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 IDEARC's PENSION PLANS, Plaintiffs, vs. VERIZON COMMUNICATIONS, INC., VERIZON EMPLOYEE BENEFITS COMMITTEE, VERIZON PENSION PLAN FOR NEW YORK AND NEW ENGLAND ASSOCIATES, VERIZON MANAGEMENT PENSION PLAN, IDEARC EMPLOYEE BENEFITS COMMITTEE, Defendants.	§ § § § § § § § § § § § § § § § § § § §	CIVIL ACTION NO. **3:09-cv-2262-G**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

DATED this 2nd day of December, 2010. Respectfully submitted,

s/ Curtis L. Kennedy
Texas State Bar No. 11284320
Colorado State Bar No. 12351
Curtis L. Kennedy, Esq.
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Tele: 303-770-0440
CurtisLKennedy@aol.com
ATTORNEY FOR PLAINTIFFS

s/ Robert E. Goodman, Jr.
Texas State Bar No. 08158100
Robert E. Goodman, Jr., Esq.
KILGORE & KILGORE LAWYERS
3109 Carlisle Street
Dallas, Texas 75204
Tele: 214-969-9099
Fax: 214-953-0133
reg@kilgorelaw.com
ATTORNEY FOR PLAINTIFFS

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PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs PHILIP A. MURPHY, JR., SANDRA R. NOE, and CLAIRE M. PALMER, by and through their counsel, file their brief in support of their motion for class certification pursuant to Rule 23, Fed.R.Civ.Proc.

I. BACKGROUND

On November 25, 2009, Philip A. Murphy, Jr., Sandra R. Noe and Claire M. Palmer (collectively, "Plaintiffs"), filed this case against the Verizon Defendants and the Idearc/SuperMedia Defendants on behalf of themselves and others similarly situated, alleging that their suit should be certified as a class action. On January 6, 2010, Plaintiffs filed their "Amended Complaint for Proposed Class Action Relief Under ERISA." (Docket No. 6). 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. §§ 1001- 1461.

Plaintiffs' claims arise out of Verizon Defendants' actions taken during November-December 2006 when Plaintiffs and the proposed class of several thousand retirees were involuntarily transferred out of Verizon's long established pension plans into pension plans of a newly formed, highly leveraged spin-off company, Idearc, Inc., now known as SuperMedia Inc. [1] The involuntary transfer of Plaintiffs and putative class members proved to be an economic detriment to the retirees and their beneficiaries. The transferred retirees suffered significant loss of retiree benefits not suffered by tens of thousands of retirees who remained enrolled in Verizon's sponsored pension and employee benefit plans. (Docket No. 6, Amended Complaint

[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 emerged from Chapter 11 bankruptcy proceedings and changed its name to SuperMedia, Inc. (Docket No. 6, Amended Complaint at ¶¶ 19, 62)

at ¶¶ 49, 66, 150).

As a result of Docket 33, the Court's October 18, 2010 Order dismissing several claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, remaining within the Amended Complaint are five claims for relief and each count is briefly summarized in the following paragraphs.

In Count One, Plaintiffs contend pension plan administrators Idearc/SuperMedia EBC breached fiduciary duties under ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1), by denying the individual named Plaintiffs a full and fair administrative review. Plaintiffs do not seek class certification of this claim.

In Count Two, Plaintiffs seek to recover a monetary penalty due to the failure of pension plan administrators to produce requested documents. However, the Court dismissed this claim with respect to SuperMedia EBC on the grounds that the requested documents were not required to be produced under the ERISA Section 104(b)(4), 29 U.S.C. Section 1024(b)(4). Plaintiffs do not seek class certification of the remaining portion of Count Two still pending against Verizon EBC.

In Count Three, Plaintiffs contend Defendant Verizon EBC violated ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), the duty to comply with pension plan document rules. (*Id.* at ¶ 136). Plaintiffs contend that all actions taken with respect to pension assets and retired plan participants had to be in exact accordance with then existing governing plan terms and rules, but that said defendant acted contrary to the controlling terms and rules. (*Id.* at ¶ 128). Plaintiffs invoke *Kennedy v. Plan Administrator for DuPont Savings and Investment*, ___ U.S. ___, 129 S.Ct. 865 (2009), wherein the Supreme Court confirmed that ERISA provides no

exception to the plan administrator's duty to act in accordance with existing plan documents and stated rules. (*Id.* at ¶ 129). Plaintiffs contend that Verizon EBC's involuntary reclassification and removal of Plaintiffs and the putative class of retirees from Verizon sponsored pension plans as of November 17, 2006 was action taken in violation of the retirees' contractual rights under the Verizon pension plans and action taken in violation of controlling pension plan terms and rules. (*Id.* at ¶ 134). Plaintiffs seek a declaration from this Court that Defendant Verizon EBC failed to act in compliance with Verizon's pension plan documents rules and violated ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). (*Id.* Prayer at ¶ G.2).

