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

PHILIP A. MURPHY, JR., *et al.*,	)	
Plaintiffs,	)	**CIVIL ACTION NO. 3:09-CV-2262-G**
v.	)	
VERIZON COMMUNICATIONS INC., *et al.*,	)	
Defendants.	)	

REPLY MEMORANDUM IN FURTHER SUPPORT OF THE VERIZON DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIFTH CLAIM FOR RELIEF

Plaintiffs' opposition to the Verizon Defendants' motion to dismiss their ERISA Section 510 claim as time-barred does not dispute three important bases for Verizon's motion. First, plaintiffs acknowledge that a borrowed Texas statute of limitations applies to their claim. *E.g.*, Opp. at 14. Second, plaintiffs concede that Texas' two-year statute of limitations for the tort of wrongful discharge applies to a "typical Section 510 claim." *Id.* at 11-12. Third, plaintiffs recognize that their Count V claim accrued in late 2006, and so must be dismissed, if the "typical" two year limitations period applies here. *Id.* at 7, 14; *see id.* at 9.

Instead, plaintiffs argue only that the idiosyncratic nature of their Section 510 allegations requires application of Texas' four-year statute of limitations for contract claims. This assertion fails for two independent reasons. *First*, the law is clear that a single state statute of limitations applies to *all* claims brought under Section 510 regardless of the particular allegations at issue in a given case. And, as plaintiffs acknowledge, the Fifth Circuit has repeatedly applied Texas'

two-year limitations period to Section 510 claims. *Id.* at 12-13 & n.3. *Second*, plaintiffs' interference allegations themselves sound in tort, not contract. Accordingly, even if this Court were required to characterize plaintiffs' allegations in order to determine the most analogous Texas statute of limitations, plaintiffs' claim would be time-barred under Texas' two-year limitations period for tort claims.[1]

I. Texas' Two-Year Limitations Period Applies To All Section 510 Claims.

Plaintiffs assert that "[b]efore determining the most analogous state statute to apply to plaintiffs' ERISA Section 510 claim, the Court must properly address, as a preliminary matter, the underlying characterization of the Fifth Count." *Id.* at 10. Thus, according to plaintiffs, this Court must determine the appropriate Texas statute of limitations to borrow based upon the particular allegations contained in Count V, which plaintiffs characterize as materially different from "typical" Section 510 claims alleging wrongful termination. Plaintiffs, however, do not cite any authority for the novel proposition that the statute of limitations applicable to a Section 510 claim turns on the particular allegations at issue in a given case. Nor could they do so.

Every court of appeals to consider the question has held that a single borrowed state statute of limitations applies to *all* Section 510 claims brought within the state. For instance, in *Sandberg v. KPMG Peat Marwick, LLP*, 111 F.3d 331, 334 (2d Cir. 1997), the Second Circuit held that courts should "select the most analogous cause of action and apply a single, uniform

[1] Plaintiffs' clarification of the nature of their atypical Section 510 claim, moreover, reveals that they have failed to state a claim upon which relief can be granted. This is because "a fundamental prerequisite to a § 510 action is an allegation that the employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way." *Deeming v. Am. Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990); *accord Carmouche v. MEMC Pasadena, Inc.*, No. 06-2074, 2008 WL 2838474, at *13 (S.D. Tex. July 21, 2008) (dismissing Section 510 claim as a matter of law because the plaintiff did not allege any "changes to his employment status"). Accordingly, plaintiffs' Section 510 claim should be dismissed for this reason as well.

period to all section 510 claims." In so holding, the Second Circuit expressly rejected plaintiffs' approach, under which the courts would be required "to parse the various grievances that may be alleged under section 510, assigning to each a distinct statute of limitations." *Id.* Similarly, in *Teumer v. General Motors Corp.*, 34 F.3d 542, 549 (7th Cir. 1994), the Seventh Circuit rejected plaintiffs' "case-to-case approach" for determining the applicable Section 510 statute of limitations, instead holding that that the task is to determine "*a* [single] best parallel cause of action to § 510 generally." *Id.* (emphasis in original); *cf. Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987) (superseded by statute on other grounds) (reaffirming that "a *single* state statute of limitations should be selected to govern *all* § 1983 suits" (emphasis added)); *Wise v. Verizon Commc'ns, Inc.*, No. 08-35866, __ F.3d __, 2010 WL 1376622, at *5 (9th Cir. Apr. 8, 2010) (holding that "only one statute of limitations per state applies to benefits-recovery actions under [ERISA Section 502(a)(1)(B)]"). As the Second and Seventh Circuits recognized, "there is much to be said, in the interest of simplicity, for selecting a *single* most appropriate statute of limitations for *all* claims under [§ 510]." *Teumer*, 34 F.3d at 549 (emphasis added); *Sandberg*, 111 F.3d at 334 (2d Cir. 1997) (same); *see also Wise*, 2010 WL 1376622, at *5 (explaining that "the 'federal interests in uniformity, certainty, and the minimization of unnecessary litigation' are equally relevant to the ERISA context as they were in the § 1983 cases").

