiture clause set forth in the the SPDs last issued to Plaintiffs. (See generally, the forfeiture clauses within the SPDs issued to Plaintiffs and Class members – App. 127-129, the 2001 SPD for New York & New England Associates; App. 155-157, the 2001 SPD for Mid-Atlantic Associates; App. 185-186, the 2001 SPD for management retirees).

37. On December 22, 2006, Verizon adopted pension plan amendments which transferred pension assets and liabilities for certain current VIS employees and inactive

employees whose last service was with a VIS unit, including Plaintiffs and Class members, from Verizon sponsored pension plans to Idearc pension plans. These amendments made participation in the Idearc pension plans retroactively effective November 17, 2006. (App. 3 ¶ 10).

38. Each of the December 22, 2006 dated amendments for the Verizon management pension plans provides that Class members who were Verizon management retirees transferred to Idearc no longer have rights to continue participation in the Verizon management pension plan as of November 17, 2006. (App. 202 and 208). Both management pension plan amendments state, "As a result, except as provided in the paragraph below, former Employees described in the immediately preceding sentence shall cease to be eligible for a Pension or any other benefit from the Plan based on employment before the spin-off date." (*Id.*).

39. Each of the December 22, 2006 dated plan amendments for the Verizon union pension plans provides that Class members who were Verizon nonmanagement retirees transferred to Idearc no longer have rights to continue participation in the Verizon union pension plan as of November 17, 2006. (App. 132 and 160). Both union pension plan amendments state, "As a result, except as provided in the paragraph below, former Employees described in the immediately preceding sentence shall cease to be eligible for a Pension or any other benefit from the Plan based on employment before the spin-off date." (*Id.*).

40. Verizon EBC Chairman Marc C. Reed is the Verizon Executive Vice President who executed the belated pension plan amendments on December 22, 2006 that were made retroactive to November 17, 2006. (App. 113; App. 131; App. 159).

41. Verizon EBC did not disclose in any Summary of Material Modifications ("SMM") provided to Plaintiffs and Class members the execution date of the December 22, 2006

pension plan amendments and the fact that the terms of the amendments were applied retroactively. (App. 96 ¶ 202).

42. Verizon EBC member Donna C. Chiffriller put a hold on mailing of notices to retirees who were to be transferred out of Verizon's pension plans. (App. 313; App. 344-345, Wiley Deposition Tr. 117:20-118:23). As of November 21, 2006, just days after the Spin-off Transaction, the proposed letters for the retirees were on hold and "there were ongoing discussions whether or not these [letters] should be sent, and there is no current plan to send them at this time." (App. 316; App. 346, Wiley Deposition Tr. 127:2-25).

43. By letter dated on or about January 25, 2007, Verizon informed management retirees, including Plaintiff Palmer, that they had been transferred to Idearc. (App. 321; App. 454, Gist Deposition Tr. 58:6-22; App. 75 ¶ 73; App. 484 ¶ 97).

44. By letter dated on or about February 15, 2007, Verizon informed nonmanagement retirees, including Plaintiff Murphy and Plaintiff Noe, that they had been transferred to Idearc. (App. 322; App. 455, Gist Deposition 62:7-17; App. 75 ¶ 75; App. 474 ¶ 7; App. 479 ¶ 7).

45. By letter dated on or about March 28, 2007, Idearc notified Plaintiffs and Class members that, as a result of the Spin-off, Idearc assumed both the responsibility and obligations for the benefit plans of Idearc Inc. employees as well as retirees and other former employees whose final Verizon service was with VIS or an associated company. (App. 4 ¶ 16; App. 59).

46. Not until many months *after* the retirees were transferred did plan administrators first disclose in a benefit forfeiture clause contained in newly issued SPDs the consequences of a corporate spin-off: "**How Benefits Could Be Reduced, Lost, Suspended or Delayed**. . . • You transfer to another company as a result of a sale, spinoff or outsourcing arrangement, and

your benefit is transferred to and paid from another pension plan maintained by such other company." (emphasis original) (App. 140-142, the 2007 SPD for New York & New England Associates; App. 194-196, the 2007 SPD for management retirees).

47. Verizon did not provide Idearc Inc. any funding for Plaintiffs' and Class members' OPEB liabilities. (App. 4 ¶ 13; App. 468, Gist Deposition Tr. 108:18-21).

48. After being transferred to Idearc sponsored employee benefit plans, Plaintiffs continued to receive Verizon labeled documents and they did not receive a SuperMedia pension plan summary plan description. (Supp. App. 524-525, Murphy Affd. ¶ 8; Supp. App. 530-531, Noe Affd. ¶ 8; Supp. App. 536-537, Palmer Affd. ¶ 8).

49. Since they were transferred into Idearc/SuperMedia's pension plans and retiree rolls, Class members have been required to pay substantially more for their OPEBs than they would have been required to pay had they not been involuntarily transferred from Verizon. For instance, Plaintiff Murphy has paid over $5,000 for retiree health care coverage whereas his peers entitled to benefits from Verizon have paid nothing for their health care coverage. (App. 474-475 ¶ 9). Plaintiff Noe has had to pay more than $5,000 for Idearc/SuperMedia OPEBs and her peers entitled to benefits from Verizon have paid nothing for their OPEBs. (App. 479-480 ¶¶ 9-10).

50. On March 31, 2009, Idearc Inc, commenced Chapter 11 bankruptcy proceedings within the Dallas Division of this District. On December 31, 2009, Idearc Inc. emerged from Chapter 11 bankruptcy proceedings and announced it had changed its name to SuperMedia Inc. The Idearc EBC was renamed the SuperMedia EBC. (App. 4 ¶ 14).

51. When Idearc Inc emerged from bankruptcy with a changed name of SuperMedia,

Inc. the corporation's common stock started trading on January 4, 2010 at $49.00 per share. Today, SuperMedia's common stock share price is not much higher than $2.00 per share, thus, Plaintiffs and Class members are concerned about the potential for another bankruptcy. (App. 485 ¶ 10).

52. SuperMedia EBC is the current plan administrator of SuperMedia's pension plans and has assumed responsibilities for Plaintiffs' and Class members' pensions. SuperMedia EBC administers such plans within this District at 2200 West Airfield Drive, D/FW Airport, Texas. SuperMedia EBC is a body appointed by SuperMedia Inc. and, as a body, performs certain designated fiduciary and administrative functions under SuperMedia Inc.'s pension plans. (App. 4 ¶ 15).

53. The SuperMedia Pension Plan for Collectively Bargained Employees, the pension plan for both Plaintiff Murphy and Plaintiff Noe, is underfunded. (App. 466-467, Gist Deposition Tr. 92:13-93:15; App. 234, Annual Funding Notice reporting liabilities of $185,344,000 with assets of $157,989,760).

54. SuperMedia Inc. has stipulated in this case to become bound by certain equitable judicial relief entered herein. (Docket 15 at ¶ 3).

55. SuperMedia EBC concedes in this case that "[t]o the extent the Court determines a SuperMedia Defendant is needed to effectuate an order transferring retirees back to Verizon's pension plans, the plans' administrator is the appropriate party—SuperMedia EBC." (Docket 29 at p. 3 & n.4).

III. CONCLUSION AND REQUEST FOR ORAL ARGUMENT

In view of all of the aforesaid undisputed facts and for all the reasons set forth in Plaintiffs' memorandum brief filed herewith, this Court should deny (Docket 77) Verizon Defendants' Motion for Summary Judgment. Due to the importance of the issues in this civil action, which case is being monitored by hundreds of Class members, the complexity of the case and the unique legal arguments posed by both sides, an oral argument hearing may be useful to the Court and is requested.

DATED this 14th day of October, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2011, 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 and a courtesy copy was emailed to Defendants' counsel as follows:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF TEXAS
DALLAS DIVISION

PHILIP A. MURPHY, Jr.,	§	
SANDRA R. NOE, and	§	
CLAIRE M. PALMER,	§	
Individually, and as Representatives of plan	§	
participants and plan beneficiaries of	§	
VERIZON's PENSION PLANS	§	
involuntarily re-classified and treated as	§	
transferred into SuperMedia's PENSION PLANS,	§	
	§	
Plaintiffs,	§	
vs.	§	CIVIL ACTION NO. **3:09-cv-2262-G**
	§	ECF
VERIZON COMMUNICATIONS INC.,	§	
VERIZON CORPORATE SERVICES GROUP INC.,	§	
VERIZON EMPLOYEE BENEFITS COMMITTEE,	§	
VERIZON PENSION PLAN FOR NEW YORK	§	
AND NEW ENGLAND ASSOCIATES,	§	
VERIZON MANAGEMENT PENSION PLAN,	§	
VERIZON ENTERPRISES MANAGEMENT	§	
PENSION PLAN,	§	
VERIZON PENSION PLAN FOR MID-ATLANTIC	§	
ASSOCIATES,	§	
SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE,	§	
	§	
Defendants.	§	

PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' OPPOSITION TO (Docket 77) VERIZON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

DATED this 14[Th] day of October, 2011.

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Plaintiffs PHILIP A. MURPHY, JR., SANDRA R. NOE, and CLAIRE M. PALMER, by and through their counsel, file their Brief in support of their opposition to (Docket 77) Verizon Defendants' Motion for Summary Judgment as to Claims One, Two, Three, Four, Six and Seven of the Plaintiffs' Second Amended Complaint ("SAC").[1]

STATEMENT OF UNDISPUTED FACTS

In an ERISA case as complicated as this one, the temptation is strong to gloss over the record and focus on abstract principles. The Verizon Defendants, regrettably, succumb to that temptation. In neither their motion nor their memorandum brief is there a section devoted to the undisputed facts. In accordance with Local Rule 56, the undisputed facts are set out in Plaintiffs' Opposition to the Verizon Defendants' Motion for Summary Judgment filed simultaneously with this Brief. Plaintiffs incorporate their Appendix filed as Docket 85 on August 26, 2011 which Appendix (hereinafter "App.") consists of pages 1-503. Plaintiffs also incorporate their Supplemental Appendix (hereinafter "Supp. App.") which consists of pages 504-581 filed concurrently herewith.

BACKGROUND AND SUMMARY OF ARGUMENT

On November 25, 2009, Philip A. Murphy, Jr., Sandra R. Noe and Claire M. Palmer (collectively, "Plaintiffs"), filed this civil action against the Verizon Defendants and the Idearc/SuperMedia Defendants on behalf of themselves and others similarly situated, alleging that this action should be certified as a class action. All of the asserted claims are governed by a single federal law, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.

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[1] Claim Five of the SAC is not directed against the Verizon Defendants.

§§ 1001-1461. All claims will be tried to the Court. On March 3, 2011, the Court certified this case as a class action and set forth in the order a Fed.R.Civ.Proc Rule 23(c)(1)(B) description of the claims as, *inter alia*, "[w]hether plaintiffs and the class are entitled to 'other appropriate equitable relief' under ERISA § 502(a)(3) as a result of the transfer of plaintiffs and class members to Idearc pension plans.'" (Docket 55, p. 2). On June 21, 2011, Plaintiffs filed their "Second Amended Complaint for Proposed Class Action Relief Under ERISA." (Docket 64).

Plaintiffs' claims arise out of actions by Defendants Verizon Communications, Inc. ("Verizon") and Verizon Employee Benefits Committee (together referred to as "Verizon Defendants") during November and December 2006 to involuntarily transfer Plaintiffs and members of the certified class (the "Class") out of Verizon's long established pension plans into pension plans of a newly formed, highly leveraged spin-off company, Idearc Inc. (hereinafter the "Spin-off"). Idearc Inc. is now known as SuperMedia Inc.[2] As a result, Defendant SuperMedia Employee Benefits Committee ("SuperMedia EBC") became the plan administrator of Plaintiffs' and Class members' pension and retiree welfare benefits.