In Count Four, Plaintiffs have asserted a novel claim seeking appropriate equitable relief against Verizon, in its capacity as the pension plans sponsor, and against Verizon EBC, in its capacity as plan administrators.[2] Plaintiffs contend that the pension assets Verizon transferred to Idearc/SuperMedia were excess or surplus pension assets not earmarked or tied to any identifiable retirees. (Docket 6 at ¶ 138). Pursuant to ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3), Plaintiffs request this Court grant them appropriate equitable relief, including a declaration that the transfer of surplus assets, whenever it did occur, did not serve to change the retirees' status and did not extinguish any plaintiff's or putative class member's rights to receive payment of benefits from Verizon's sponsored pension plans. (*Id.* at ¶ 138, Prayer at ¶ G.3). Plaintiffs contend the December 22, 2006 pension plan amendments were illegally applied retroactively, and Plaintiffs request a declaration that the December 22, 2006 plan amendments are null and void. (*Id.* at ¶ 139, Prayer at G.3). Plaintiffs ask this Court

[2] The Court approved the parties' stipulated agreement that SuperMedia Inc. be dismissed from this litigation and SuperMedia Inc has agreed to be bound by appropriate equitable relief ordered by the Court, such as injunctive relief reinstating the retirees into Verizon's retirement rolls. (Docket Nos. 17 and 15).

to grant all retirees appropriate equitable relief which would include injunctive relief rescinding Verizon's reclassification of Plaintiffs and the putative class and an order requiring all retirees be restored to their former status as participants and beneficiaries enrolled in Verizon's pension and welfare plans and that they be made whole. (*Id.* at ¶140, Prayer at ¶ G.4). Plaintiffs request an order requiring Idearc/SuperMedia Defendants to transfer Plaintiffs and all putative class members back into Verizon's sponsored pension and welfare benefit plans (*Id.*, Prayer at ¶ G.5).

In Count Six, Plaintiffs seek payment of benefits from Verizon's pension plans. Plaintiffs assert their ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), claim as an alternative claim to their ERISA Sections 502(a)(2) and (a)(3) based claims, should the Court not grant full relief under those claims. (*Id.* at ¶ 152). Plaintiffs contend that Verizon vested pension plan benefits due and payable under the terms in existence before December 22, 2006 were not actually provided to Plaintiffs and putative class members. (*Id.* at ¶ 157). Plaintiffs seek for themselves and the putative class members benefits payable under the unaltered terms and plan language in existence before December 22, 2006. (*Id.* at ¶ 158, Prayer at ¶ H).

The Court has jurisdiction of each claim for relief based upon the civil enforcement provisions of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1132(a)(1), 1132(a)(2), 1132(a)(3), 1132(e)(1) and 1132(f), and upon 28 U.S.C. § 1331.

Plaintiffs seek certification of a plaintiff class (hereinafter the "Class"), defined as follows:

> All retirees and their beneficiaries formerly enrolled in Verizon's pension plans who were reclassified by Verizon and treated as transferred into Idearc's pension plans pursuant to the spin-off occurring in November 2006.

(Docket 6 ¶ 171). The Class does not include persons who were active Verizon employees, not retired, when the spin-off occurred.

Class certification is entirely appropriate here. There are no individualized issues of proof on any elements of Plaintiffs' ERISA based claims. There are several documents that purport to affect all Class members. On the last day of the Spin-off, Verizon and Idearc executed an Employee Matters Agreement ("EMA") which called for Plaintiffs and all Class members to be included in the Spin-off and transferred into Idearc's retiree rolls. (See Exhibit 1 filed herewith). In addition, Defendants will contend that all Class members' rights were affected by pension plan amendments executed after the Spin-off on December 22, 2006. See, e.g., Exhibit 2 filed herewith). Defendants attempted to make the pension plan amendments retroactive to November 17, 2006, the final date of the Spin-off.

This case raises uniform, classwide legal and factual questions whether Verizon Defendants violated ERISA and whether the Court should grant the Class appropriate equitable relief, namely reinstatement into Verizon's sponsored employee benefit plans. For the following reasons, the Court should grant class certification.

II. ARGUMENT and AUTHORITIES

A. THIS IS A CLASSIC CASE FOR CLASS CERTIFICATION. PLAINTIFFS' CLAIMS ARE BASED ON DEFENDANTS' UNIFORM CONDUCT WHICH HAS AFFECTED ALL CLASS MEMBERS IN THE SAME WAY AND THEIR CLAIMS WILL BE DECIDED UNDER THE PROVISIONS OF THE PLANS AND ERISA.

Plaintiffs, are mindful that as movants for class certification, they bear the burden of demonstrating that a class action is appropriate and that all requirements of Rule 23 are satisfied. *Berger v. Compaq Computer Corp*., 257 F.3d 475, 479 (5th Cir.2001). Here, the requirements

of Rule 23 are readily met, as this case presents uniform, common questions of fact and law regarding the legality of Verizon Defendants' conduct when involuntarily transferring the Class from Verizon's sponsored pension plans into SuperMedia's sponsored pension plans.

"Class actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99, 101 S.Ct. 2193, 2199 (1981). Class actions permit plaintiffs to "vindicat[e] the rights of individuals" who might not have initiated litigation, "in which the optimum result might be more than consumed by the cost." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338, 100 S.Ct. 1166, 1174 (1980). Accordingly, "if there is to be an error made, let it be in favor and not against the maintenance of the class action." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928, 89 S.Ct. 1194 (1969). The Fifth Circuit has held that judges should err in favor of certification. *Hamilton v. First American Title Ins. Co*., 266 F.R.D. 153, 158 (N.D. Tex. 2010) (citing *Bywaters v. United States*, 196 F.R.D. 458, 463 (E.D. Tex. 2000) (citing *Horton v. Goose Creek Independent School District*, 690 F.2d 470, 487 (5th Cir.1982), *cert. denied*, 463 U.S. 1207, 103 S.Ct. 3536 (1983)).

