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' REPLY MEMORANDUM BRIEF IN SUPPORT OF (Docket 81) MOTION FOR PARTIAL SUMMARY JUDGMENT

DATED this 28th day of October, 2011.

Respectfully submitted,

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Plaintiffs PHILIP A. MURPHY, JR., SANDRA R. NOE, and CLAIRE M. PALMER, by and through their counsel, file their Reply Memorandum Brief in support of (Docket 81) their Motion for Partial Summary Judgment as to Claims Two, Three, Four and Six of the Second Amended Complaint.

I. STATEMENT OF UNDISPUTED FACTS

The Verizon Defendants' response does not take issue with any part of Plaintiffs' Statement of Undisputed Facts set forth in Plaintiffs' motion filed as Docket 81 on August 26, 2011. 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.") filed as Docket 90 on October 14, 2011 which consists of pages 504-581. Plaintiffs also incorporate certain portions designated herein of the Verizon Defendants' Appendices (hereinafter "Defts' Appx.) filed as Docket 79 on August 26, 2011 and Docket 94 on October 14, 2011.

II. ARGUMENT AND AUTHORITIES

A. Verizon Plan Fiduciaries Breached Their Duty to Disclose, By Failing to Disclose in a Benefit Forfeiture Clause of a Summary Plan Description, that One Manner Whereby Verizon Pension Benefits Could Be Lost or Offset Was a Corporate Spin-off and Transfer of the Retirees, the Basis for Plaintiffs' Second Claim for Relief. The Verizon Defendants' Concede "the SPDs' Silence on the Subject."

In their Memorandum Brief, Verizon Defendants do not effectively dispute Plaintiffs' Second Claim for Relief wherein 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 at issue. 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). Department of Labor ("DOL") Regulation requires, in part, the SPD contain a 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. . .

29 C.F.R. Section 2520.102-3-(*l*). In their Memorandum Brief, the Verizon Defendants neither quote the statute and DOL Regulation nor do they pay homage to the disclosure requirements. Moreover, the Verizon Defendants do not present any evidence to dispute Plaintiffs' testimony proving that 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).

The Verizon Defendants focus on a single aspect of ERISA's disclosure requirements and feebly argue "ERISA requires only that plan administrators disclose to participants the circumstances that might result in a *denial or reduction of benefits* under existing plan terms." (emphasis added) (Docket 93, p. 32). The Verizon Defendants ignore the fact that the statute requires much more, including disclosure of "circumstances that may result in *disqualification, ineligibility*, or denial or loss of benefits." 29 U.S.C. § 1022(b). All the Verizon Defendants do is cite to *Wise v. El Paso Natural Gas Co*., 986 F.2d 929 (5th Cir. 1993), a case that is particularly inapposite.

In *Wise*, the plan sponsor disclosed by way of distributing newly revised SPDs to current

workers that after March 1, 1986 any person taking retirement would forfeit company sponsored health care benefits. *Id.* at 936. The appellate court noted that the complaining plaintiffs "cannot dispute that they received personal and unambiguous notice of the prospective change months before it became effective." *Id.* Furthermore, *Wise* did not involve a claim that the employer failed to comply with either ERISA Section 102(b) or the DOL Regulation. In contrast, Plaintiffs and Class members received no forewarning whatsoever about the effect of a corporate spinoff on their eligibility for continued participation in Verizon's employee benefit plans. The Verizon Defendants did not comply with the ERISA Section 102(b) and the DOL Regulation by failing to disclose that a spinoff could result in an offset or loss of benefits or make participants ineligible for participation in Verizon's pension plans. The Verizon Defendants have conceded "the SPDs' silence on the subject." (Docket 93, p. 33). Even so, the fact of the corporate spinoff and concomitant transfer of retirees to Idearc proved to be the very circumstance used by the Verizon pension plan administrators to deny Plaintiffs' class-wide administrative claim to be reinstated into Verizon's pension rolls. (See generally Docket 90, Supp. App. 549-561 and 575-581).

For their Second Claim for Relief, Plaintiffs are not seeking relief under ERISA Section 502(a)(1)(B), making the Verizon Defendants' reliance on *Watson v. Deaconess v. Waltham Hosp*., 298 F.3d 102, (1st Cir. 2002) and *Anderson v. Chrysler Corp.*, 99 F.3d 846 (7th Cir. 1996) misplaced. In both the *Watson* and *Anderson* cases, the courts held that a technical violation of ERISA's disclosure requirements do not state a cause of action that can be remedied via ERISA Section 502(a)(1)(B). Herein, Plaintiffs are seeking relief under ERISA Section 502(a)(3), the correct avenue for them to seek recourse for the Verizon Defendants' disclosure violations.