---

[2] On March 31, 2009, Idearc Inc. and its domestic subsidiaries filed within the Dallas Division of this District voluntary petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code. On May 7, 2009, Idearc's attorney described to the bankruptcy court the debt load and initial capital structure that Verizon forced upon Idearc as:

> It's simply the company, when the spin occurred two and a half years ago it was saddled with too much debt. And that became a problem that the company recognized proactively and very aggressively and moved to remedy in the context of filing this Chapter 11 case.

(Supp. App. 508, Tr. 17:9-13). As of January 4, 2010, Idearc Inc. emerged from Chapter 11 bankruptcy proceedings and changed its name to SuperMedia Inc. (App. 4 ¶ 14).

Prior to the November 17, 2006 Spin-off, each Plaintiff and Class member was participating in one of the following four Verizon sponsored pension plans:

Verizon Pension Plan for New York & New England Associates (a union plan);
Verizon Pension Plan for Mid-Atlantic Associates (a union plan);
Verizon Management Pension Plan (a management plan); and
Verizon Enterprises Management Plan (a management plan).

On November 17, 2006, Plaintiffs and Class members, based upon their nonmanagement or management retiree classification, were transferred into one of two Idearc sponsored pension plans:

Idearc Pension Plan for Collectively Bargained Employees (a union plan); and
Idearc Management Pension Plan (a management plan).

The involuntary transfer of Plaintiffs and Class members to Idearc proved to be a huge economic detriment to the retirees and their beneficiaries. The transferred retirees suffered significant loss of security in pension benefits, and their pension benefits continue to be jeopardized by the fact that Idearc/SuperMedia proves to be a financially weak plan sponsor. All of the Plaintiffs' and Class members' non-qualified pension benefits, plus their unfunded retiree welfare benefits, are in jeopardy of being totally lost, and the retirees have already suffered a loss of retiree welfare benefits not suffered by tens of thousands of retirees who remained enrolled in Verizon's sponsored pension and welfare benefit plans.

The uncontroverted evidence establishes that Plaintiffs and Class members were simply transferred to Idearc's employee benefit plans without their knowledge or consent. They were given no explanation, there were not asked for permission, and they were not even informed of the transfer until several months after the fact. The outcome for the retirees that the Verizon Defendants ask this Court to countenance is precisely what ERISA was enacted to prohibit:

action that is contrary to retirees' best interests; action that is contrary to pension plan terms; and enforcement of an undisclosed, unexplained *post hoc* changes to retirement plans upon which the plan sponsor and administrators rely to justify abandoning their responsibility for the retirees' vested accrued and associated retiree benefits. While the defendants may contend that the action taken against the retirees was "proper," Plaintiffs contend the defendants engaged in a complete disregard of the rights and interests of the retirees and a clear breach of ERISA statutory duties, including ERISA Section 404(a)(1) fiduciary duties.

Sitting in equity and deciding the asserted ERISA claims, this district court is a "court of conscience." *United States v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996) (quoting *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 90, 18 L.Ed. 727 (1867). For all of the following reasons, this Court should deny Verizon Defendants a summary judgment as to Claims One, Two, Three, Four, Six and Seven. Furthermore, this Court should grant Plaintiffs a partial summary judgment, as requested in Docket 81, and this Court should order the defendants to restore Plaintiffs and Class members to their former status as participants in Verizon's employee benefit plans and to otherwise make the retirees whole.

RULE 56 STANDARD

Plaintiffs have no disagreement with Verizon Defendants' recitation and argument concerning Fed.R.Civ.Proc. Rule 56(a), as set forth in Docket 78, the Verizon Defendants' Memorandum Brief at p. 21. Plaintiffs emphasize that, when ruling on a motion for summary judgment, the Court is required to view all facts and inferences in the light most favorable to the nonmoving party and resolve all disputed facts in favor of the nonmoving party. *Boudreaux v. Swift Transp. Co., Inc.*, 402 F.3d 536, 540 (5th Cir. 2005). A court "may not make credibility determinations or weigh the evidence" in ruling on motion for summary judgment. *Reeves v.*

Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S.Ct. 2097, 2110 (2000); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 254-55, 106 S.Ct. 2505, 2513 (1986).

ARGUMENT AND AUTHORITIES

I. The Undisputed Evidence Establishes Plaintiffs' Fourth Claim for Relief – Breach of Fiduciary Duty.

In their Memorandum Brief, the Verizon Defendants attack Plaintiffs' claims set forth in the SAC out of numerical order and, therefore, Plaintiffs address the claims in the same sequence. First, Verizon Defendants offer the following arguments for summary judgment dismissal of Plaintiffs' Fourth Claim for Relief: (1) during the Spin-off transaction, there was no statutory violation because sufficient assets were transferred to the Idearc pension plans in compliance with ERISA Section 208; (2) spinning off assets and liabilities of the pension plans is a "settlor" rather than "fiduciary" function; and (3) when the spinoff occurred, Verizon's pension plans allowed for the transfer of pension assets and liabilities. (Docket 78, pp. 22-35). All of the defendants' arguments completely miss the mark. First, Plaintiffs' Fourth Claim for Relief is neither about the amount of assets that were transferred nor about whether the funding requirements of ERISA Section 208 were met. The claim concerns the involuntary surreptitious transfer of persons all having vested rights to Verizon sponsored pension benefits. Second, the "settlor" versus "fiduciary" argument does not aid the Verizon Defendants. An employer's decision to modify or terminate an ERISA plan is a "settlor" rather than "fiduciary" function, see *Beck v. PACE Int'l Union*, 551 U.S. 96, 101, 127 S.Ct. 2310, 1216 (2007), but the question here is whether the modification attempt was permissible manner under ERISA and consistent with existing pension plan terms. Third, the issue posed by Claim Four is not whether Verizon's pension plans allowed the plan sponsor to transfer excess assets or liabilities, but whether plan

terms allowed for the involuntary removal from the plans the Class of retirees all having vested rights to Verizon sponsored benefits.

A. The Involuntary Transfer of Verizon Retirees Violated the Rules of the Governing Plan Documents and Verizon Plan Fiduciaries' Duty of Loyalty, the Basis for Plaintiffs' Fourth Claim for Relief.

An employer plan sponsor that also acts as a plan administrator is said to wear "two hats." When the employer acts in its fiduciary capacity, it must comply with ERISA's fiduciary duties. ERISA Section 3(21) defines a plan "fiduciary" as one who "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets" or who "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). Accordingly, courts have typically distinguished between employer actions that constitute "managing" or "administering" a plan and those that are said to constitute merely "business decisions" that have an effect on an ERISA plan; the former are deemed "fiduciary acts" while the latter are not. In the case of welfare plans, a company does not act in a fiduciary capacity when deciding to amend or terminate the plans. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78, 115 S.Ct. 1223, (1995) ("Employers or other plan sponsors are generally free under ERISA for any reason at any time, to adopt, modify, or terminate welfare plans."). Welfare plan sponsors are generally free to make changes to welfare benefits due to Congress' considered decision that welfare benefit plans are not subject to a vesting requirement. However, in the case of pension plans, ERISA provides for automatic vesting of pension plan rights and places strict limitations on an employer's ability to transfer pension plan liabilities. See ERISA Sections 201, 208, 29 U.S.C. §§ 1051, 1058.

When the Spin-off occurred on November 17, 2006, all defendants acted as if the November 17, 2006 Employee Matters Agreement ("EMA") governed the retirees' rights. In their Memorandum Brief, Verizon Defendants sheepishly suggest that the Verizon Board of Directors' authorization for the EMA document to be executed "*could* be viewed as an amendment to the Verizon plans. . ." (emphasis added). (Docket 78, p. 32). However, this position is belied by Verizon Defendants' prior admission that the EMA is not a plan document. (App. ¶ 48). In their answer to Plaintiffs' prior complaint, Verizon Defendants more directly admitted that "[t]he EMA is neither a governing pension plan document nor an amendment to Verizon's pension plans." (Docket 20, Verizon Defendants' Answer to Amended Complaint ¶ 30 admitting the allegations of Amended Complaint ¶ 30; See also, Defts' Appx. 501, "The Committee agrees that the EMA is not a governing document for the Plans and does not constitute an amendment to the governing document for the Plans."). SuperMedia EBC admits that the "Employee Matters Agreement was an exhibit to the Distribution Agreement and that an Idearc officer signed the Distribution Agreement." (Docket 34, SuperMedia's Answer to Amended Complaint ¶ 30). Therefore, the EMA never governed the retirees' pension plan rights.

In an ERISA case, only the applicable plan documents govern the rights and obligations of a participant, beneficiary, administrator or fiduciary. See, e.g., *Walker v. Wal-Mart Stores, Inc.*, 159 F.3d 938, 940 (5th Cir. 1998) (per curiam) (stating that a court must "interpret ERISA plans' provisions as they are likely to be 'understood by the average plan participant,' consistent with ERISA's statutory drafting requirements") (quoting 29 U.S.C. § 1022(a)(1)).

1. The Governing Plan Documents Allowed Only Transfers of Assets and Liabilities, Not Participants or Beneficiaries. Plaintiffs

and Class Members Are Neither "Assets" Nor "Liabilities".

When asked in an interrogatory to identify the specific terms of the pension plans that permitted Verizon to transfer Plaintiffs and Class members out of Verizon sponsored pension plans, Verizon Defendants identified section 20.6 of the union pension plans and section 11.3 of the management pension plans. (App. 440). Section 20.6 of the union plans impose a condition whenever assets or liabilities are merged, consolidated or transferred to another plan. (App. 122 ¶ 20.6; App. 150 ¶ 20.6). The condition is that, whenever assets or liabilities are transferred to another plan, the plan sponsor and administrator must insure that the benefit that each participant in the pension portion of the Verizon plan would receive, if there were a termination immediately after a merger consolidation or transfer of assets or liabilities, not be less than the participant would have received if there were a termination of the Verizon plan immediately before the merger, consolidation or transfer of assets or liabilities. (*Id.*). Section 20.6 says nothing about a right to transfer retired persons or other participants or beneficiaries.

Likewise, section 11.3 of the management pension plans imposes essentially the same condition on the transfer of assets or liabilities as applied to the union plans and, again, says nothing about a right to transfer retired persons, other participants or beneficiaries. Section 11.3 states in relevant part:

> [N]o such merger, consolidation, or transfer shall be consummated unless each Employee, Retired Employee, former Employee and Beneficiary under the [Verizon] Plan would, if the resulting plan then terminated, receive a benefit immediately after the merger, consolidation, or transfer, if the [Verizon] Plan had then terminated;. . .

(App. 171-172 ¶ 11.3; App 177-178 ¶ 11.3).

Not one line within either the extensive and reticulated text of ERISA, accompanying

regulations or the terms of Verizon's pension plans suggest that the meaning of "assets" and "liabilities" includes retired persons. ERISA Section 3(42) states that "the term 'plan assets' means plan assets as defined by such regulations as the Secretary [of Labor] may prescribe, except that under such regulations the assets of any entity shall not be treated as plan assets if, immediately after the most recent acquisition of any equity interest in the entity, less than 25 percent of the total value of each class of equity interest in the entity is held by benefit plan investors...." 29 U.S.C. § 1002(42). The United States Department of Labor ("DOL"), the federal agency charged with administering and enforcing Title I of ERISA, issued a regulation in 1986 that gives the term "plan assets" a very ordinary monetary and investment connotation and does not include either persons or plan participants. See 29 C.F.R. § 2510.3-101. The DOL has advised that plan assets should be identified based on "ordinary notions of property rights." See, U.S. Department of Labor, Advisory Op. No. 93–14A (May 5, 1993) (letter sent to the Covington & Burling law firm stating, ". . .the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law.") (App. 494, 497).[3] Put simply, persons are not property rights to which either the plan or the plan sponsor has any beneficial ownership interest.