Rule 23 requires a two-step analysis to determine whether class certification is appropriate. First, Plaintiffs must satisfy the four prerequisites in Rule 23(a): that (1) the Class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the Class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the Class ("adequacy of representation"). If all four requirements of Rule 23(a) are met, the plaintiff must then satisfy at least one of the subsections of Rule 23(b). *Gene and Gene, LLC v. BioPay LLC*, 541 F.3d 318,

325 (5th Cir.2008).

In determining whether class treatment is appropriate, a court need not consider the underlying merits of the action. *Castano v. American Tobacco Co*., 84 F.3d 734, 744 (5th Cir.1996); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 2152 (1974) ("we find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule"). Nevertheless, "[D]istrict courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23 have been satisfied, and this analysis will often, though not always, require looking behind the pleadings to issues overlapping with the merits of the underlying claims." *Dukes v. Wal-Mart Stores, Inc*., 603 F.3d 571, 594 (9th Cir. 2010) (en banc). By probing into the merits, however, a district court is not empowered at the class certification stage to resolve disputes regarding the merits; rather, a court should inquire into the merits only to determine whether the plaintiff has satisfied the requirements of Rule 23. *Id*. at 586, 587, 591.

A court that certifies a class must also appoint class counsel who will fairly and adequately represent the interests of the class, as required by Rule 23(g). See Fed. R. Civ. P. 23(g)(1)(C). *Barrie v. Intervoice-Brite, Inc*., Not Reported in F.Supp.2d, 2006 WL 2792199 (N.D. Tex. September 26, 2006); *In re Electronic Data Systems Corp. Securities Litigation*, 226 F.R.D. 559, 571 (E.D. Tex. February 11, 2005).

As explained below, the liability elements under Plaintiffs' ERISA claims in Counts 3, 4 and 6 of the Amended Complaint are all subject to class-wide, common proof. Certification of these issues therefore will take full advantage of Rule 23's objective of achieving judicial

economy by avoiding presentation of identical or similar evidence by potentially thousands of retirees and their beneficiaries who were expelled from Verizon's retirement rolls and sent to Idearc/SuperMedia's retirement rolls. Once Defendants' liability is established, the requested remedy is the same for the Class, i.e., reinstatement into Verizon's sponsored employee benefit plans.

B. THIS ACTION MEETS ALL FOUR REQUIREMENTS OF RULE 23(a).

Fed. R. Civ. Proc. 23(a) requires that: (1) the class be so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims and defenses of the class; and (4) the representative party will fairly and adequately protect the interests of the class. This action meets all four requirements of Rule 23(a).

1. Numerosity

Numerosity is satisfied when the class is so numerous that joinder of all members is impracticable (i.e., extremely difficult or inconvenient). *Garcia v. Gloor,* 618 F.2d 264, 267 (5th Cir.1980). No specified number is needed to maintain a class action, rather practicality of joinder depends on several factors, including: (1) the size of class, (2) ease of identifying and serving its members, (3) their geographic dispersion, and (4) whether individual claims are so small as to inhibit a class member from pursuing his own interest. *James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir.2001) (citation and internal quotation marks omitted), *cert. denied*, 534 U.S. 1113, 122 S.Ct. 919 (2002).

Plaintiffs have alleged that the proposed class consists of well over two thousand persons.

(Docket 6, ¶ 171). Verizon Defendants aver that "the precise of the putative class is unknown." (Docket 20 ¶ 171). Idearc/SuperMedia Defendants generally deny the allegation. (Docket 34 ¶ 171). Rule 23 does not require a plaintiff to prove the exact number of class members. See NEWBERG & A. CONE, NEWBERG ON CLASS ACTIONS §§ 3.20, 3.5 (4TH ed. 2003). Nevertheless, the Form 5500s that Idearc filed [3] with two federal agencies reported that right after November 17, 2006 Idearc's newly formed pension plans had the following number of retirees:

Management retired or separated participants receiving benefits:	847
Management retired or separated participants entitled to future benefits:	386

(Exhibit 3, filed herewith at p. 2, lines 7b and 7c).

Nonmanagement retired or separated participants receiving benefits:	788
Nonmanagement retired or separated participants entitled to future benefits:	539

(Exhibit 4, filed herewith at p. 2, lines 7b and 7c). Added, the figures exceed several thousand.

Even if those numbers could be disputed by Defendants, the Fifth Circuit holds that to meet the requirement of Rule 23(a)(1), the potential class representatives need show only that it is difficult or inconvenient to join all members of the proposed class. See *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir. 1981) (noting that "[t]he proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors."). Plaintiffs have compiled a list of the names and addresses of known retirees who, thus far, have actively communicated with the retiree organization or Plaintiffs or both and expressed their support for Plaintiffs in pursuit of this litigation. (See Exhibit 5 filed herewith). The list reveals the retirees are widely dispersed

[3] Idearc's in-house counsel Joe A. Garza, Jr., provided the Form 5500s to Plaintiffs' counsel Curtis L. Kennedy in response to a ERISA 104(b)(4) document request made by the Plaintiffs.

throughout the United States. Defendants cannot dispute the fact that Class members are, indeed, dispersed throughout the United States which fact strongly suggests that joinder is very impracticable.