The Verizon Defendants contend that "technical violations of ERISA's notifications requirements, without a showing of bad faith, active concealment or detrimental reliance, do not state a cause of action." (Docket 93, p. 35, citing *Ackerman v. Warnaco, Inc*., 55 F.3d 117, 124 (3rd Cir. 1995)). However, *Ackerman* concerned a failure to disclose which persons constituted "the management" empowered to make plan changes pursuant to ERISA Section 402(b)(3) and the case was remanded to the trial court to make a finding on whether the plan's amendment procedure was complied with by appropriate personnel when the employer ended its severance pay policy. *Ackerman* did not concern a failure on the part of plan administrators to make disclosures required by ERISA Section 102(b) and the DOL Regulation.

No court has held that failure to comply with ERISA Section 102(b) and the accompanying DOL Regulation is a mere "technical violation," as characterized by the Verizon Defendants. Indeed, a failure to comply with ERISA Section 102(b) is clearly a substantive violation.

In their Memorandum Brief, the Verizon Defendants also rely upon *Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1022 (7th Cir.1998) (Docket 93, p. 33). In *Mers*, the appellate court held that since the applicable SPD failed to satisfy ERISA Section 102(b)'s disclosure requirements, the undisclosed term could not be enforced against plan participants so as to deny coverage. *Id*. at 1022. Similarly, courts have recognized that where an 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). Verizon Defendants' Memorandum Brief does not address those case decisions.

In their Memorandum Brief, Verizon Defendants do not cite any case law generated within the Fifth Circuit addressing a violation of ERISA Section 102(b) and the DOL Regulation. The Fifth Circuit has not yet provided guidance on the issue of what remedy ERISA provides for a violation of disclosure requirements. See *Custer v. Murphy Oil USA, Inc*., 503 F.3d 415, 422 n.5 (5th Cir. 2007). However, lower courts within the Fifth Circuit have uniformly refused to enforce conditions and terms required by ERISA Section 102(b) to be disclosed, but were not disclosed, in the SPD. *Burgett v. MEBA Medical and Benefits Plan*, Not Reported in F.Supp.2d, 2007 WL 2815745 *5 (E.D. Tex. September 25, 2007) (holding that since an SPD did not disclose that participants or beneficiaries must execute a subrogation agreement as a condition to receiving benefits, the administrator was legally incorrect when it imposed that requirement); *Collinsworth v. AIG Life Ins. Co*., 404 F.Supp.2d 911, 921 (N.D. Tex. 2005) (Lynn, J.) (ruling that the disclosure requirements of ERISA Section 102(b) would be effectively eviscerated if the court were to allow enforcement of additional undisclosed terms and limitations not set forth in the SPD). This Court should follow these decisions and take into account that Congress expects uniformity of decisions under ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56, 107 S.Ct. 1549, 1557 (1987) ("The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." (internal quotation marks omitted)).

Accordingly, this Court should hold that Verizon Defendants failed to comply with

ERISA Section 102(b) and DOL Regulation 29 C.F.R. Section 2520.102-3-(*l*) by failing to include within an SPD disclosure that a corporate spin-off might result in the retirees' ineligibility, forfeiture, offset or loss or denial of Verizon pension plan benefits.

The Verizon Defendants do not dispute Plaintiffs' contention that "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 spin-off. No such scenario can be envisioned from a reasonable review, reading and understanding of any of Verizon's pension plan SPDs." (Docket 83, p. 6, referencing App. 473-474, Murphy Affidavit ¶¶ 3-5; App. 478-479, Noe Affidavit ¶¶ 3-5; App. 483, Palmer Affidavit ¶¶ 3-5).

By not being given the benefit of a disclosure required by ERISA Section 102(b) and the DOL Regulation, Plaintiffs and Class members suffered a substantive harm because they were prejudiced by not being able to protect their interests. Throughout each material step of the almost year-long planning and consummation of the Spin-off transaction, all Plaintiffs and Class members were fully uninformed, and they lost all opportunity to collectively work together, with or without a union's assistance, and with or without the assistance of the officers of Verizon Information Services ("VIS"), so as to persuade Verizon not to include retirees in the Spin-off transaction and not transfer them to Idearc Inc. 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 sponsor, each would have taken a different course of action and even used his or her influence to bring about a legal challenge so as to prevent such action against himself or herself and other retirees. (*Id.*). By being

uninformed, each Plaintiff was harmed because he or she did not know the possible consequences of a selective spin-off and each was prejudiced by having lost an opportunity to take appropriate preventive action. Verizon Defendants do not dispute Plaintiffs' testimony but they scoff at Plaintiffs and contend they have failed to show that, had they tried to take action to better protect themselves, they would have succeeded. (Docket 93, p. 36 "plaintiffs fail to offer any evidence that they would have actually succeeded in causing the union to bring a lawsuit, let alone that any such lawsuit would have prevented the transfer of class members' pension benefit obligations"). But no such showing is required. Since Plaintiffs were kept in the dark and denied any opportunity to help themselves and protect Class members, they cannot be faulted for not being able to prove the level of success they would have achieved with their efforts.