Courts have focused solely on categorizing items of financial concern as "plan assets." See e.g., *Kayes v. Pacific Lumber Co*., 51 F.3d 1449, 1468 (9th Cir.1995) (holding collateral for a bridge loan was a plan asset); *Michigan Elec. Employees Pension Fund v. Encompass Elec. & Data, Inc*., 556 F.Supp.2d 746, 779 (W.D. Mich. 2008) (finding that unpaid benefit contributions

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[3] Federal agency interpretations in opinion letters are "entitled to respect" to the extent they have the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 164 (1944).

were assets of the plan); *Operating Engineers' Local 324 Fringe Benefit Funds v. Nicolas Equip., L.L.C.*, 353 F.Supp.2d 851, 854 (E.D. Mich. 2004) (holding a company's contributions to benefit funds, as they become due, constitute plan assets under ERISA); *Reich v. Lancaster*, 843 F.Supp. 194, 202–03 (N.D. Tex.1993), *aff'd*, 55 F.3d 1034 (5th Cir.1995) (payment of commissions and fees paid to service providers constitutes transfer of plan assets because agent improperly purchased policies that offered him extra compensation); *In re Consolidated Welfare Fund ERISA Litig*., 839 F.Supp. 1068, 1073 (S.D. N.Y. 1993) (commission earned for investment plan management constitutes "plan assets" under ERISA). There are no reported court cases wherein plan participants or retirees have been categorized as plan "assets."

Nor are participants assets because of any phantom allocation of plan assets to them. "A defined benefit plan," such as each of the four Verizon pension plans involved in this case, "consists of a general pool of assets" . . and . ."no plan member has a claim to any particular asset that composes a part of the plan's general asset pool." *Hughes Aircraft v. Jacobson*, 525 U.S. 432, 439-440, 119 S.Ct. 755, 761 (1999). When Verizon decided to transfer pension assets to Idearc for the Spin-off, none of the assets could be tied or traced to any particular retiree. Verizon Defendants cannot substantiate their argument that the assets transferred to Idearc were "associated with class members' pension benefits." (Docket 78, p. 20).

Likewise, none of Verizon's pension plans contain terms that define "liabilities" so as to include retired persons. ERISA itself does not define "liabilities." In their Memorandum Brief at p. 31, Verizon Defendants distort portions of Treasury Regulation § 1.414(*l*)-1(o) and falsely suggest it defines liabilities so as to encompass the transferred employees. (Docket 78, p. 31

citing 26 C.F.R. § 1.414(*l*)-1(o)).[4] Another Treasury Regulation provides, in relevant part: "The term 'liabilities' as used in section 401(a)(2) includes both fixed and contingent obligations to employees." 26 CFR § 1.401–2(b)(2). That is to say, the very definition of "liabilities" excludes individuals. This is certainly the case under the most accepted definition of liabilities, the one used by the Financial Accounting Standards Board (FASB): "Liabilities are probable future sacrifices of economic benefits arising from present obligations of a particular entity to transfer assets or provide services to other entities in the future as a result of past transactions or events." (App. 497, FASB Statement of Financial Accounting Concepts No. 6, at p. CON6-13, ¶ 35).

Plaintiffs concede that Verizon, as plan sponsor, had the right to assign to another fund or trust the responsibility for paying very limited amounts otherwise payable by Verizon pension plans, such as administrative costs, asset investment fees, actuarial fee charges, costs of SPD photocopying and distribution, or certain benefit claims. That is self-evidently not a license for the plan sponsor to remove from the pension plans a select group of retirees having vested pension rights. Neither Section 20.6 of the union plans nor Section 11.3 of the management pension plans permit the suggestion that the plan sponsor had the right to either remove, sell, trade, barter, or transfer retirees and treat them as if they were mere property rights. Retired

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[4] Treasury Regulation 26 C.F.R. § 1.414(*l*)-1(o) states: **Transfers of assets or liabilities.** Any transfer of assets or liabilities will for purposes of section 414(l) be considered as a combination of separate mergers and spinoffs using the rules of paragraphs (d), (e) through (j), (l), (m), or (n) of this section, whichever is appropriate. Thus, for example, if in accordance with the transfer of one or more employees, a block of assets and liabilities are transferred from Plan A to Plan B, each of which is a defined benefit plan, the transaction will be considered as a spinoff from Plan A and a merger of one of the spinoff plans with Plan B. The spinoff and merger described in the previous sentence would be subject to the requirements of paragraphs (n) and (e) through (j) of this section respectively. (emphasis in original).

persons, plan participants, have none of the characteristics of either assets or liabilities.

Most notably, both Verizon and Idearc agreed upon a definition of liabilities that does not include persons. Section 1.1 at page 4 of the November 17, 2006 EMA states:

> Liabilities'" means any and all losses, claims, charges, debts, demands, actions, costs and expenses (including administrative and related costs and expenses of any plan, program or arrangement), of any nature whatsoever, whether absolute or contingent, vested or unvested, matured or unmatured, liquidated or unliquidated, accrued or unaccrued, known or unknown, whenever arising.

(App. 17, Section 1.1).

Moreover, Verizon's own pension plans prohibited a change that affected the employee's benefit rights without the consent of an employee with vested benefits. Section 15.1(b) of the Verizon Pension Plan for New York & New England Associates states: "A change or termination shall not affect the rights of any Employee, without his or her consent, to any benefit or pension to which he may have previously become entitled hereunder." (App. 121, Section 15.1(b)); See, also Section 15.1(b) of the Verizon Pension Plan for Mid-Atlantic Associates. (App. 149) (stating same). Retirees with vested pension rights necessarily have such protection.

In interpreting the provisions of Sections 15.1(b) and 20.6 in Verizon's union plans and Section 11.3 in Verizon's management plans, the Court should recognize that ERISA's central objective is to protect the interests of employees and retirees and to guard against the termination of vested benefits. See ERISA Section 2, 29 U.S.C. § 1001; *Shaw v. Delta Air Lines*, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896 (1983). The Court should, accordingly, declare that, while the Verizon pension plans contain provisions for the plan sponsor to transfer assets and liabilities, the plans do not contain any authorization for the plan sponsor to unilaterally and involuntary remove retirees with rights to vested benefits.

2. Verizon Defendants Wrongly Retroactively Applied Plan Amendments Adopted After the Retirees Were Transferred.

When the Spin-off occurred on November 17, 2006, existing Verizon pension plan terms permitted only the transfer of assets or liabilities. There were, as noted, no existing terms or provisions allowing Verizon to remove the retirees and transfer them to Idearc, but actually, prohibitions of doing such. The fact that the November 17, 2006 EMA reflected an intent that the pension plans be amended is nothing more than that, and the plans' terms as then written remained in effect. The Supreme Court emphasized the importance of the plan documents rule in *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 555 U.S. 285, 129 S.Ct. 865 (2009).[5] In *Kennedy*, the Supreme Court declared that ". . .ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule. . ." *Id.,*129 S.Ct. at 875. A court should reject efforts to stray from the express terms of a pension plan, regardless of whom those express terms may benefit. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002). On November 17, 2006, all Plaintiffs and Class members had vested rights to continue as participants in the Verizon sponsored pension plans.

The Verizon EBC and plan administrators, by removing Plaintiffs and Class members from such plans, thereby breached their duties to continue administering benefits in strict accordance with existing plan terms. They improperly participated in the plan sponsor's devious scheme to retroactively apply amendments adopted after the retirees had been surreptitiously

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[5] ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), is commonly known as the "plan documents rule." The Supreme Court amplified that a "plan administrator is obliged to act 'in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA],' § 1104(a)(1)(D), and the Act provides no exemption from this duty when it comes time to pay benefits.'" *Kennedy,* 129 S.Ct. 865, 875 (2009).

transferred to Idearc. On December 22, 2006, Verizon adopted amendments stating the retirees were no longer eligible, as of November 17, 2006, to participate in Verizon's pension plans. Such action was wrongful because courts have consistently held that attempts to backdate plan amendments and apply them retroactively so as to defeat plan participants' rights are ineffective to amend the plan. *Confer v. Custom Engineering Company*, 952 F.2d 41 (3rd Cir. 1991); *Member Svcs. Life Ins. Co. v. Amer. Nat'l Bank & Trust Co. of Sapulpa*, 130 F.3d 950, 954-956 (10th Cir. 1997); *Winterrowd v. American General Annuity Ins.*, 321 F.3d 933 (9th Cir. 2003).

In their Memorandum Brief at page 32, Verizon Defendants' rely upon *Penn v. Howe-Baker Engineers, Inc*., 898 F.2d 1096 (5th Cir. 1990) and *Dyce v. Salaried Employees' Pension Plan of Allied Corp*., 15 F.3d 163 (11th Cir.1994) as appellate authority approving what was done to the Plaintiffs and Class members. Both *Penn* and *Dyce* are distinguishable in significant ways from this case.

In *Penn*, the plaintiff challenged a pension plan amendment that changed the method of calculating vested service from a "1,000 hours" to an "elapsed time" method. The plan amendment executed in February 1984 and made retroactive to January 1, 1984 and had been specifically approved by the IRS. The appellate court was most critical of the complaining plaintiff's claim since the "amendment itself did not result in a lessening of Penn's vested percentage of the accrued benefit since at the time the amendment was adopted, Penn had zero vesting in any benefits." *Penn*, 898 F.2d at 1104.

In *Dyce*, the parent company's wholly owned subsidiary maintained its own pension plan, which provided that when employees were terminated from employment and they elected to take early retirement, they would be eligible for and receive certain special pension benefits.

Before any of the employees had elected to retiree, the subsidiary was merged with another parent company. All plaintiffs continued their employment without interruption. As part of the deal, the former subsidiary's pension plan was amended eight months after the merger and change in ownership and the amendment was made retroactive to the date of merger to provide that the change in ownership would not be deemed a termination of employment and, thus a triggering date for payment of early retirement benefits. The plaintiff group of employees contended that the merger had resulted in the employees' departure from the former parent company, thus triggering benefits under the unamended plan, and contended the retroactive change to the ERISA plan was improper. The court determined the retroactive application of the plan amendment was permissible upon finding that the employees had not previously elected to retire from the prior parent company and the second parent company had effectively stepped into the shoes of the prior parent company, and the employees had not experienced any loss or change in benefits. *Whitt v. Sherman Intern. Corp.*, 147 F.3d 1325, 1331-32 (11th Cir. 1998) (explaining *Dyce*).

In contrast to the situation in *Dyce* involving employed persons, here, all Class members were retired with vested benefit rights. All of the *Dyce* employees remained in the same pension plan and none were removed from continued participation. Moreover, the retroactive effective date of Verizon's *post hoc* pension plan amendments violated the terms of the Verizon pension plans. Specifically, on December 22, 2006, Verizon amended section 5.11 to the Verizon Pension Plan for New York and New England Associates (App. 132). The changed provision was given a stated effective date of November 17, 2006. (*Id.*). However, the pension plan had no term permitting an amendment to section 5.11 to be retroactively applied so as to

affect participants in retirement status. Indeed, the Verizon Pension Plan for New York & New England Associates had and continues to have the following provision specifically preventing Verizon Defendants from applying the December 22, 2006 change to section 5.11 so as to adversely affect the rights of retirees, persons who were separated from employment service:

> In the case of <u>a provision with a stated effective date</u> earlier or later than January 1, 1999, the provision <u>shall</u> <u>apply</u> (if otherwise applicable) <u>only to Employees who perform services for the Company or Affiliate on or after the stated effective date</u>. . . . The provisions of section 5.10 and Articles X, XIII, XIV, XV and XX shall apply to all Participants, regardless of the date of separation from service.