Prior to November 17, 2006, Class members were all carried on Verizon's retirement rolls and Defendants cannot dispute the fact that both Verizon and SuperMedia have computerized data bases making the retiree Class easily identifiable from Defendants' business records. Any required notice of class certification can be provided by regular mail.

Thus, there is sufficient numerosity under Rule 23(a)(1) in this case.

2. Commonality

To demonstrate commonality, Plaintiffs must allege that there exist "questions of law or fact common to the class." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 625 (5th Cir.1999). This requirement is not onerous. *Id.* The inquiry is not whether common questions of law or fact predominate, but only whether such questions exist. The commonality requirement is a "low bar," and "courts have generally given it a permissive application." *In re New Motor Vehicles Canadian Export Antitrust Litig*., 522 F.3d 6, 19 (1ST Cir. 2008) (citation and internal quotations omitted). The undemanding commonality test of Rule 23(a) is met, when there is "at least one issue whose resolution will affect all or a significant number of the putative class." *Forbush v. J. C. Penney Co., Inc*., 994 F.2d 1101, 1106 (5th Cir.1993) (holding that the plaintiffs had met the commonality requirement, despite the fact that four different pension plans were involved). The requirement is not defeated by minor differences in the underlying facts of an individual case. *Id*.

In this case, the claims asserted do not require the Court to engage in any individualized

analysis. The Class shares a common factual circumstance. The Plaintiffs' class claims rest on the same legal questions; whether the monies Verizon transferred to SuperMedia's pension plans constituted "surplus assets" as opposed to "liabilities"; whether Verizon Defendants' retroactive application of December 22, 2006 plan amendments violated the terms of the pension plans; whether the involuntarily transferred retirees are entitled to equitable relief, including injunctive orders directing all Defendants restore retirees and their beneficiaries into Verizon's sponsored employee benefit plans. The commonality element is met inasmuch as all of these issues, and others, are subject to generalized proof, not individualized findings of fact. The primary question posed by the Amended Complaint concern the terms of the pension plans and the federal law ERISA. For instance, with respect to whether the plan sponsor was allowed on November 17, 2006, the last day of the Spin-off, to transfer retired persons, as opposed to 'assets' or 'liabilities', is common to every single member of the Class. See *Alabama v. Blue Bird Body Company, Inc*., 573 F.2d 309, 320 (5th Cir.1978) (concluding that "an issue common to the class" is one that is "subject to generalized proof," not one that is "unique to each class member"). The novel claim in Count Four of the Second Amended Complaint seeking appropriate equitable relief under ERISA Section 502(a)(3) asserted against Verizon in its capacity as the sponsor of the pension plan is common to every single member of the Class.[4] Permeating from Count Four is the Class's universal contention that a pension plan sponsor should not be allowed to involuntarily remove vested pensioners from a pension plan as if they were mere chattels.

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[4] SuperMedia Inc. stipulated "that it shall be subject to the jurisdiction of the Court and become bound by any equitable judicial relief entered herein only as is necessary for the effectuation of any remedial order of the District Court. . ." (Docket 15 ¶ 3).

In this case, there are shared legal issues with no divergent factual predicates. In this case, the focus is entirely on the actions of defendants, not the actions of any Class member. The evidence of Verizon Defendants' common course of conduct will be used to establish liability under ERISA. Likewise, evidence of Verizon EBC's and SuperMedia EBC's fiduciary status will be common to all Plaintiffs and the Class. *In re Unisys Corp. Retiree Medical Benefits ERISA Litg*., 57 F.3d 1255, 1261 (3d Cir. 1995) (whether defendants acted as fiduciaries found to be a common issue). *In re Unisys Corp. Retiree Medical Benefits ERISA Litig*., 957 F. Supp. 628, 645 (E.D. Pa. 1997) (finding that proof of fiduciary status had been proven on a class-wide basis). There is commonality in as much as there are several key documents central to the dispute in this case.

Although Class members retired from either a management classified pension plan or occupational classified pension plan, there is a high degree of similarity among those plans, thus presenting common factual and legal issues. For instance, as alleged in the Amended Complaint in ¶¶ 116 and 118, on November 17, 2006, when the Class was thrown into the mix for the Spin-off, neither Verizon's management pension plan nor Verizon's occupational pension plan authorized the transfer of plan participants. While the pension plans did authorize the plan sponsor to transfer "assets" or "liabilities", the plans did not give the plans' sponsor license to expel retired persons with vested pension rights. (*Id.* ¶ 134).

Plaintiffs can identify not only the November 17, 2006 EMA (Exhibit 1) which is common to the Class, but also at least two December 22, 2006 pension plan amendments executed after the Spin-off and their involuntary transfer into SuperMedia's custody. The December 22, 2006 pension plan amendments made retroactive to the November 17, 2006 Spin-

off contain language similar enough to permit the Court to make findings on a class-wide basis. (See, e.g., Exhibit 2 at p. 5 ¶ 3).

Thus, there is sufficient commonality under Rule 23(a)(2) in this case.

