

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’ RESPONSE IN OPPOSITION TO (Docket 102)**  
**“VERIZON’S MOTION TO STRIKE AND FOR A PROTECTIVE ORDER”**

Plaintiffs PHILIP A. MURPHY, JR., SANDRA R. NOE, and CLAIRE M. PALMER, by and through their counsel, oppose Docket 102, “Verizon’s Motion to Strike and For a Protective Order.” In their motion to strike, the Verizon Defendants have responded to Docket 100, Plaintiffs’ motion submitted on December 23, 2011 requesting this Court consider two additional exhibits as supplemental evidence in connection with the pending motions for summary judgment. With respect to Plaintiffs’ Exhibit 1 filed as Docket 100-1, an email message authored by former Verizon CEO Ivan Seidenberg, the Verizon Defendants state that they “do

not object to the inclusion of this document in the record.” (Docket 103, p. 7). However, with respect to Plaintiffs’ Exhibit 2 filed under seal as Docket 101-1, an email message authored by one of Verizon's outside legal counsel, the Verizon Defendants move to strike and they seek a protective order.

1. Initially, the Verizon Defendants’ motion should be denied due to their failure to comply with Local Rule 7.1(a). None of the Verizon Defendants ever conferred with Plaintiffs’ counsel about defendants’ motion before filing it. There is no “Certificate of Conference” confirming any discussion about any potential motion to strike or for protective order as required by Local Rule 7.1(h). In addition, for the following reasons, the motion should be denied.

2. There is no dispute that, during early morning on December 1, 2011, Plaintiffs and their counsel first obtained both Exhibit 1 and Exhibit 2 via Public Access to Electronic Records ("PACER") by downloading the documents which were filed late afternoon on November 30, 2011 in the related case of *U S Bank NA, v. Verizon Communications, Inc.*, Case No. 3:10-cv-01842 (N.D. Tex.). Accordingly, Plaintiffs found the information in the public domain.

3. “What transpires in the court room is public property.” *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254 (1947). “It is clear that the courts of this country recognize a general right to inspect and copy . . . judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597, 98 S.Ct. 1306, 1312 (1977). This general presumption of access under the common law promotes transparency and accountability in the judicial system; specifically, it enables the public “to monitor the functioning of our courts, thereby ensuring quality, honesty and respect for our legal system.” *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302,

1308 (7th Cir. 1984).

4. The public-domain doctrine is grounded in the “venerable common-law right to inspect and copy judicial records.” *Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999). Under the public-domain doctrine, materials normally immunized from disclosure lose their protective cloak once disclosed and placed in a public record. *Id.*; see also *Inner City Press Community on the Move v. Bd. of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 248-49 (2<sup>nd</sup> Cir. 2006).

5. Public access to the plethora of court filings submitted in the several civil actions concerning the Idearc Spin-off Transaction and its demise helps Class members come to terms with their present plight. The civil actions serve an important prophylactic purpose, providing the retirees an outlet for their common concern about having been surreptitiously and involuntarily transferred from Verizon to Idearc. The need for such understanding is especially apparent where, as here, there are many elderly retirees speculating about what actually was the reason for their transfer and what did the Verizon Defendants truly know about how prudently Idearc was established. “No community catharsis can occur if justice is ‘done in a corner [or] in any covert manner.’” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571, 100 S.Ct. 2814, 2824 (1980) (internal citations omitted).

6. On December 14, 2011, counsel for Plaintiffs emailed the following message to counsel for the Verizon Defendants and counsel for SuperMedia EBC:

This is an attempt to confer, pursuant to the local rules of the Dallas federal court, and obtain your agreement that Plaintiffs should be allowed to submit some supplemental materials in support of their claim of breach of fiduciary duty, i.e., that the surreptitious and involuntary transfer of retirees out of Verizon's sponsored pension plans into Idearc's sponsored pension plans was not in the best interest of Class members.

On December 1, 2011, I obtained via PACER, a copy of Docket No. 161, the Amended Complaint filed on November 30, 2011 in the case of *U.S. Bank, N.A., v. Verizon, et al*, which case is also pending before Senior Judge Fish in the Dallas federal court. After sharing the court filing with Named Plaintiffs and numerous retirees, it is the opinion of the Class that the Amended Complaint is chock full of material evidence, not revealed to Named Plaintiffs in the course of the *Murphy* discovery proceedings, that ought to be considered by Judge Fish when he issues rulings on the parties' respective motions for summary judgments.