(emphasis added) (App. 116, Section 1.2(b)). Clearly, the intent of the pension plan was for any retroactive change to section 5.11 to be effective only for persons performing employment services. The pre-amendment Section 5.11 of the New York & New England Associates plan provided in pertinent part:

> **5.11 Offset Due to Transfer of Benefit Obligation**.
> In the case of an Employee whose entire obligation is assumed. . . (d) by a plan maintained by an entity which is a successor to all or part of a Participating Company, no benefits shall be paid under this Plan.

(emphasis original) (App. 118, Section 5.11). The New York and New England Associates plan defines "Employee" as "any individual employed by the Company or an Affiliate." (App. 117, Section 2.28). "Employee" does not include inactive employees, persons such as Plaintiffs and Class members who are in retirement status.

When Verizon Defendants amended Section 5.11, they failed to realize their hands were tied by virtue of the rule stated in Section 1.2(b) precluding retroactive effect to any amendment to Section 5.11 except with respect to persons actively employed by Verizon. It was wrong for Verizon Defendants to give the December 22, 2006 amendment retroactive application so as to defeat Plaintiff Murphy's, Plaintiff Noe's and other Class members' rights to continued

participation in the Verizon Pension Plan for New York and New England Associates.

Likewise, Verizon Defendants repeated the same wrongdoing with respect to Class members who were participants in the Verizon Pension Plan for Mid-Atlantic Associates. On December 22, 2006, Verizon amended section 5.12 to the Verizon Pension Plan for Mid-Atlantic Associates (App. 160). Pre-amendment Section 5.12 of the plan contemplated an obligation to an active employee being transferred or assumed by another pension plan, not an obligation to a person in retirement status:

> **5.12 Offset Due to Transfer of Benefit Obligation**.
> In the case of an Employee whose entire obligation is assumed. . . (d) by a plan maintained by an entity which is a successor to all or part of a Participating Company, no benefits shall be paid under this Plan.

(emphasis original) (App. 147, Section 5.12). Once again, "Employee" is a defined term under this plan as well meaning "any individual employed by the Company or an Affiliate." (App. 145, Section 2.25). "Employee" does not include inactives employees, persons such as Plaintiffs and Class members who are in retirement status.

About five weeks after transferring the retirees, Verizon likewise amended Section 5.12 of the Verizon Pension Plan for Mid-Atlantic Associates and gave the changed provision a stated effective date of November 17, 2006. Again, such a retroactive change as to retirees was precluded.

Finally, the Verizon Pension Plan for Mid-Atlantic Associates had and continues to have provisions which likewise served to prevent Verizon Defendants from applying the December 22, 2006 change to section 5.12 so as to affect the rights of retirees, persons who were separated from employment service:

In the case of a provision with a stated effective date earlier or later than January

> 1, 1999, the provision shall apply (if otherwise applicable) only to Employees who perform services for the Company or Affiliate on or after the stated effective date. . . . The provisions of section 5.11 and Articles X, XIII, XIV, XV and XX shall apply to all Participants, regardless of the date of separation from service.

(emphasis added) (App. 144, Section 1.2(b)). Clearly, the intent of the Mid-Atlantic Associates union plan was for Section 5.12 to be effective only as to persons performing employment services. When Verizon Defendants amended Section 5.12, they failed to take any account of the rule stated in Section 1.2(b). It was, accordingly, wrong for Verizon Defendants to give the December 22, 2006 amendment retroactive application so as to defeat Class members' rights to continued participation in the Verizon Pension Plan for Mid-Atlantic Associates.

Verizon Defendants tried to adversely affect the vested rights of management retirees as well. About five weeks after Plaintiff Palmer and other management retirees were surreptitiously removed from Verizon's management pension plans and enrolled in Idearc's management pension plan, Verizon made plan amendments purportedly retroactive to November 17, 2006. (App. 201, Schedule VIII; App. 207, Schedule XLV). The amendments removed Plaintiff Palmer and other management retirees, all persons with vested rights, from Verizon sponsored plans and specifically stated those persons "shall cease to be eligible for a Pension or any other benefit from the Plan based on employment before the spin-off date." (App. 202; App. 208).

Verizon EBC's conduct violated the terms of Section 11.2 of both management pension plans providing that "no amendment shall reduce any benefit, or the percentage (if any) of such benefit that is vested. . ." (App. 171, § 11.2; App. 177, § 11.2).

Since Verizon Defendants did not pay homage to the existing terms of the pension plans and rules protective of the retirees, plan participants who were no longer in active employment

status, the Court must rule there was a violation of the plans in violation of ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

3. Verizon Defendants Violated the ERISA Fiduciary Duty of Loyalty and Duty to Act in the Best Interests of the Retiree Plan Participants.

At all times, the Verizon EBC and plan administrators had a duty of loyalty to Plaintiffs and Class members, a duty long recognized by the federal courts.

> Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries. Restatement of Trusts 2d s 170 (1959); II Scott on Trusts s 170, at 1297-99 (1967) (citing cases and authorities); Bogert, The Law of Trusts and Trustees s 543 (2d ed. 1978). This, in turn, imposes a duty on the trustees to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan.

Donovan v. Bierwirth, 680 F.2d 263, 271 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488 (1982); *Bussian v. RJR Nabisco, Inc*., 223 F.3d 286, 294 (5th Cir. 2000) ("ERISA's duty of loyalty is the highest known to the law"). A fiduciary must discharge plan responsibilities as a "prudent man," solely in the interest of the participants and beneficiaries (not the sponsoring employer) and for the exclusive purpose of providing benefits to participants and their beneficiaries and of defraying the reasonable expenses of the plan, in accordance with the lawful terms of the plan's controlling documents. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). The duty is analogous to the common trust law duty of "undivided loyalty." E.g., *McDonald v. Provident Indem. Life Ins. Co.,* 60 F.3d 234, 237 (5th Cir. 1995), *cert. denied*, 516 U.S. 1174, 116 S.Ct. 1267 (1996); *Eaves v. Penn*, 587 F.2d 453,457 (10th Cir. 1978).

Before the November 17, 2006 Spin-off, all Plaintiffs and Class members had vested rights to continued participation in Verizon's sponsored pension plans. Verizon Defendants admit that no consent was obtained from any Plaintiff or any other retiree within the Class before Verizon expelled them from continued participation in Verizon's plans. The surreptitious transfer of retirees to the financially overwhelmed Idearc was eerily similarly to the fate of retirees involuntarily transferred in the case of *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir.1994), *aff'd on other grounds*, 516 U.S. 489, 116 S.Ct. 1065 (1996). In *Howe*, the trial court summarily concluded that an employer violated its fiduciary duties under ERISA when it transferred its obligation to pay retirees' benefits to a nearly-bankrupt company without informing the retirees' of the change or obtaining their consent. The Eighth Circuit affirmed that determination, ruling:

> As we have indicated, these employees were simply "transferred" to MCC without their knowledge or consent. They were given no explanation, they were not asked for permission, and they were not even informed of the "transfer" until MCC went into receivership. Such a complete disregard of the rights and interests of beneficiaries is a clear breach of fiduciary duty in violation of Section 1104(a)(1), and the named individual plaintiffs have a right of action for redress under Section 1132(a)(3). An obligor (here, M-F and Varity) cannot free itself of contractually created duties without the consent of the persons to whom it is obligated. Restatement (2d) of Contracts, Section 318(3), comment d. M-F and Varity cannot unilaterally relieve themselves of obligations to the individual retirees. Their attempt to do so is of no legal effect, and we uphold the District Court's ruling in favor of the ten named individual plaintiffs.

Howe, 36 F.3d at 756.[6] The Eighth Circuit found a breach of fiduciary duty in the fact that retirees' benefit obligations were transferred to the new company without their consent.

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[6] The *Howe* case proceeded to the Supreme Court, but the Justices declined to review this portion of the Eighth Circuit's opinion because it construed the petition for certiorari as not having raised the issue. *Varity Corp. v. Howe*, 516 U.S. at 496, 116 S.Ct. at 1070. ("[a]s we construe Varity's petition, it does not sufficiently call into question the District Court's holding that Varity breached a fiduciary duty with respect to the Massey-Ferguson retirees whose benefit obligations had been involuntarily assigned to Massey Combines.").

Similarly, herein the hard fact for the Verizon Defendants is that both the New York and New England Associates union plan and the Mid-Atlantic Associates union plan specifically required consent of active employees with vested benefits for there to be either a change or termination of Verizon benefits. Therefore, Plaintiffs and Class members, retirees with vested benefits, should have first been consulted and then their consent obtained before they were switched over to the highly indebted spin-off entity's pension plans. When carrying out the Spin-off, Verizon pension plan fiduciaries breached their duty of loyalty to Plaintiffs and Class members.

Verizon Defendants argue that the decision to include retirees in the Spin-off did not implicate any fiduciary duties under ERISA and cite case law involving the sale or division of a corporate entity. But the cited case law only concerns non-vested contingent benefits. For example, in *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893 (1987), the Eleventh Circuit upheld the trial court's decision that a sale of a corporate division which had an adverse impact on employees' rights to future contingent nonvested benefits did not implicate ERISA fiduciary duties. Notably different was the fact that the courts were not grappling with any retirees' vested rights and the appellate court stated:

> We emphasize that the only "interests" at stake in this case are contingent and non-vested future retirement benefits. There is no dispute that Amoco has fulfilled and continues to fulfill its obligations with respect to vested retirement benefits earned under the Standard Plan.

Id., at 1471. Other courts have held that normal business decisions with potential collateral effects on prospective, non-vested contingent benefits need not be made in the interest of plan participants. *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir.1988), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893 (1987). See also *Sengpiel v. B.F. Goodrich Company*, 156 F.3d 660 (6th Cir. 1998), *cert. denied*, 526 U.S. 1016, 119 S.Ct. 1249 (1999) wherein the court held that

"BFG's decision to spin off its tire division and to transfer a share of its welfare benefit liabilities approximately equivalent to the portion of its business devoted to tires does not constitute discretionary plan administration according to the plan's terms or management of its assets." *Id.* at 666. The considered result in *Sengpiel* was based upon the court's observation that:

> There is nothing in the record to suggest that BFG was motivated by bad faith or self-dealing considerations. Nor is there evidence that BFG's actions, when taken, were imprudent or manifestly adverse to plaintiffs' interests. Because welfare benefits are not vested, plaintiffs were in the same position after the transfer that they were in when the BFG plans still covered them. In fact, from 1990 until 1995, plaintiffs and their fellow transferred retirees were in better positions than their former colleagues still under the BFG plans. Michelin recently made a contribution to the retirees' pension fund that now makes their pensions fully-funded. Nothing in the record suggests that Michelin will ultimately be a less stable or secure sponsor of the retirees' benefit plans than BFG.