3. Typicality

Rule 23(a)(3) requires that the claims asserted by a plaintiff on behalf of a class be typical of the claims of the other class members. The analysis under this requirement overlaps and "tend[s] to merge" with Rule 23(a)(2)'s requirement of commonality, because both "serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are [sufficiently] interrelated." *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 n.13, 102 S.Ct. 2364, 2270-71 (1982). The basic question under the typicality requirement is whether the claims of the class representative and class members are based on the same legal or remedial theory. To meet the typicality requirement, class representatives should have the same interests and have suffered the same injuries as others in the putative class, and the representatives' and class members' claims need only share the same essential characteristics, i.e., arise from a similar course of conduct and share the same legal theories." *In re Enron Corp. Secs. v. Enron Corp.*, Not Reported in F.Supp.2d, 2006 WL 1662596, at *10 (S.D. Tex. June 7, 2006). Plaintiffs' incentives in this action are aligned with those of the Class so as to assure their interests will be fairly represented. Plaintiffs and Class members are equally motivated to be removed from SuperMedia's pension rolls and restored into Verizon's pension rolls.

In this case, Defendants will be unable to point out any factual underpinnings of the Plaintiffs and the Class. And if Defendants were able to point out minute differences in the

factual underpinnings of the Plaintiffs and the Class, that would not be enough to destroy typicality, as claims need not be completely identical to satisfy typicality requirements *James*, 254 F.3d at 571 . The typicality requirement ensures that the claims of the class representative are sufficiently aligned with those of the other class members. Typicality is satisfied when the plaintiffs and the class have an interest in prevailing on similar legal claims.

Herein, the claims of Plaintiffs and the Class arise out of the same course of conduct, their inclusion in the Spin-off. The claims of Plaintiffs and the Class are based on the same legal theories, all governed by the same federal law - ERISA - concerning their involuntary transfer into Idearc/SuperMedia's retirement rolls. Plaintiffs establish typicality because they possess the same interests and suffered the same injuries as the Class. The claims will be decided on the basis of the same provisions of governing plan documents, the same evidence with respect to the Spin-off of Idearc and the uniform consequences for the affected retirees. Plaintiffs will rely upon and present the same legal and remedial theories for themselves and for the Class.

As with the commonality element, the focus of the typicality inquiry is on Defendants' conduct, not Plaintiffs' conduct. The Plaintiffs' claims are not antagonistic to the Class. There is typicality. See, e.g., *Stoffels v. SBC Communications, Inc*., 238 F.R.D. 446, 253 (W.D. Tex. 2006) ("Course of conduct challenged and the legal theories behind are shared by all and therefore, typical").

Defendants cannot attack Plaintiffs' motion for class certification on the grounds that many Class members did not try to utilize the pension plans' internal claims procedures. It is well established that in ERISA suits, absent class members are not required to have exhausted their claims through a plan's internal review procedures so long as the named plaintiffs have

done so. *In re Household Int'l Tax Reduction Plan*, 441 F.3d 500, 500-02 (7th Cir. 2006); *Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.*, 491 F.3d 1180, 1193, FN5 (10th Cir. 2007); *Humphrey v. United Way of Tex. Gulf Coast*, Not Reported in F.Supp.2d, 2007 WL 2330933, at *13 (S.D. Tex. Aug. 14, 2007). In any event, Plaintiffs have alleged that use of Verizon Defendants' internal claims procedures is a futile exercise and Defendant SuperMedia EBC completely refused to process Plaintiffs' proposed class-wide claim. (Docket 6, Amended Complaint ¶¶ 60, 69 78-82). Given that ERISA requires plan administrators to treat all similarly situated participants in a consistent manner, there can be no question that if any Class member presented a claim materially similar to Plaintiffs' claim, he or she would receive the same answer from Defendants: you are not entitled to have your involuntary transfer rescinded and restored into Verizon's pension plans.

Accordingly, Plaintiffs have met their burden of proving typicality under Rule 23(a)(3).

4. Adequacy of Representation

Before certifying a class, the Court must find that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement has two related elements: the interests of the named plaintiffs must be sufficiently aligned with those of the class members; and class counsel must be qualified, experienced and generally capable of serving the interests of the entire class. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26, 117 S.Ct. 2231, 2250-2251 (1997). Representation is adequate if: (1) the named plaintiffs' interests are not opposed to those of other class members, and (2) the plaintiffs' attorneys are qualified, experienced and able to conduct the litigation. *Berger*, 257 F.3d. at 479. Both prongs of the adequacy test are readily satisfied here.

First, there is nothing to suggest that any of the Plaintiffs has any interest antagonistic to the Class. There is no apparent conflict. Plaintiffs have the backing of hundreds of members of the class and at least two retiree organizations to which class members belong, to-wit, the "Association of BellTel Retirees, Inc." and the "Directory Alumni Council".[5] Plaintiffs seek what Class members seek, namely restoration into Verizon's sponsored pension plans. (Docket 6, Amended Complaint, Prayer ¶ G.4).

The three Named Plaintiffs in this action are well informed of the basis for their action and they tried to pursue internal ERISA claims for the benefit of the Class. (*Id.*, ¶¶ 59-84). Each has formally recognized his or her duties as class representatives. (See, e.g., Exhibit 6 filed herewith). Insofar as class litigation, plaintiffs are merely asked to have a general understanding of their position with respect to the cause of action and the alleged wrongdoing. *Rubenstein v. Collins*, 162 F.R.D. 534, 538-39 (S.D. Tex. 1995).[6] Plaintiffs fulfill the test of being capable,