Contrary to plaintiffs' suggestion, this rule is entirely consistent with the Fifth Circuit's holding in *McClure v. Zoecon, Inc.*, 936 F.2d 777 (5th Cir. 1991). In that case, the Fifth Circuit held as a matter of first impression that Texas' two-year tort statute of limitations applies to Section 510 claims. *Id.* at 778. In doing so, the court sought to determine "the proper characterization of *a § 510 claim*." *Id.* (emphasis added). In other words, the Fifth Circuit recognized that the task of determining the most analogous state limitations period turns

primarily on the proper characterization of the *statute giving rise to the case of action*, not the particular allegations raised in a given case. *See id.* at 779 (indicating that the Section 510 statute of limitations should be determined in light of "Congress's purpose . . . in passing § 510").[2]

Notably, both the Fifth Circuit and Texas federal district courts have applied Texas' two-year statute of limitations to Section 510 claims that do not involve allegations of wrongful discharge. *Berry v. Allstate Ins. Co.*, No. 03-40568, 84 Fed. Appx. 442, 2004 WL 34807, at *1 (5th Cir. Jan. 5, 2004) (citing *McClure*) (applying Texas' two-year statute of limitations in a Section 510 case challenging an employer's denial of ERISA benefits to temporary workers); *see Onyebuchi v. Volt Mgmt. Corp.*, No. 4:04-CV-576-A, 2005 WL 1981393, at *4 (N.D. Tex. Mar. 31, 2005) (citing *McClure*) (applying Texas' two-year statute of limitations in a Section 510 case where plaintiff challenged defendants' alleged refusal to enroll plaintiff in ERISA plan); *St. Julian v. Trustees of the Agreement of Trust for Maritime Association-I.L.A. Pension Plan*, 5 F. Supp. 2d 469, 472 (S.D. Tex. 1998) (applying Texas' two-year limitations period to the Section 510 claim of a retired pension plan participant alleging improper denial of disability benefits). Similarly, other federal courts have rejected attempts by plaintiffs to avoid the application of borrowed wrongful discharge statutes of limitations on the ground that their particular allegations related to "benefits situations" like those at issue here. *See, e.g., Cox v. Graphic Commc'ns Conference*, 603 F. Supp. 2d 23 (D.D.C. 2009) (applying D.C. statute of limitations for wrongful discharge to Section 510 claim challenging the denial of ERISA medical benefits to plaintiff following her retirement).

[2] As plaintiffs themselves acknowledge, "[s]ection 510 was designed primarily to prevent unscrupulous employers from discharging or harassing employees in order to keep them from obtaining vested pension rights." Opp. at 9. (emphasis and citation omitted).

In sum, every circuit expressly to consider the question has held that a *single* state statute of limitations should be borrowed for *all* Section 510 claims brought within that state. The Fifth Circuit, moreover, has applied Texas' two-year statute of limitations to *every* Section 510 case that it has considered, including in at least one case outside the wrongful termination context, *see Berry*, 2004 WL 34807, at *1. Accordingly, the two-year Texas statute of limitations applies here and Count V should be dismissed.

II. A Two-Year Limitations Period Applies Because Plaintiffs' Claims Sound In Tort.

Even were this Court required to characterize the particular allegations at issue in Count V in order to determine the most analogous Texas statute of limitation to borrow, that statute of limitations would be Texas' two-year statute of limitations for torts. Tex. Civ. Prac. & Rem. Code Ann. § 16.003; *see Green v. Kaposta*, No. 05-00-00220-CV, 2001 WL 878106, at *2 (Tex. App. - Dallas Aug. 6, 2001) ("The general statute of limitations for injury to a person (torts) is two years."). Notably, plaintiffs fail to cite any caselaw in support of their assertion that, where "[t]he rights involved solely pertain to continued participation in pension plans," a four-year statute of limitations applies. *See* Opp. at 13-14. Their unsupported assertion is incorrect.