For instance the Amended Complaint and accompanying exhibits (see copy attached hereto) reveal that "*CEO Seidenberg remarked privately that the directories business was undergoing a 'secular' change and would never compete with the Internet.*" Also, the Amended Complaint and exhibits reveal that Verizon hired a consultant that "*confirm[ed] the directories business would likely continue to decline.*" Furthermore, the Amended Complaint reveals that one of Verizon's chief outside lawyers who was intimately involved with the spinoff transaction wrote in an email that, ". . . . . REDACTED. . . ." All of this information unknown to Named Plaintiffs, happening behind the scenes, surely, supports the underlying thesis of the Class's contention that there was a breach of fiduciary duty, that the retirees should not have been transferred to Idearc.

Certainly, Verizon Defendants cannot complain of any prejudice by Named Plaintiffs submitting the additional material information to Judge Fish, as all of it originates from Verizon's business records and is information disclosed in the course of the other case pending before Judge Fish. Likewise, Named Plaintiffs see no basis for SuperMedia EBC complaining of any prejudice.

The Class requests that you let me and Attorney Bob Goodman know by the end of business on Monday, December 19, 2011 of your clients' position on this matter so that they may apprise Judge Fish whether there is any opposition to the motion to submit the supplemental material information. Thanks in advance.

(See Exhibit 3 filed contemporaneously herewith). All defense attorneys were made aware that the publicly accessible information was shared with Plaintiffs and numerous Class members.

7. The Verizon Defendants cannot be heard to complain that they took all reasonable

and available means to stop Plaintiffs from further distributing the information they fairly obtained via PACER. For sixteen (16) days, the Verizon Defendants' cadre of defense counsel said nothing to Plaintiffs about the alleged privileged status of Exhibit 2, Docket 101-1.

8. On December 30, 2011, well after the "cat had been let out of the bag", the Verizon Defendants first requested there be no further dissemination of the information that Plaintiffs had fairly discovered in the public domain. (See Docket 103-3, December 30, 2011 letter).<sup>1</sup> Accordingly, the situation here is not at all like that situation in the case of *Allread v. City of Grenada*, 988 F.2d 1425, 1933 (5<sup>TH</sup> Cir. 1993), wherein the defendant took immediate steps upon learning of the 'inadvertent' disclosure of attorney-client privileged information. Furthermore, Plaintiffs submitted Exhibit 2, Docket 101-1, in this *Murphy* case under seal. (See Docket 101).

9. This Court can take judicial notice of Exhibit 2, Docket 101-1, as this Court is presiding over the related *U S Bank, NA* case wherein the very same document has been submitted.

10. In the *U S Bank, NA* case, the document was designated by Verizon as "Joint Privilege", since it is an email authored by outside legal counsel who jointly represented both Verizon and Idearc during the Spin-off Transaction. The attorney-client privilege protects from disclosure "communications from the client to the attorney made in confidence for the purpose of obtaining legal advice." *Wells v. Rushing*, 755 F.2d 376, 379 n. 2 (5<sup>th</sup> Cir.1985). "It shields communications from the lawyer to the client only to the extent that these are based on, or may

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<sup>1</sup> The December 30, 2011 letter makes no mention of any plan by the Verizon Defendants to file a motion to strike or for a protective order. Hence, there was no compliance with Local Rule 7.1(a) before defendants' motion was filed with this Court.

disclose, confidential information provided by the client or contain advice or opinions of the attorney.’’ *Aspex Eyewear, Inc. v. E’Lite Optik, Inc.*, 2002 WL 1592606, at \*2 (N.D. Tex. July 17, 2002) (Fitzwater, J.) (quoting *United States v. Neal*, 27 F.3d 1035, 1048 (5<sup>th</sup> Cir.1994)).

While the attorney-client privilege serves an important purpose, it also impedes the full and free discovery of truth and therefore should be strictly construed. *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 473 (N.D. Tex. 2004) (Kaplan, J.) (citing *Perkins v. Gregg County, Tex.*, 891 F.Supp. 361, 363 (E.D. Tex. 1995)); see also *In re Grand Jury Proceedings in re Fine*, 641 F.2d 199, 204 n. 5 (5<sup>th</sup> Cir. Unit A Mar.1981) (“[T]he attorney-client privilege should be confined within the narrowest limits consistent with its purpose.”).

11. An examination of the first sentence of the email message appearing on Exhibit 2, Docket 101-1, proves that, instead of it either revealing a client’s communication made in confidence to the attorney or containing an attorney’s advice expressed to a client, the email reveals facts about how imprudently Idearc was formed. The document does not contain any confidential communication to an attorney. Likewise, the document contains no legal analysis or legal conclusions. Quite simply, the document should not be treated as privileged.<sup>2</sup>