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[5] Plaintiffs have the full support of the Association of BellTel Retirees, Inc. (See Exhibit 7, filed herewith, Affidavit of C. William Jones, President and Executive Director of the retiree organization). At the retiree website for the Association of BellTel Retirees, Inc., Plaintiffs have a dedicated webpage for all important court filings with respect to this *Murphy* case. See: **http://www.belltelretirees.org/index.php?option=com_content&view=article&id=44%3Alegal-developments&catid=5%3Aassociation-activities&Itemid=32** Plaintiffs regularly provide known Class members with updated information about the litigation. The Directory Alumni Council also supports Plaintiffs' efforts in this action and has established a webpage with information about this case. See: http://ypalumni.org/home.htm

[6] Before filing this civil action, Plaintiffs pursued a months long 2-step internal administrative claims process, proving there can be no doubt about their resolve to try and benefit the entire Class. Defendants have no good cause to question either Plaintiffs' motives or involvement in this litigation, and any planned deposition proceeding of a Plaintiff would simply be an act of litigation harassment. It should be remembered that each Plaintiff was long ago last employed at Verizon, well before the Spin-off of Idearc. It would be absurd to expect them to understand the terms of the Spin-off transaction, none of which details were contemporaneously disclosed to any retirees. Furthermore, it would be absurd to expect Plaintiffs to know the

committed advocates, willing and able to take an active role in and control the litigation in order to protect the interests of the Class. *Berger,* 257 F.3d. at 484. There has been no suggestion by any of the Defendants that Plaintiffs' interests are at odds with any member of the Class.

Second, Plaintiffs have retained highly experienced counsel in the field of class action litigation, and particularly class litigation brought under ERISA and employment discrimination laws on behalf of participants and beneficiaries. Declarations, including brief biographical statement for the Class's principal attorney, are attached hereto as Exhibits 8 and 9 filed herewith). Attorney Curtis L. Kennedy has over 25 years experience in ERISA matters and class action litigation. (Exhibit 8, Curtis L. Kennedy Decl. ¶ 5). Likewise, Attorney Robert E. Goodman, Jr., has over 20 years experience in assorted class and collective actions. (Exhibit 9, Robert E. Goodman, Jr. Decl. ¶ 5). Through their counsel, Plaintiffs have pursued and will continue to vigorously pursue this litigation on behalf of all members of the Class. The extensive experience of Plaintiffs' counsel in ERISA and employment discrimination class litigation, and the Plaintiffs' personal commitment to the vigorous prosecution of this action as demonstrated by the proceedings to date, should leave no doubt that Plaintiffs and their counsel are adequate representatives of the Class. Counsel Curtis L. Kennedy for Plaintiffs has the resources necessary to pursue this civil action on a contingency-fee basis and to advance necessary expenses, including the expense of notice to the Class if so ordered.[7]

In this case, Defendants have no reason to question the skill, competence or experience of

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intricacies of ERISA, which federal law more often than not eludes even experienced counsel.

[7] Mr. Kennedy will submit more detailed explanation to the Court of the financial resources available to prosecute this action as well as the ability to finance a class notice, if such information is desired by the Court.

Plaintiffs' counsel. Absent contrary proof, class counsel are presumed competent and sufficiently experienced to prosecute the action on behalf of the class. See *Gibb v. Delta Drilling Company*, 104 F.R.D. 59, 75 (N.D. Tex.1984) (Fish, J.) ("It is significant here that defendants have not challenged the competence of counsel for the proposed class. ... This is relevant because inquiries into the professional competence of their counsel inevitably merge into the broader issue of whether the representatives and their counsel together will sufficiently serve the interests of absent class members.") (emphasis in original).

Thus, there is adequacy of representation as required by Rule 23(a)(4).

C. THIS ACTION MEETS THE REQUIREMENTS OF RULE 23(b).

In addition to meeting the prerequisites of Rule 23(a), parties seeking class certification must also show that the action is maintainable under Rule 23(b)(1), (2), or (3). *Amchem*, 521 U.S. at 614, 117 S.Ct. at 2245. Here, this action satisfies the requirements set forth in Rule 23(b)(1)(B), Rule 23(b)(2), and Rule 23(b)(3).

Certification under either Rule 23(b)(1) or 23(b)(2) provides for a "mandatory" class, under which class members would be precluded from opting-out of the action. See, *McManus v. Fleetwood Enterprises, Inc*., 320 F.3d 545, 553 (5th Cir. 2003). In contrast, certification pursuant to Rule 23(b)(3) specifically affords class members the ability to opt out of the class. *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 844, 119 S.Ct. 2295, 2314 (1999).

When a lawsuit can be certified under Rules 23(b)(1) or 23(b)(2), as well as under Rule 23(b)(3), class certification should be made under 23(b)(1) or 23(b)(2) or both, so that the judgment will have res judicata effect as to all the class (since no member has the right to opt out in a (b)(1) or (b)(2) suit), thereby furthering the policy underlying (b)(1) and (b)(2) class suits.

Since certification is appropriate here under Rules 23(b)(1), 23(b)(2), and 23(b)(3), a class maintained under Rule 23(b)(1) or Rule 23(b)(2), or under both, is the preferred method.