Id. at 667. In contrast, herein, as set forth in Plaintiffs' Statement of Undisputed Facts, there is ample evidence that Verizon was motivated by self-dealing considerations, especially given that the soon-to-become Idearc executives sought to have the better financed Verizon maintain responsibility for Plaintiffs and Class members, including the planned treatment of retiree OPEB liability, and were soundly rebuffed. Despite the concerns expressed by the soon-to-become Idearc executives, the defendants went full speed forward with the Spin-off transaction. "Verizon determined that the stock market likely would react positively to a separation of VIS from Verizon." (Docket 78 at p. 9, citing Defts' Appx. 18, Fitzgerald Depo. Tr. 67:17-68:6). Moreover, the bankruptcy of Idearc Inc. confirmed that Idearc was a less stable or secure sponsor of the retirees' benefit plans.[7]

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[7] When Idearc Inc emerged from bankruptcy with a changed name of SuperMedia Inc. the corporation's common stock started trading on January 4, 2010 at $49.00 per share. As of the filing date of this memorandum brief, SuperMedia's common stock share price is not much higher than $1.50 per share, thus, giving good reason for Plaintiffs and Class members to be concerned about

In *Systems Council EM-3, Intern. Broth. of Elec. Workers, AFL-CIO v. A.T.&T. Corp.,* 972 F.Supp. 21 (D. DC 1997) , the plaintiffs were both current workers and retirees who made a challenge, pursuant to ERISA Section 208,[8] concerning the percentage of surplus pension assets retained by AT&T when spinning off and creating Lucent Technologies, Inc. The trial court noted "[p]laintiffs make it clear that their challenge is to AT & T's allocation of plan assets and liabilities resulting from the spin-off of Lucent and its benefit plans." *Id.,* at 29. The trial court determined those acts were not fiduciary in nature, ruling "it is well settled that ERISA's fiduciary duties do not apply to the allocation and transfer of assets pursuant to a spin-off." (citation omitted). *Id.*, at 30. The trial court's dismissal of the claims was affirmed. *Systems Council EM-3 v. AT&T Corp*., 159 F.3d 1376 (DC Cir. 1998) (holding AT&T was not acting in a fiduciary capacity when it allocated pension and welfare plan assets and liabilities between AT&T and Lucent). In contrast, herein, Plaintiffs and Class members make no challenge as to Verizon's transfer and allocation of pension assets and liabilities to Idearc's master trust and pension plans. Rather, they challenge the unauthorized and non-consensual transfer of the retirees, all of whom had vested non-forfeitable rights under a Verizon pension plan. No such challenge was made in the *Systems Council EM-3* case.

During the last few weeks before the Spin-off was conducted, the soon-to-become senior

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the potential for another bankruptcy. (App. 485, Palmer Affidavit ¶ 10).

[8] ERISA. Section 208 states: "A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan ... unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated)." 29 U.S.C. § 1058.

leadership of Idearc Inc. expressed reservations about the wisdom of Idearc assuming the burden of the retirees' liabilities. The group called Verizon Information Services ("VIS") that became Idearc had obtained an independent consultant's advice that "Overall, Verizon is in a better overall position to continue covering the retirees under their programs". (App. 8; App. 445-446, Gist Depo. Tr. 37:19-38:10; App. 448, Gist Depo. Tr. 40:18-25). ERISA fiduciaries are ". . . obliged at a minimum to engage in an intensive and scrupulous independent investigation . . . to insure that they act in the best interests of the plan beneficiaries." *Fought v. UNUM Life Ins. Co. of Am.,* 379 F. 3d. 997, 1015 (10th Cir. 2004) (citing *Hightshue v. AIG Life Ins. Co.,* 135 F.3d 1144, 1148 (7th Cir. 1998) ("Seeking independent expert advice is evidence of a thorough investigation.")). But the Verizon Defendants took no such action. While summarily dismissing the VIS executives' request that Verizon maintain responsibilities for Plaintiffs' and Class members' benefits, none of the Verizon Defendants ever sought guidance from either a disinterested independent fiduciary or any neutral legal advisor. (App. 97 ¶¶ 204, 206). Verizon determined that if it maintained responsibility for the retirees' pension and welfare benefits and reduced Idearc's benefit obligations that action "likely would have decreased the combined post-spinoff share value of Verizon and Idearc." (Docket 78, p. 15, referencing Defts' Appx at 19-21, 26-27 and 122).

However, Verizon decided to divide the group of deferred vested pensioners who had worked in the directories business and give management-classified deferred vested retirees more favorable treatment. Verizon informed VIS, soon-to-become Idearc, that Verizon would retain management classified retirees who had earned rights to deferred vested pensions. Verizon made that self-serving decision in order to avoid having to give Idearc about $400 million, the

proportionate share of surplus assets in the Verizon Enterprises Management Pension Plan. Thus, while all of the non-management deferred vested pensioners were surreptitiously transferred to Idearc, Verizon kept within its safety net and on its pension rolls all management retirees with rights to deferred vested pensions. Verizon Defendants' action was the antithesis of the pension plans' underlying premise that they were "created for the exclusive benefit of the Participants or their Beneficiaries." (App. 121, § 14.8; App. 149, § 14.8). Verizon's last hour decision to give more favorable treatment to the management deferred vested retirees and maintain corporate responsibility for their pensions was carried out, after all the number-crunching was done, simply in order to make certain that Verizon would not have to share a percentage of its surplus pension assets with Idearc, the spin-off entity, under the rules of the Pension Benefit Guaranty Corporation.[9]

This Court should hold that whenever a corporate employer negotiates and carries out either the sale or spinoff of a division or business segment which will include retirees having vested rights to future benefits, the corporate employer's actions and those actions of pension plan fiduciaries assisting the corporate employer implicate fiduciary duties as to the retirees, and the parties must act in accordance with the pension plans' existing terms. The Spin-off resulted in the retirees losing the security of Verizon sponsored vested and non-forfeitable pension benefits, not to mention welfare benefits. On the facts presented in this case, when Verizon Defendants imposed upon Idearc all future responsibility for the retirees' panoply of benefits,

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[9] Verizon's sole motivation for maintaining responsibility for the carved-out group of management retirees who had rights to deferred vested pensions is more fully explained in Paragraph No. 17 of the Statement of Undisputed Material Facts set forth in "Plaintiffs' Response in Opposition to (Docket 77) Verizon Defendants' Motion for Summary Judgment" filed concurrently herewith.

they acted arbitrarily and capriciously. Verizon Defendants did not carefully assess the impact of the Spin-off on the Plaintiffs and Class members.

While Verizon Defendants make an empty assertion that its VIS subsidiary had "very strong current cash flows" (see, e.g., Docket 78 at p. 9), the truth of the matter is that VIS had been experiencing a steady decline in its yellow pages telephone directory business, with revenues decreasing by $169 million between 2005 and 2006 alone. (Supp. App. 511). With knowledge that Idearc Inc. was confronted with a crushing financial burden, an oppressive debt to annual cash flow revenue of 5.8 to 1, Verizon Defendants, actually acted in bad faith by including the retirees in the Spin-off mix. This Court should find that Verizon Defendants' conduct towards Plaintiffs and Class members, all without their consent and contrary to the specific requirements of Verizon's pension plans, violated ERISA's fiduciary duty of loyalty and requirement to act in the best interests of the retirees, in accordance with ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). Accordingly, the Court should deny the Verizon Defendants' motion for a summary judgment as to Plaintiffs' Fourth Claim for Relief.

II. Verizon Defendants Speciously Attack Plaintiffs' Third Claim for Relief -- ERISA Prohibited Activity.

In their Memorandum Brief at p. 36, Verizon Defendants speciously contend that Plaintiffs' Third Claim for Relief lacks merit and "falls wide of the mark." (Docket 78, p. 36). In making that argument, the defendants inexplicably rely upon ERISA Section 406(a), which is not the basis for Plaintiffs' Third Claim, and disregard the fact that surreptitiously transferring retirees out of Verizon sponsored employee benefit plans was not in their best interests.

A. Members of the Verizon EBC, the Pension Plan Administrator, While Acting as Corporate Officers, Violated ERISA Section 406(b)(2), One

of the Bases for Plaintiffs' Third Claim for Relief.

In their Third Claim for Relief, Plaintiffs contend the Verizon EBC violated ERISA Sections 406(b)(2) and (b)(3), 29 U.S.C. §§ 1106(b)(2) and (b)(3). (Docket 64, SAC ¶¶ 150-174). ERISA Section 406 states:

> **(b) Transactions Between Plan and Fiduciary.—** A fiduciary with respect to a plan shall not—
>
> **(2)** in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or
>
> **(3)** receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(emphasis original) 29 U.S.C. § 1106(b)(2), (b)(3).

Verizon Defendants attack the Third Claim by ignoring the plain language of ERISA Section 406(b)(2). Instead, the Verizon Defendants reference ERISA Section 406(a) which, indeed, is a statutory provision directed at actions taken while serving in a fiduciary capacity. *Hunter v. Caliber System, Inc*., 220 F.3d 702 (6th Cir. 2000), the primary case relied upon by Verizon Defendants, is completely inapposite, as the case concerned ERISA Section 406(a), and there was no discussion about ERISA Section 406(b)(2). *Id.*, at 724-25. Likewise, *Flanigan v. General Elec. Co*., 242 F.3d 78 (2nd Cir. 2001) is of no help to Verizon Defendants because *Flanigan* has no discussion about ERISA Section 406(b)(2). *Id.* at 87-88. *Blaw Knox Retirement Income Plan v. White Consolidated Industries*, 998 F.2d 1185 (3rd Cir. 1993), another case in which Verizon Defendants' misplace their reliance, clarifies that "section 406(b) bars transactions between a plan and its fiduciary including dealing with a plan's assets in the fiduciary's own interest or on behalf of a party whose interests are adverse to a plan or its

participants or beneficiaries." *Id.*, at 1190-91. Verizon Defendants' citation of *Evans v. Bexley*, 750 F.2d 1498, (11th Cir. 1985) involves mere dicta in which the court expressed disagreement with the plaintiffs' "expansive interpretation of section 1106." *Id.*, at 1500, n.3. Lastly, Verizon Defendants' reliance upon *Tibble v. Edison Intern*., 639 F.Supp.2d 1074 (C.D. Cal. 2009) misfires because the trial court explained that, for purposes of ERISA Section 406(b)(2):

> An 'adverse party' is one whose interests conflict with those of the plan and its members." *Donovan v. Walton*, 609 F.Supp. 1221, 1246 (S.D. Fla.1985). "[T]he interests need not directly conflict but must be sufficiently different." *Int'l Bhd. of Painters & Allied Trades Union & Indus. Pension Fund v. Duval*, 925 F.Supp. 815, 825 (D.D.C.1996).

Tibble, 639 F.Supp.2d at 1094, n. 10). In *Tibble*, the trial court further explained that ERISA Section 406(b)(2) has been applied where "fiduciaries held an official position with the adverse party, which allowed each court to find that the fiduciary was acting "on behalf of" or "representing" the adverse party. *Id.,* at 1095. That is exactly the situation alleged in Plaintiffs' Third Claim for Relief.

By enacting ERISA Section 406(b)(2), prohibiting any transaction between the trust or pension plan and a "party in interest" or fiduciary, Congress intended to prevent the fiduciary from "being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries." *N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc*., 453 U.S. 322, 333–34, 101 S.Ct. 2789, 2796 (1981) (internal quotations omitted). Here, the members of the Verizon EBC, including its chairperson, chose to do what they thought might be best for Verizon's shareholders, not what was best for the Plaintiffs and Class members. As already noted, "Verizon determined that the stock market likely would react positively to a separation of VIS from Verizon." (Docket 78, p. 9, referencing Defts'. Appx 18).

Verizon was a party to the Spin-off transaction and, as Class members' former employer and plan sponsor of Class members' employee benefit plans, by definition a party in interest under 29 U.S.C. § 1002(14)(C).[10] The Spin-off transaction involved the Verizon pension plans. Verizon gave the Verizon EBC, the fiduciary of Verizon's pension plans, ultimate responsibility for implementing Verizon's decision to transfer Plaintiffs and Class members out of Verizon sponsored pension plans to Idearc sponsored pension plans. "Members of the Verizon Employee Benefits Committee were the Verizon personnel with principal responsibility for implementing the decision of Verizon, as settlor of the Verizon Pension Plans, to transfer assets and obligations relating to the pension benefits of former VIS employees to Idearc's pension plans in connection with the November 2006 Idearc spin-off transaction." (App. 112-113).