12. The Verizon Defendants cannot be heard to complain that Plaintiffs never

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<sup>2</sup> Apparently one reason the Idearc Bankruptcy Trustee publicly efiled the document as an exhibit to its Amended Complaint is that its position was that “[Verizon] waived [any alleged privilege] by not seeking relief before “joint privileged” documents were used more than 50 times in at least eleven depositions over a six moth period. See, e.g., *Alpert v. Riley*, 267 F.R.D. 202, 206-12 (S.D. Tex.2010) (failure to take steps to preserve privilege after evidence that confidentiality was breached fatal to privilege); *Nguyen v. Excel*, 197 F.3d 200, 206-08 (5<sup>th</sup> Cir. 1999) (failure to object to questions designed to elicit information about privileged information led to waiver of privilege); *Crossroads v. Dot Hill*, No. A-03-CA-754-SS, 2006 U.S. Dist. LEXIS 3618, at \*6-11 (W.D. Tex. May 31, 2006) (failure to object to questioning about privileged material led to waiver of privilege). . . . Defendant did not designate any of the testimony [relating to the document as] ‘Confidential.’” (See Docket 172, pages 8 and 9 of 12, filed in *U S Bank, NA*, Case No. 3:10-cv-01842-G).

previously objected to the non-disclosure of Exhibit 2, Docket 101-1, because the document was not listed in the 35 page privilege log that the Verizon Defendants provided Plaintiffs during formal discovery proceedings in this *Murphy* case. Since Plaintiffs were clueless about the document's existence until after it was efiled with this Court on November 30, 2011, they had no reason to make an objection about its non-production.

13. Finally, the Verizon Defendants' reliance upon Federal Rule of Evidence 502(d) as a basis for obtaining an order requiring Plaintiffs to return all copies of Exhibit 2, Docket 101-1, is to no avail. That evidentiary rule does not govern the affect of disclosure of alleged privileged information that occurs outside of formal discovery proceedings such as when someone innocently discovers via PACER that the information has been placed within the public domain. There is neither case law nor any other legal authority supporting the Verizon Defendants' motion to strike and for a protective order with respect to Exhibit 2, Docket 101-1.

WHEREFORE, Plaintiffs request this Court enter an order denying Docket 102, the Verizon Defendants' motion to strike and for a protective order.

DATED this 12<sup>th</sup> day of January, 2012.

Respectfully submitted,

*s/ Curtis L. Kennedy*  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 12<sup>th</sup> day of January, 2012, a true and correct copy of the above and foregoing document, together with Exhibit 3, 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:

<p>Jeffrey G. Huvelle, Esq. Christian J. Pistilli, Esq. COVINGTON &amp; BURLING LLP 1201 Pennsylvania Avenue, NW Washington, DC 20004-2401 Tele: 202-662-5526 Fax: 202-778-5526 jhuvelle@cov.com cpistilli@cov.com <i>Counsel for Verizon Defendants</i></p> <p>Christopher L. Kurzner, Esq. 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 <i>Counsel for Verizon Defendants</i></p>	<p>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, Texas 78701 Tele: 512-320-9330 Fax: 512-320-4930 davidwhittlesey@andrewskurth.com <i>Counsel for Idearc/SuperMedia Defendants</i></p> <p>Marc D. Katz, Esq. ANDREWS KURTH LLP Texas State Bar No. 00791002 1717 Main Street, Suite 3700 Dallas, Texas 75201 Tele: 214-659-4400 Fax: 214-659-4401 marckatz@andrewskurth.com <i>Counsel for Idearc/SuperMedia Defendants</i></p>
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Also, copy of the same was delivered via email to Plaintiffs as follows:

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s/ Curtis L. Kennedy  
Curtis L. Kennedy





Subj: **Murphy v. Verizon / Plaintiffs' motion to submit supplemental materials. . .**  
Date: 12/14/2011 6:48:46 A.M. Mountain Standard Time  
From: [CurtisLKennedy@aol.com](mailto:CurtisLKennedy@aol.com)  
To: [jhuvelle@cov.com](mailto:jhuvelle@cov.com), [cpistilli@cov.com](mailto:cpistilli@cov.com), [CKurzner@kurzner.com](mailto:CKurzner@kurzner.com), [davidwhittlesey@andrewskurth.com](mailto:davidwhittlesey@andrewskurth.com),  
[caseylo@andrewskurth.com](mailto:caseylo@andrewskurth.com), [marckatz@andrewskurth.com](mailto:marckatz@andrewskurth.com)  
CC: [reg@kilgorelaw.com](mailto:reg@kilgorelaw.com), [CurtisLKennedy@aol.com](mailto:CurtisLKennedy@aol.com)

**December 14, 2011**

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**Gentlemen:**

**This is an attempt to confer, pursuant to the local rules of the Dallas federal court, and obtain your agreement that Plaintiffs should be allowed to submit some supplemental materials in support of their claim of breach of fiduciary duty, i.e., that the surreptitious and involuntary transfer of retirees out of Verizon's sponsored pension plans into Idearc's sponsored pension plans was not in the best interest of Class members.**

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*Curtis*

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Attachment 55 pages

c: Bob Goodman, Esq.  
*Murphy* Named Plaintiffs