1. The Class Meets the Requirements of Rule 23(b)(1)(B).

Rule 23(b)(1)(B) applies where individual cases would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). Therefore, Rule 23(b)(1)(B) frequently has served as the basis for class certification in ERISA cases challenging the conduct of plan representatives alleged to have violated plan terms or statutory rights, including fiduciary breaches. See, e.g., *In re: Williams Cos. ERISA Litig*., 231 F.R.D. 416, 424-25 (N.D. Okla 2005) (holding breach of fiduciary duty claims "are particularly well suited for Rule 23(b)(1) certification by virtue of the substantive law of ERISA"), quoting *In re: Ikon Office Solutions*, 191 F.R.D. 457, 466 (E.D. Pa. 2000), and quoting *Bunnion v. Consolidated Rail Corp*., 1998 WL 372644 at *13 (E.D. Pa. May 14, 1998)); See also *Ortiz*, 527 U.S. at 833-34, 119 U.S. at 2308-09 (noting that "actions charging 'a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class' of beneficiaries, requiring an accounting or similar procedure 'to restore the subject of the trust,'" are among the '[c]lassic examples" of Rule 23(b)(1)(B) class actions (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23)). The 1966 Advisory Committee Note makes clear that Rule 23(b)(1)(B) was designed to address situations where trust beneficiaries alleged a breach of a fiduciary duty. See 1966 Advisory Committee Note, Rule 23(b)(1) ("The same reasoning applies to an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries").

In this case, Plaintiffs seek declaratory, injunctive and appropriate equitable relief related to their involuntary transfer from Verizon's sponsored pension plans into SuperMedia's sponsored pension plans. There is a realistic possibility that, in the absence of a class action, separate actions would be brought. The Court's determination of whether the terms of Verizon's pension plans were offended, whether Verizon Defendants retroactive application of December 22, 2006 dated plan amendments was permissible and whether Plaintiffs and the Class should be restored to their former status in Verizon's sponsored employee benefit plans, will necessarily affect all transferred retirees and their beneficiaries. Accordingly, this action could be dispositive of the interests of other affected retirees by virtue of the *stare decisis* effects of the Court's rulings and, thus, meets the requirements of Rule 23(b)(1)(B).

2. The Class also Meets the Requirements of Rule 23(b)(2).

"Certification under rule 23(b)(2) requires plaintiffs to show that 'the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.' Rule 23(b)(2). This includes a requirement that claims for injunctive relief predominate over claims for monetary relief.'" *Smith v. Texaco, Inc*., 263 F.3d 394, 408 (5th Cir. 2001). There is no question that situation is present in this case. First, Verizon Defendants involuntarily transferred Plaintiff and the Class over to SuperMedia's pension rolls. Second, all Defendants have refused to grant Plaintiffs and any Class members restoration into their former Verizon sponsored pension plans. Since Defendants' actions or inactions are generally applicable to all members of the Class, the case is amenable to a uniform or group remedy.

Plaintiffs and the Class seek the same declaratory, injunctive and appropriate equitable

relief based on the terms of Verizon's pension plans, and rely on Defendants' common course of conduct that was uniformly applicable to Plaintiffs and all Class members generally. Class certification is appropriate where broad, class-wide injunctive or declaratory relief is sought as in this case which involves a uniform, group remedy. *Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 414 (5th Cir.1998). Here, any monetary relief or varying plan benefits that would flow to Class members would be ancillary to the primary injunctive relief sought which is restoration into Verizon's sponsored pension plans.

Hence, class certification under Rule 23(b)(2) is appropriate.

3. If Necessary, the Class Would Meet the Requirements of Rule 23(b)(3).

As noted above, certification under Rule 23(b)(1) and or 23(b)(2) is preferred when these provisions are applicable. Thus, certification under Rule 23(b)(3) need not be reached in this case. However, class certification would, if necessary, also be appropriate under Rule 23(b)(3).

Where certification is sought pursuant to Rule 23(b)(3), the court must find "that the questions of law or fact common to members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The proposed Class in this case satisfies the requirements of Rule 23(b)(3).

a. Predominance.

The central task of the predominance inquiry is to consider "how a trial on the merits would be conducted if a class were certified." *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Company*, 319 F.3d 205, 218 (5th Cir. 2003), *cert. denied*, 540 U.S. 819,

124 S.Ct. 101 (2003). No aspect of this case will degenerate into the need for separate 'mini-trials.' In this case, there will be no need to engage in any individualized factual determinations. Common issues predominate because resolution of the ERISA based claims will turn on a proper interpretation of the terms of the pension plan and analysis of the federal statute. Common issues predominate since the focus will be on the Defendants' common course of conduct, not the Class members' course of conduct. Each Class member seeks relief on claims arising from the same conduct by Defendants. The alleged harms and claims are identical across the Class. The elements of Plaintiffs' claims are susceptible to class-wide proof, which will be the same for each and every Class member.

The Class is also sufficiently cohesive to warrant class-wide adjudication in that there are no disparities in the way individuals were treated. This case involves a single course of conduct - the involuntary transfer of retirees into SuperMedia's pension plans - and practices applied uniformly to all Class members without regard to their individual circumstances. Further, there is cohesiveness of the Class in that the remedies are common.

b. Superiority.

Rule 23(b)(3) provides four factors to consider when determining whether a class action is superior to other adjudication: (1) the interests of the members of the class in individually controlling the prosecution of separate actions; (2) the extent and nature of other pending litigation about the controversy by members of the class; (3) the desirability of concentrating the litigation in a particular forum ; and (4) the difficulties likely to be encountered in management of the class action. Fed. R. Civ. Pro. 23(b)(3).