Verizon Defendants contend that, when Verizon EBC members were taking action to carry out the Spin-off Transaction, no person was acting in his or her fiduciary capacity, that each was acting in his or her capacity as an officer of the corporation. (*Id.*). Nevertheless, the language of ERISA Section 406(b)(2) extends the scope of liability beyond fiduciaries and parties-in-interest by prohibiting a transaction between a plan and a third party when the transaction is "for the benefit of a party in interest." See *Reich v. Compton*, 57 F.3d 270, 286-87 (3rd Cir. 1995). Furthermore, that statutory subsection "applies regardless of whether the transaction is "fair" to the plan.'" *Id.*, at 288. In *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1213 (2nd Cir.1987), the appellate court noted that section 406(b) needs to be "broadly construed." (citing *Leigh v. Engle*, 727 F.2d 113, 126 (7th Cir. 1984) ("The entire

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[10] ERISA Section 3(14) states, "[t]he term 'party in interest' means, as to an employee benefit plan--(C) an employer any of whose employees are covered by such plan. 29 U.S.C. § 1002(14)(C).

statutory scheme of ERISA demonstrates Congress' overriding concern with the protection of plan beneficiaries, and we would be reluctant to construe narrowly any protective provisions of the Act.")). Liability under ERISA Section 406(b)(2) is imposed even where there is "no taint of scandal, no hint of self-dealing, no trace of bad faith," *Cutaiar v. Marshall*, 590 F.2d 523, 528 (3rd Cir. 1979) (noting that "[s]ection 406(b)(2) speaks of 'the interests of the plan or the interests of its participants or beneficiaries.' It does not speak of 'some' or 'many' or 'most' of the participants.'"). In *Donovan v. Mazzola*, 716 F.2d 1226, 1238 (9th Cir.1983), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 704 (1984), the appellate court noted that a *per se* prohibition of section 406(b) is consistent with the remedial purpose of ERISA, for "at the heart of the fiduciary relationship is the duty of complete and undivided loyalty to the beneficiaries of the trust") (citations omitted).

As officers, the members of the Verizon EBC acted to promote the financial interests of Verizon when they included Plaintiffs and Class members in the Spin-off transaction and, thereby, eliminated the corporation's obligations to the retirees. The Verizon EBC members, as fiduciaries, took no steps to protect or advocate for the best interests of Plaintiffs and Class members. Instead, the Verizon officers endeavored to assist and promote Verizon's corporate interests and goals which were adverse to the retirees' interests. Both prior to and on the Spin-off date, the Verizon EBC assisted and allowed Verizon to go forward with transferring Plaintiffs and Class members out of Verizon's pension plans, despite the nonexistence of pension plan terms that would allow such action. Verizon EBC Chairman Marc C. Reed is the Verizon Executive Vice President who executed the belated pension plan amendments on December 22, 2006 that were made retroactive to November 16, 2006. (App. 131, 159 and 203). The plan

amendments directed the Plan Administrator, the Verizon EBC, to make the decisions as to which retirees were to be transferred to Idearc.[11] Verizon EBC member Donna Chiffriller is the Verizon Vice President who held off sending the retirees any notice until several months after they had been surreptitiously transferred. Clearly, those two pension fiduciaries allowed themselves to be put in a position where they had dual loyalties, but dishonored their primary ERISA duty of loyalty in failing to act exclusively for the benefit of the pension plans' participants and beneficiaries.

Plaintiffs contend "[i]t was in the best interest of Plaintiffs and class members that they *not* be included in the Spin-off transaction and that they be permitted to continue participation in Verizon's sponsored pension and welfare benefit plans." (Docket 64, SAC ¶ 165). Curiously, in response, Verizon Defendant state they "do not have sufficient information to admit, and so deny the allegations of paragraph 165 of the amended complaint." (App. 90 ¶ 165).

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[11] The amendments to the Verizon management pension plans identify each transferred management retiree as a person who "has been determined by the Committee" (meaning the Verizon EBC) to have met the necessary last active employment criteria. (App. 201and 207). Likewise, the amendments to the Verizon union pension plans identify each transferred union retiree as a person "who has been determined by the Plan Administrator" (meaning the Verizon EBC) to have met the necessary last active employment criteria. (App. 132 and 160).

B. Members of the Verizon EBC, the Pension Plan Administrator, While Acting as Corporate Officers, Violated ERISA Section 406(b)(3), the Other Basis for Plaintiffs' Third Claim for Relief.

As a result of the Spin-off transaction, Verizon distributed to all members of the Verizon EBC monetary consideration for their own personal accounts in the form of corporate stock issued by Idearc. The Verizon Defendants admit that the members of the Verizon EBC received one share of Idearc stock for every 20 shares of Verizon common stock owned. (*Id.*, ¶ 171). Such payment of consideration was *per se* improper under ERISA Section 406(b)(3). Plaintiffs have, accordingly, established the required elements of their Third Claim for Relief that ERISA Sections 406(b)(2) and (b)(3), 29 U.S.C. §§ 1106(b)(2) and (b)(3), were violated and the Court, accordingly, should deny summary judgment for Verizon Defendants on that claim.

III. <u>Verizon Defendants Speciously Attack Plaintiffs' Second Claim for Relief – Deficient Disclosure in Pension Plan SPDs</u>.

In their Memorandum Brief at p. 39, Verizon Defendants contend that Plaintiffs' Second Claim for Relief "fails as a matter of law" and Plaintiffs "cannot come forward with evidence that they suffered 'actual harm'" as a result of Verizon's faulty SPD disclosures. (Docket 78, p. 39).

A. Verizon Plan Fiduciaries Breached Their Duty to Disclose, in a Benefit Forfeiture Clause of a SPD, That One Manner Whereby Verizon Pension Benefits Could Be Lost or Offset Was a Corporate Spin-off and Transfer of the Retirees, the Basis Plaintiffs' Second Claim for Relief.

For their Second Claim for Relief, Plaintiffs contend Verizon EBC violated ERISA Section 102(b), due to Verizon Defendant's failure to provide a required disclosure in the summary plan descriptions ("SPDs") for the pension plans. Verizon Defendants informed Plaintiffs and Class members by distributing SPDs that stated there was a commitment by

Verizon to continue paying monthly pension benefits for life:

> In general, is you are retired and receiving your monthly benefit or if you are receiving a surviving beneficiary benefit, the amount of your benefit will continue to be paid *by Verizon* without change.

(emphasis added). (App. 126, SPD for New York & New England Associates; App. 153, SPD for Mid-Atlantic Associates). There was no disclosure of the fact that a corporate spin-off and consequential transfer of pension obligations could result in the retirees' loss of Verizon sponsored pension benefits. (App. 473-474, Murphy Affidavit ¶¶ 3-5; App. 478-479, Noe Affidavit ¶¶ 3-5; App. 483, Palmer Affidavit ¶¶ 3-5).

ERISA Section 102(b) requires, in part, that a pension plan administrator provide each plan participant with an SPD which describes the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b). The DOL crafted a regulation that addresses the statutory obligation and requires, in part, the SPD contain an even more exacting detailed statement:

> clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction or recovery. . . of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits. . .

(emphasis added). 29 C.F.R. Section 2520.102-3-(*l*). The SPD is considered essential in informing employees and retirees of their rights, reasonable expectations and obligations under a pension plan.

Prior to the November 17, 2006 Spin-off, the Verizon EBC consistently failed to meet ERISA's requirement to disclose in pension plan SPDs all circumstances that Verizon, as plan sponsor, contemplated may result in Plaintiffs' and Class members' ineligibility for, offset or loss of the Verizon sponsored pension plan benefits the retirees reasonably expected to continue

to be paid by Verizon without charge. In none of the SPDs issued to the retirees is there any discussion, disclosure or notice that a retiree with vested rights could be involuntarily removed from enrollment in his or her pension plan and, as a result of a spin-off and consequential transfer of pension obligations to a new entity, thereby made ineligible for continued receipt of Verizon sponsored pension benefits. The word "spin-off" appears nowhere within the forfeiture clause set forth in the SPDs last issued to Plaintiffs. (See forfeiture clauses within the SPDs issued to Plaintiffs and Class members, App. 127-129, the 2001 SPD for New York & New England Associates; App. 155-157, the 2001 SPD for Mid-Atlantic Associates; App. 185-186, the 2001 SPD for management retirees). No average plan participant would understand from reading any of the pension plan SPDs that he or she could be removed from a Verizon sponsored pension plan and enrolled in a new pension plan sponsored by a new independent corporate entity created as a result of a Verizon corporate spin-off. No such scenario can be envisioned from a reasonable review, reading and understanding of any of Verizon's pension plan SPDs. (App. 473-474, Murphy Affidavit ¶¶ 3-5; App. 478-479, Noe Affidavit ¶¶ 3-5; App. 483, Palmer Affidavit ¶¶ 3-5). Therefore, this Court should conclude that the SPDs issued to Plaintiffs contravened both ERISA and the DOL regulation by failing to provide notice that the retirees' pension benefits would be offset or otherwise lost should the plan sponsor include the retirees in a corporate spinoff and send them off to a newly established pension plan.

Verizon Defendants sardonically contend they fulfilled the specific statutory and regulatory requirements by simply including within the SPDs a typical reservation of rights ("ROR") clause stating the plan could be amended or changed. (Docket 78, p. 40). Such defendants argue they cannot be held responsible for failing to accurately predict all possible

future changes and plan amendments, including a voluntary self-directed corporate spinoff, and they cite to *Fisher v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3rd Cir. 1993). *Fisher* proclaimed "an ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan," when addressing the plaintiffs' claim that they were misled because they did not know there would be an offer of early retirement in the near future. *Fisher* is inapposite because it did not concern a violation of the statutory and regulatory duty to include the required disclosure in a forfeiture clause in a pension plan SPD. For the same reason, *Flanigan v. General Elec. Co*., 242 F.3d 78, 84-85 (2nd Cir. 2001), also cited on page 40 of the Verizon Defendants' Memorandum Brief, is of no help to such defendants. *Flanigan* did not concern a failure to make a material disclosure in an SPD, as required by the statute and DOL Regulation.

The specific requirements of ERISA Section 102(b) and 29 C.F.R. Section 2520.102-3-(*l*) are not fulfilled by inserting a general ROR within a pension plan SPD stating that there might be future changes. In the Verizon Defendants' view, both the statute and regulation are merely superfluous recommendations for an SPD. The failure to provide Plaintiffs an SPD with a disclosure about the possible consequences of a spin-off, the immediate loss, ineligibility, forfeiture or offset of Verizon benefits, is not a "technical violation." The failure is a statutory violation and breach of fiduciary duty. "The duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trusts long before the enactment of ERISA." *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750 (D.C. Cir. 1990). Verizon EBC, as plan administrator, was obligated to provide each Plaintiff and Class member with such disclosure without any request being made by anyone. *Chiles v. Ceridian Corp*., 95 F.3d 1505, 1518 (10th Cir. 1996) (citing the statute and ruling that an employer "is obligated by the SPD to

inform its employees" of these limitations on benefits). Since there was no such disclosure, the SPDs given to Plaintiffs and Class members "ha[d] the effect of failing to inform" the retirees of a key limitation on their right to recover benefits under their pension plans, a violation of ERISA Section 102(b) and 29 C.F.R. § 2520.102–3(b).

B. Plaintiffs' Have Presented Evidence Fulfilling the "Actual Harm" Element for Recovering Appropriate Equitable Relief.

Verizon Defendants contend that, whenever there is deficient pension plan SPD, a participant's remedy is limited to the "harm stemming from [the plaintiffs'] reliance on the SPD", relying upon Justice Scalia's concurring opinion in the recent case of *CIGNA Corp. v. Amara*, 536 U.S. _, 131 S.Ct. 1866, 1885 (2011).[12] Furthermore, the defendants erroneously contend there is no record evidence that Plaintiffs suffered any harm caused by the deficiencies in the pension plan SPDs. (Docket 78, p. 41).