Plaintiffs appear to argue that their claim should be governed by a four-year limitations period primarily because their right to benefits under the Verizon plans is contractual in nature. This, however, is precisely the argument that was made in dissent – and rejected by the majority opinion – in *McClure*. *See* 936 F.2d at 780 (Thornberry, J., dissenting); *see also McClure*, 936 F.2d at 779 (rejecting proposition that the limitations period for contract claims applies "where 'economic rights' (rather than 'individual or personal rights')" are at issue). The United States Supreme Court, moreover, has held that claims under 42 U.S.C. § 1981 – which protects an individual's right to "make and enforce contracts" – are governed by the personal injury statute of limitations of the forum state. *Goodman*, 82 U.S. at 661-62 (partially superseded by statute as

recognized in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004)). And the Fifth Circuit has recognized that Texas' two-year statute of limitations applies to claims for tortious interference with contract under Texas law. *First Nat'l Bank v. Levine*, 721 S.W.2d 287, 289 (Tex. 1986) (citing *Atomic Fuel Extraction Corp. v. Estate of Slick*, 386 S.W.2d 180 (Tex. Civ. App. - San Antonio 1964), *writ ref'd n.r.e. per curiam*, 403 S.W.2d 784 (Tex. 1965)). Accordingly, plaintiffs' assertion that their claim involves only contractual rights does not alter the fact that it sounds in tort rather than in contract.

Plaintiffs' argument that the statute of limitations applicable to contract claims governs here also confuses their claim for benefits under ERISA Section 502(a)(1)(B) in Count VI with their Count V interference claim. Section 502(a)(1)(B) permits a plan participant "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 terms of the plan." 29 U.S.C. § 1132(a)(1)(B). As the Fifth Circuit has recognized, Section 502(a)(1)(B) "provides a contract based cause of action." *Estate of Bratton v. National Union Fire Ins. Co.*, 215 F.3d 516, 523 (5th Cir. 2000). Accordingly, insofar as plaintiffs seek to vindicate purported contractual rights under the Verizon pension plans, any such claim arises not under Section 510 but Section 502(a)(1)(B). *See generally McClure*, 936 F.2d at 778 n.13 (distinguishing contractual claims arising under Section 502(a)(1)(B) as irrelevant to the determination of the appropriate Section 510 cause of action).[3]

[3] Plaintiffs also assert – in passing and without any support – that a four-year statute of limitations should apply because the conduct at issue in Count V also allegedly constituted a breach of the Verizon Defendants' fiduciary duties. Opp. at 14 (*citing* Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(5)). ERISA, however, provides a separate cause of action for breach of fiduciary duty, *see* 29 U.S.C. §§ 1109, 1132(a)(2), which plaintiffs invoke, *inter alia*, in Count III. Moreover, the mere fact that some of the Verizon Defendants allegedly are fiduciaries does not convert plaintiffs' Section 510 interference claim into a fiduciary duty claim. Nor does it

Finally, as noted above, a number of courts – including federal courts within Texas – have applied a two-year statute of limitations to claims involving the denial of ERISA benefits outside the wrongful termination context. *See Berry* 2004 WL 34807, at *1 (challenging an employer's denial of ERISA benefits to temporary workers); *Onyebuchi*, 2005 WL 1981393, at *4 (challenging defendants' alleged refusal to enroll plaintiff in ERISA plan); *St. Julian*, 5 F. Supp. 2d at 472 (challenging allegedly improper denial of pension disability benefits to retiree); *see also Cox*, 603 F. Supp. 2d 23 (D.D.C. 2009) (challenging the denial of medical benefits to retiree). In these cases – as here – the claims involved allegations of interference with contractual rights to ERISA benefits. The courts nevertheless concluded that Texas' two-year statute of limitations applied. This Court should do the same here.

distinguish this case from the run of Section 510 cases applying personal injury statutes of limitations, since the defendants in such cases often also have allegedly breached fiduciary duties to plaintiffs. *E.g.*, *Onyebuch*, 2005 WL 1981393, at *1; *St. Julian*, 5 F. Supp. 2d at 472.

Conclusion

For the foregoing reasons, as well as the reasons stated in the Verizon Defendant's opening memorandum, the Fifth Count of plaintiffs' Complaint should be dismissed with prejudice.

Dated: April 13, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2010, I caused a true and correct copy of the foregoing instrument to be served on counsel for plaintiffs via the Court's electronic filing system as set forth in Miscellaneous Order 61 as follows:

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