A class action is superior to other available methods for the fair and efficient adjudication

of a dispute that affects a large number of persons injured by the common acts of a defendant. The claims by Plaintiffs and the Class present the same legal question: Did their involuntary transfer out of Verizon's retirement rolls and into SuperMedia's retirement rolls violate ERISA? Further, the primary relief sought by Plaintiffs is equitable relief. If the Plaintiffs prove that their transfer into SuperMedia's pension plans violated ERISA, this Court may grant equitable relief pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3). The Supreme Court has stated:

> [ERISA Section 502(a)(3)] authorizes "appropriate" equitable relief. We should expect that courts, in fashioning "appropriate" equitable relief, will keep in mind the "special nature and purpose of employee benefit plans," and will respect the "policy choices reflected in the inclusion of certain remedies and the exclusion of others.". . .Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

Varity v. Howe, 516 U.S. 489, 515, 116 S.Ct. 1065, 1079 (1996) (internal citations omitted).

In *Varity*, the plaintiffs were misled into *voluntarily* transferring out of their employer's sponsored employee benefit plans into the plans sponsored by a newly formed subsidiary. That transaction turned out to be bad for the plaintiffs and they wanted to be restored to their former employee benefit plans. The Supreme Court observed, "[w]e are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law." *Varity*, 116 S.Ct. at 1079.

Here, the situation is just as compelling as that situation in *Varity*. Here, Plaintiffs and all putative class members were *involuntarily* transferred and notified after the fact of their change in status. Plaintiffs and putative class members want that transaction reversed. Just as in *Varity*, in this case, Plaintiffs cannot obtain the remedy they seek via either ERISA Section

502(a)(1)(B), which provides for a recovery of unpaid benefits, or ERISA Section 409,which provides for recovery of losses to a pension plan. Granting Plaintiffs the requested injunctive remedy, pursuant to ERISA Section 502(a)(3), is consistent with the Supreme Court's rulings in *Varity*.

There are no individual issues of fact that predominate over common issues. Common issues predominate. No management difficulties are apparent here. The class members are readily identifiable current retirees of SuperMedia or previous retirees of Verizon. The issues are straightforward and limited. Thus, a class action is the superior method.

D. PLAINTIFFS' COUNSEL SATISFY THE REQUIREMENTS OF RULE 23(g).

When certifying a class, a court must also appoint class counsel under Rule 23(g), which mandates that a court appoint class counsel who will "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1). Rule 23(g) also requires the court to consider the following four factors in appointing class counsel: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law, and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(C)(i).

Plaintiffs seek appointment of their attorneys as class counsel under Rule 23(g) of the Federal Rules of Civil Procedure. To date, the filings made in this case demonstrate the intensity of the work Plaintiffs' counsel has performed to prosecute the claims, their knowledge and experience in ERISA, and their commitment to the litigation. This evidence shows that they are qualified to fairly and adequately represent the interests of the class. Plaintiffs' counsel

should be appointed class counsel.

III. CONCLUSION and REQUEST FOR ORAL ARGUMENT

For all the foregoing reasons, the Court should grant Plaintiffs' motion for class certification. Due to its complete suitability for Rule 23 certification, this case should be ruled a class action so that the parties and the Court can gain the efficiencies and procedural certainty of class treatment. The alternative, of course, would be potentially thousands of individual claims that would demand a much greater use of resources by the parties and the Court.

Due to the importance of the issues in this civil action, which case is being monitored by hundreds of putative 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 2nd day of December, 2010. Respectfully submitted,

s/ Curtis L, Kennedy
Texas State Bar No. 11284320
Colorado State Bar No. 12351
Curtis L. Kennedy, Esq.
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Tele: 303-770-0440
CurtisLKennedy@aol.com
ATTORNEY FOR PLAINTIFFS

s/ Robert E. Goodman, Jr.
Texas State Bar No. 08158100
Robert E. Goodman, Jr., Esq.
KILGORE & KILGORE LAWYERS
3109 Carlisle Street
Dallas, Texas 75204
Tele: 214-969-9099
Fax: 214-953-0133
reg@kilgorelaw.com
ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of December, 2010, a true and correct copy of the above and foregoing document, together with Exhibit 1-9, 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:

Jeffrey G. Huvelle, Esq. Christian J. Pistilli, Esq. COVINGTON & BURLING LLP 1201 Pennsylvania Avenue, NW Washington, DC 20004-2401 Tele: 202-662-5526 Fax: 202-778-5526 jhuvelle@cov.com cpistilli@cov.com *Counsel for Verizon Defendants* Christopher L. Kurzner Texas Bar No. 11769100 KURZNER PC 1700 Pacific Avenue, Suite 3800 Dallas, Texas 75201 Tele: 214-442-0801 Fax: 214-442-0851 CKurzner@kurzner.com *Counsel for Verizon Defendants*	David P. Whittlesey, Esq. Texas State Bar No. 00791920 Casey Low, Esq. Texas State Bar No. 24041363 ANDREWS KURTH LLP 111 Congress Avenue, Suite 1700 Austin, TX 78701 Tele: 512-320-9330 Fax: 512-320-4930 davidwhittlesey@andrewskurth.com *Counsel for Idearc/SuperMedia Defendants*

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

Philip A. Murphy, Jr.
25 Bogastow Circle
Mills, MA 02054-1039
phil.murphy@polimortgage.com (Philip A. Murphy, Jr.)

Sandra R. Noe
72 Mile Lane
Ipswich, MA 01938-1153
capsan@comcast.net (Sandra R. Noe)

Claire M. Palmer
26 Crescent Street
West Newton, MA 02465-2008
priesing@aol.com (Claire M. Palmer)

s/ Curtis L. Kennedy
Curtis L. Kennedy