Neither the majority nor the concurring opinion in *CIGNA* offers details on what kinds of actual harm a participant must prove in order to receive equitable relief under ERISA Section 502(a)(3) as a result of a deficient pension plan SPD. However, the majority opinion states that actual harm, as required for relief, can be shown by "the loss of a right protected by ERISA or its

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[12] The issue in *CIGNA* was the conversion of the plan sponsor's defined benefit plan to a cash balance plan. The plaintiffs charged that the SPD inadequately disclosed the change, causing potential or likely harm to participants. The district court agreed and reformed the plan ordered benefits paid under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), but declined to decide whether it could provide the same relief under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3). The Second Circuit summarily affirmed that decision. On *certiorari review*, the Supreme Court said that the lower courts had erred and reversed the decision to grant relief under ERISA Section 502(a)(1)(B). However, the Supreme Court discussed three potentially available equitable remedies: reformation, equitable estoppel and surcharge. In particular, the Supreme Court stated that surcharge is an available remedy under ERISA. The Supreme Court ordered the case remanded for a determination of appropriate equitable relief under ERISA Section 502(a)(3).

trust-law antecedents." *CIGNA,* 131 S.Ct. at 1881. In this case, Plaintiffs were stripped of their ERISA-protected right to receive accurate information – information important to all plan participants – because the Verizon Defendants, in breach of their fiduciary duty, provided Plaintiffs with SPDs that failed to contain the statutory and regulatory required disclosure. Due to the defendants' fiduciary breaches, Plaintiffs and Class members lost the valuable right of being able to reasonably apprise themselves about their future benefits. Each Plaintiff has testified that had he or she known about the undisclosed possibility of being surreptitiously transferred out of his or her Verizon sponsored pension plan, at the whim of the plan's sponsor, each would have taken a different course of action and even used his or her influence to cause the union to make a legal challenge so as to prevent such action against himself or herself and other retirees. (App. 473-474, Murphy Affidavit ¶¶ 3-5; App. 478-479, Noe Affidavit ¶¶ 3-5; App. 483, Palmer Affidavit ¶¶ 3-5). By being uninformed, each Plaintiff was harmed because he or she did not know the possible consequences of a corporate spin-off. All Plaintiffs lost an opportunity to better protect themselves and take appropriate preventive action.

Verizon Defendants themselves admitted in as much after the fact. During or after year 2007, after transferring the retirees, Verizon Defendants first disclosed in a benefit forfeiture clause inserted into the pension plans' SPDs that a corporate spinoff is a circumstance affecting pension plan eligibility requirements, as follows: **"How Benefits Could Be Reduced, Lost, Suspended or Delayed**. . . • You transfer to another company as a result of a sale, spinoff or outsourcing arrangement, and your benefit is transferred to and paid from another pension plan maintained by such other company." (emphasis original) (App. 140-142, the 2007 SPD for New York & New England Associates; App. 194-196, the 2007 SPD for management retirees).

That prior to the Spin-off transaction, Verizon Defendants could not predict a corporate spin-off could result in a retiree's offset, loss or ineligibility for continued Verizon sponsored benefits, cannot be considered either some sort of an idiosyncratic contingency or failure on the part of plan administrators to exercise "clairvoyance" about a future plan change. A spin-off scenario is rather a broad exception to the continuation of Verizon paid benefits that should have reasonably been included in the SPDs issued to Plaintiffs. Having failed to describe in the SPDs that a corporate spinoff was a potential circumstance for an offset or ineligibility for continued plan participation, the plan administrators and plan sponsor should be prevented or "estopped" from relying on an undisclosed right to involuntarily transfer Plaintiffs and Class members so as to terminate their accrued benefit rights under Verizon sponsored pension plans. It is fundamentally unfair for a plan sponsor to take adverse action against retirees with vested rights when there has been neither forewarning nor proper disclosure that such adverse action against retirees could be taken in the future at the whim of either the plan sponsor or plan administrators.

There is no provision of ERISA providing specific relief for violation of ERISA Section 102(b). Therefore, nothing precludes equitable relief for violation of the statute. In Justice Breyer's majority opinion in *CIGNA*, the Supreme Court identified estoppel as an appropriate remedy for faulty SPD disclosures. *CIGNA*, 131 S.Ct. at 1880. *CIGNA's* 6-2 decision holds that a fiduciary who improperly deprives beneficiaries of funds or pension benefits can be compelled to give the aggrieved participant or beneficiary the withheld monies, an action known in equity as "surcharge." *Id.* Furthermore, the *CIGNA* ruling explains that surcharge, or monetary compensation by a fiduciary for loss resulting from the fiduciary's breach of duty, was a "traditional equitable remed[y]" and thus falls within the "category of traditionally equitable

relief" *Id.* In *CIGNA*, the Supreme Court proclaimed that:

> [T]he District Court injunctions require the plan administrator to pay to already retired beneficiaries money owed them under the plan as reformed. But the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief. Equity courts possessed the power to provide relief in the form of monetary "compensation" for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment. (citations omitted).

Id. The Supreme Court concluded that, contrary to the trial court's fears, the types of remedies the lower court had entered fall within the scope of the term "appropriate equitable relief" in ERISA Section 502(a)(3). *Id.* The Supreme Court's central holding, upon which it remanded for further proceedings, was that ERISA Section 502(a)(3) allows for equitable remedies such as surcharge without a showing of detrimental reliance. *Id.*, 131 S.Ct. at 1881-82.[13]

Numerous courts have exercised their equitable powers under ERISA and refused to allow plan administrators to use undisclosed provisions as a shield so as to deny participants' claims for benefits. In *Wilkins v. Mason Tenders District Council Pension Fund*, 445 F.3d 572, 585 (2nd Cir. 2006), the court refused to enforce a requirement that plan participants produce proof of covered employment as a condition of receiving the benefits to which they are entitled under the terms of the plan, in the event that their employers underreport earnings, since the

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[13] Because the Supreme Court's discussion of surcharge under ERISA Section 502(a)(3) was essential to answer the question of the applicable standard of harm for the members of the participant class to receive appropriate equitable relief, it is not dicta that lower courts are free to ignore, as concurring Justices Scalia and Thomas would have it. See *CIGNA*, 131 S.Ct. at 1882-85 (Scalia, J., concurring in judgment). But even if the discussion of surcharge is viewed as dicta, it is ordinarily the duty of a lower court to follow recent Supreme Court dicta. See *United States v. Fareed*, 296 F.3d 243, 247 (4th Cir. 2002) (following "the dictum endorsed by six justices" of the Supreme Court), citing *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (federal court of appeals is "bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements").

requirement was not disclosed in the multi-employer pension plan SPD, as imposed by ERISA Section 102(b) and the DOL regulation. See, also *Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1022 (7th Cir.1998) (holding that since SPD failed to satisfy ERISA's disclosure requirements, the undisclosed term could not be enforced against plan participant so as to deny coverage). Similarly, courts have recognized that where the SPD does not contain a benefit forfeiture clause, then such a forfeiture [even when contained in the underlying controlling plan document] will not be enforced against a participant. *Jensen v. SIPCO, Inc*., 867 F.Supp. 1384, 1391 (N.D. Iowa 1993), *aff'd*, 38 F.3d 945 (8th Cir.1994), *cert. denied*, 514 U.S. 1050, 115 S.Ct. 1428 (1995); *James v. New York City Dist. Council of Carpenters' Benefits*, 947 F.Supp. 622, 628 (E.D. N.Y.1996).

Since the SPDs issued to Plaintiffs and Class members prior to the Spin-off did not satisfy ERISA's disclosure requirements, this Court should estop Verizon Defendants from exercising undisclosed rights. This Court should, accordingly, deny Verizon Defendants a summary judgment on Plaintiffs' Second Claim for Relief in the Second Amended Complaint.**[14]** Pursuant to ERISA Section 502(a)(3)**[15]**, Plaintiffs have requested in (Docket 81), their motion for partial summary judgment, and this Court should grant, appropriate class-wide equitable

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[14] In a last salvo lobbed at the Second Claim for Relief, Verizon Defendants request in their Memorandum Brief that if the Court "finds a notice violation, it should strike plaintiffs' class allegations with respect to Count II." (Docket 78, p. 42). No such request is made in the Verizon Defendants' motion for summary judgment and no motion to strike was timely raised after the filing of the SAC. Leaving aside its procedural deficiency, the cryptic motion to strike should be overruled.

[15] ERISA Section 502(a)(3) allows a participant to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3).

relief, including a declaration that Verizon EBC violated ERISA Section 102(b), 29 U.S.C. § 1022(b), and DOL Regulation 29 C.F.R. Section 2520.102-3-(*l*), by failing to make timely disclosure in any pension plan SPD issued to Plaintiffs and Class members that a spin-off could result in their loss of eligibility for continued participation in their respective Verizon pension plan. The court should grant injunctive relief ordering reinstatement of Plaintiffs and Class members into Verizon's sponsored pension plans and order the retirees otherwise be made whole.

IV. Plaintiffs' Seventh Claim for Relief – Claim for Benefits Under ERISA Section 502(a)(1)B) – Succeeds Because the Unaltered Pension Plan Terms Prior to December 22, 2006 Indisputably Entitled Plaintiffs and Class Members to Verizon Sponsored Benefits.

In their Memorandum Brief at pp. 42-43, Verizon Defendants contend that Plaintiffs' alternative claim, the Seventh Claim for Relief, "fails for the simple reason that, pursuant to the terms of the Plans as written, plaintiffs undisputedly are not entitled to any benefit." (Docket 78, pp. 42-43). The Verizon Defendants are seriously wrong, because the unaltered terms of the plans, as they existed before December 22, 2006, indisputably entitled Plaintiffs and Class members to payment of Verizon sponsored pension benefits. The question to be decided by this Court with respect to alternative Count Seven is whether the *post hoc* plan amendments made on December 22, 2006 could be validly applied retroactively so as to defeat the retirees' vested rights to receive payment of accrued benefits prior to December 22, 2006.

Under ERISA Section 502(a)(1)(B), a plan participant may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the plan." 29 U.S.C. § 1132(a)(1)(B).

"When a beneficiary wants what was supposed to have been distributed under a plan, the appropriate remedy is a claim for denial of benefits under § 502(a)(1)(B) of ERISA rather than a fiduciary duty claim pursuant to § 502(a)(3)." *McCall v. Burlington Northern/Santa Fe Co*., 237 F.3d 506, 512 (5th Cir.2000), *cert, denied*, 534 U.S. 822, 122 S.Ct. 57 (2001).

Put simply, for their Seventh Claim for Relief, Plaintiffs seek what was supposed to have been distributed to them in accordance with the pension plan terms that existed before December 22, 2006. Prior to December 22, 2006, there were no pension plan provisions that allowed a corporate spinoff to Idearc Inc. to offset Verizon pension benefits due and owing to retirees having vested rights. Plaintiffs rightfully contend that the December 22, 2006 plan amendments used to offset the Verizon sponsored benefits were impermissibly retroactively applied so as to defeat the retirees' rights. In *Member Services Life Insurance Co. v. American National Bank & Trust Co. of Sapulpa*, 130 F.3d 950 (10th Cir.1997), the Tenth Circuit held that retroactive application of a plan amendment impermissibly serves to destroy vested rights." *Id*. at 954. The circuit court ruled that "[t]he notion of protecting vested rights prevents one party to a contract from unilaterally changing the terms of performance *after* that performance has become due." (emphasis added). *Id*. at 956. In the instant case, that is exactly what Verizon sought to accomplish by unilaterally changing the terms of performance after Verizon was on the hook for paying the service pensions due and owing to the retirees.

Other courts have held that attempts to backdate plan amendments and apply them retroactively so as to defeat plan participants' rights are ineffective to amend the plan. *Confer v. Custom Engineering Company*, 952 F.2d 41 (3rd Cir. 1991); *Winterrowd v. American General Annuity Ins.*, 321 F.3d 933 (9th Cir. 2003).

In their Memorandum Brief, Verizon Defendants correctly acknowledge that Plaintiffs have other claims asserting that the December 22, 2006 plan amendments "violate ERISA or pre-existing plan provisions, and so effectively seek to reform the Verizon Pension Plan to suppress the terms of the Idearc amendments" and so contend that those claims must be pursued under ERISA Section 502(a)(3). (Docket 78, pp. 42-43, citing, *CIGNA*, 131. S.Ct. at 1877). It is true that the holding in *CIGNA* is that ERISA Section 502(a)(1)(B) does not give courts the power to redraft plan terms. With respect to Plaintiffs' Claim Seven, however, the Court is not being asked to redraft, but is being asked to enforce, the plan terms as actually existed before December 22, 2006 when Verizon's (not Idearc's) performance was due and payable to the retirees.

Accordingly, this Court should deny Verizon Defendants a summary judgment on Plaintiffs' Seventh Claim for Relief in the Second Amended Complaint.

V. Verizon Defendants' Speciously Attack Plaintiffs' First Claim for Relief – Denial of a Full and Fair Review.

In their Memorandum Brief at pp. 43-47, Verizon Defendants contend that Plaintiffs' First Claim for Relief "is without merit, and the relief plaintiffs' request is not available under ERISA." (Docket 78, pp. 43-47). The defendants fail to mention that the plan administrators refused to respond to Plaintiffs' claim for classwide relief and refused to consider supporting evidence and records solely in the Verizon Defendants' possession that Plaintiffs insisted be included in the administrative claims record before making a final second step final administrative decision on Plaintiffs' written claims. There were no special circumstances justifying the plan administrators failure to provide a timely decision within 60 days after receipt

of Plaintiffs' September 15, 2009 administrative appeals letter. A final decision was not provided until January 12, 2010, after this civil action was commenced.

Pursuant to ERISA Section 503(2), every employee benefit plan is required to afford every plan participant whose claim for benefits has been denied a reasonable opportunity for a full and fair review of the decision to deny the claim by the appropriate named fiduciary. 29 U.S.C. § 1133(2). "In connection with th[e] statutory recognition of contractual benefit rights, Section 503 of ERISA, 29 U.S.C. § 1133, in accordance with the regulations of the Secretary of Labor, sets certain minimum requirements for the claims procedures that plans are required to follow in processing benefits claims brought by participants and beneficiaries." *Estate of Larry M. Bratton v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 215 F.3d 516, 523 (5th Cir.2000).

Plaintiffs contend it was an unfair tactic and breach of fiduciary duty for Verizon EBC to fail or refuse to include in the internal administrative record the scores of demand letters the plan administrators received from other retirees who, like Plaintiffs, sought payment of Verizon pension plan benefits and recision of their involuntary transfer into SuperMedia's pension plans. (Docket 64, SAC ¶¶ 124 and 126). During the administrative process, those documents were not disclosed to Plaintiffs, and Verizon Defendants admit the Class members' letters and the responses thereto were not made part of the administrative record relating to Plaintiffs' internal claim and appeal. (App. ¶ 124). Furthermore, the plan administrators refused Plaintiffs' demand that they comply with the terms of the Verizon Management Pension Plan which states, in part, that:

> [i]n connection with an appeal, the claimant (or his duly authorized representative) may review documents and other information relevant to the claim (copies of which shall be provided free of charge upon request) and may submit evidence and arguments in writing to the VCRC.

(Defts' Appx. 404, Section 9.13)(b)). Plaintiffs requested within both the initial demand and the internal appeal letters that numerous documents not revealed to Plaintiffs be included in the administrative record. (Supp. App. 541-542, 547-548, 563-564). The requested records were neither produced to Plaintiffs nor included in the administrative record.

At no time during the administrative claims process did Verizon Defendants reveal that all Plaintiffs and Class members were surreptitiously transferred to Idearc/SuperMedia and the transfer decision was *imposed* upon Idearc. Those material facts had to be established by way of stipulation and formal discovery in this protracted litigation. (App. 2 ¶ 4). As previously pointed out by Plaintiffs, at least one appellate court, the Eighth Circuit, has found such facts directly establish the retirees' claim of breach of fiduciary duty and their entitlement to appropriate equitable relief in the form of reinstatement into Verizon's pension plans. *Howe,* 36 F.3d at 756.

By not producing documents and information requested by Plaintiffs that they reasonably deemed relevant to their class-wide administrative claim, Verizon EBC effectively made Plaintiffs' internal appeals procedure futile. [16] The Verizon EBC's behavior thwarted ERISA's goal of encouraging the resolution of benefits disputes by means of internal grievance procedures, rather than by means of costly litigation.

The Verizon Defendants contend the reason there was no timely response to the September 15, 2009 appeals letter was so that "plaintiffs appeal could be taken up at a December 17, 2009 meeting." (Docket 78, p. 45). That explanation simply begs the question: What were

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[16] The applicable federal regulation requires plan administrators to provide a claimant "upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claimant's claim for benefits." 29 C .F.R. § 2560.503-1(h)(2)(iii).

the special circumstances for the delay? Why did it take almost a full month after the December 17 meeting for there to be a final written decision? There are no stated special circumstances, and the reasonable inference is that Verizon Defendants were simply trying to run out the three year statute of limitations clock, knowing that the Spin-off transaction took place on November 17, 2006 and the *post hoc* pension plan amendments were adopted on December 22, 2006. Had Plaintiffs held off filing this civil action, there can be no doubt that Verizon Defendants' counsel would be arguing Plaintiffs' claims of breach of ERISA fiduciary and statutory duties are barred by ERISA's general three year statute of limitations.[17]

Pursuant to ERISA Section 502(a)(3), 29 U.S.C. Section 1132(a)(3), Plaintiffs ask this Court to grant appropriate equitable relief and declare that both Verizon EBC and SuperMedia EBC failed to provide Plaintiffs with a full and fair review and, as a consequence, Plaintiffs' claims asserted herein should be deemed tolled during the administrative process and Plaintiffs should recover an award of reasonable attorney's fees and costs necessarily incurred in this civil action in order to litigate the class certification issue and the merits of Plaintiffs' administrative claim. (Docket 64, SAC ¶ 132). With respect to the First Claim for Relief, Plaintiffs are not seeking a substantive damage remedy. The Fifth Circuit has acknowledged that failure to fulfill procedural requirements "generally does not give rise to a substantive damage remedy." *Lafleur v. Louisiana Health Service and Indem. Co.* 563 F.3d 148, 157 (5th Cir. 2009).

Plaintiffs request for attorney's fees and costs is not a damages remedy. Last year, in *Hardt v. Reliance Standard Life Ins. Co*., __U.S. __, 130 S. Ct. 2149 (2010), the U.S. Supreme

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[17] ERISA Section 413(2) establishes a limitations period of three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation. 29 U.S.C. § 1113(2); *Maher v. Strachan Shipping Co.*, 68 F.3d 951, 954 (5th Cir. 1995).

Court addressed a split between the federal courts of appeal on whether an ERISA litigant must be a prevailing party in order to obtain fees under 29 U.S.C. §1132(g)(1), which provides “the court in its discretion may allow a reasonable attorney’s fee and costs of action to either party.” The Supreme Court held that prevailing party status is not required, and set a new standard that broadened the class of litigants who can qualify for fees under the statute. An ERISA litigant now must only achieve “some degree of success on the merits of a case” to be eligible for fees. *Id.*, at 2158. The Supreme Court did not, however, elaborate on the scope of the new standard, and left open questions regarding just how much success in an ERISA matter is enough to sustain a fee claim. Plaintiffs contend that their success in achieving class certification, an issue not fairly addressed during the administrative claims process and vigorously opposed initially in this case, proves some degree of success on the merits of this case and their administrative claim.

Accordingly, this Court should deny Verizon Defendants summary judgment on Plaintiffs’ First Claim for Relief in the Second Amended Complaint.

VI. Plaintiffs Should Be Granted Appropriate Equitable Relief As Requested in the Sixth Claim for Relief.

In their Memorandum Brief at pp. 47-48, Verizon Defendants contend that Plaintiffs’ Sixth Claim for Relief “fails to state a claim upon which relief can be granted.” (Docket 78, pp. 47-48). Plaintiffs contend in their Sixth Claim for Relief that the Court should grant Plaintiffs and the Class members appropriate equitable relief, as allowed under ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a) and 1132(a)(3). ERISA Section 502(a)(3) authorizes a civil action “by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate

equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]" 29 U.S.C. § 1132(a)(3).

Plaintiffs have established their First, Second, Third and Fourth Claims for Relief that Verizon Defendants violated duties imposed by ERISA and the pension plans, and ERISA Section 502(a)(3) authorizes appropriate relief for the purpose of redressing the violations and enforcing the Verizon pension plans' provisions. *Harris Trust and Savings Bank v. Saloman Smith Barney Inc.*, 530 U.S. 238, 246, 120 S.Ct. 2080, 2187 (2000). Plaintiffs were wrongfully removed from Verizon's pension plans and they ask the Court to enter an order requiring the defendants to restore Plaintiffs and Class members to their former status as participants in Verizon's employee benefit plans and order that Plaintiffs and Class members be made whole.

Reinstatement is an equitable remedy based on ERISA Section 502(a)(3). *LaRocca v. Borden, Inc.*, 276 F.3d 22, 29 n.7 (1st Cir. 2002). In *LaRocca,* the plaintiffs were improperly terminated from Borden's employee benefit plan providing life, health, dental and disability insurance coverage. The lower court's order for plaintiffs to be reinstated to Borden's plan, together with reimbursement for expenses incurred that would have been covered by the plan, was affirmed by the appellate court. Similarly, In *Varity,* the Supreme Court affirmed a lower court's reinstatement of plaintiffs who had been improperly terminated from their plan. *Varity*, 516 U.S. at 515, 116 S.Ct. at 1079.

Plaintiffs have pled they should be "restored to their former status as participants in Verizon's pension and welfare plans." (Docket 64, SAC ¶ 229, Prayer at ¶ C.8). It is undisputed that retiree health care benefits are intertwined with retiree pension benefits. The Healthcare Plan SPD issued to Plaintiff Murphy and Plaintiff Noe states that a retiree is "eligible

for coverage if • You retired with a service or disability pension under the provisions of the Verizon Pension Plan for New York and New England Associates (formerly the NYNEX Pension Plan)." (Defts' Appx. 446). Verizon pledged to "always cover the full cost of coverage" for Class members who retired on or before January 1, 1992. (Supp. App. 516). By involuntarily removing Plaintiffs and Class members from Verizon's pension plans, the defendants avoided their health care commitments to the retirees.

A corporate spinoff is not listed in the SPD as a circumstance that could result in loss of health care coverage. (See generally, Supp. App 517-521, "When participation ends".). Verizon Defendants' arguments at pp. 34-36 of their Memorandum Brief about the healthcare plans' ROR are unavailing. The ROR does not allow the healthcare plan to be amended in any procedural manner whatsoever. The ROR states the procedure is "[t]he plans may be amended by publication of any SPD, summary of material modification, enrollment materials, or the communication relating to the plans, as approved by the chairperson of the VEBC. . ." (Defts' Appx. 445). The unannounced amendment adopted on December 8, 2006, after the retirees were transferred, is not in compliance with the plan's procedure for making an amendment so as to effectively curtail the retirees' coverage and participation in the healthcare plan.

Since Plaintiffs' First, Second, Third and Fourth Claims for Relief survive the defendants' motion for summary judgment, Plaintiffs have established their entitlement to appropriate equitable relief under ERISA Section 502(a)(3), and the Court, accordingly, should deny Verizon Defendants summary judgment on the Sixth Claim for Relief.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

For all the foregoing reasons, this Court should deny Verizon Defendants' Motion for Summary Judgment. Due to the importance of the issues in this civil action, which case is being monitored by hundreds of Class members, the complexity of the case and the unique legal arguments posed by both sides, an oral argument hearing may be useful to the Court and is requested.

DATED this 14th day of October, 2011.

Respectfully submitted,

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