Notably, in their Memorandum Brief, Verizon Defendants do not take issue with Plaintiffs' contention raised in their opening brief, Docket 83 at pp. 8-9, that it is fundamentally unfair for a plan sponsor to take adverse action against retirees with vested rights when there has been no forewarning or proper disclosure that the undisclosed adverse action against retirees could be taken in the future at the whim of either the plan sponsor or plan administrators. 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 grant Plaintiffs a summary judgment on their Second Claim for Relief in the Second Amended Complaint, grant injunctive relief ordering reinstatement of Plaintiffs and Class members into Verizon's sponsored pension plans and order Plaintiffs and Class members be made whole.

B. 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.

As stated in their opening brief, Plaintiffs agree with Verizon Defendants' that the decision to undertake a pension plan spinoff is not a fiduciary act. Where Plaintiffs part ways with Verizon Defendants is their notion that their act of transferring retirees did not trigger fiduciary conduct and it did not violate either ERISA or the then existing terms of Verizon's pension plans, an issue not litigated in any of the six court of appeals decisions cited by the Verizon Defendants in their Memorandum Brief. (Docket 93, pp. 6-7). In each of those cases, the challenge made by the plaintiffs only concerned the transfer of pension property, the amount of assets and liabilities. In the only appellate case wherein a group of retirees specifically challenged their involuntary transfer, both the trial court and appellate court agreed with the retirees' challenge. In *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), the Eighth Circuit ruled:

> The remaining claim, brought by individual employees who had already retired from M-F at the time of the creation of MCC, needs only brief discussion. 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.

Id. at 756. The Eighth Circuit upheld the claim for breach of fiduciary duty on behalf of both

the class of retirees and the individual named plaintiffs. *Id.* at 756 n.5.[1]

Contrary to the Verizon Defendants' assertion, the decision in *Howe* was not effectively overruled by the Supreme Court's holding in *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 78, 115 S.Ct. 1223, (1995), that employers "are generally free under ERISA for any reason at any time to adopt, modify, or terminate welfare plans." (Docket 93, p. 8). *Curtiss-Wright* says nothing about *Howe* and the case did not involve any challenge to the treatment of retirees as if they were property rights. There are no reported cases, as proven by the lack of supporting authority cited within Verizon Defendants' Memorandum Brief, that directly offer approval of a corporate sponsor's involuntary transfer of retirees.

In their Memorandum Brief, Verizon Defendants never address Plaintiffs' contention and the Plaintiffs' accompanying sworn testimony that their inclusion in the Spin-off transaction was not in their best interests. While side-stepping this most important issue, Verizon Defendants contend there is no record evidence showing that Verizon was motivated by self-dealing considerations. (Docket 93, pp. 8-9). In fact, there is.

First, Verizon utilized the act of transferring the retirees out of Verizon's pension plans as a proxy to rid itself of significant retiree welfare obligations. It is undisputed that Verizon retiree health care benefits are intricately intertwined with Verizon 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

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[1] Varity's corporate restructuring involving the transfer of 3,500-4,000 retirees was known as "**Project Sunshine**," *Howe v. Varity Corp*., 896 F.2d 1107, 1108 (8th Cir. 1990), and the project name shares an uncanny similarity with the code name for Verizon's Spin-off Transaction which involves the transfer of over 2,500 Class members – "**Project Sunburst**." (Docket 85, App. 226; Docket 79, Defts' Appx. 211, Wiley Depo. Tr. 21:20-22:1).

Verizon Pension Plan for New York and New England Associates (formerly the NYNEX Pension Plan)." (Docket 94, Defts' Appx. 446). Verizon pledged to "always cover the full cost of coverage" for Class members who retired on or before January 1, 1992. (Docket 90, Supp. App. 516). In other words, Plaintiffs and Class members do not get to receive Verizon sponsored health care benefits unless they are service pension eligible and participants in Verizon's pension plans. By involuntarily removing Plaintiffs and Class members from participation in Verizon's pension plans, the defendants avoided their health care commitments to the retirees. As a result of their involuntary transfer to Idearc and the consequential terminally ailing financial condition of Idearc/SuperMedia, Plaintiffs and Class members have suffered significant loss of retiree health care benefits not suffered by any of the retirees kept in the Verizon household. For instance, Plaintiff Murphy has already 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). Likewise, Plaintiff Noe has paid more than $5,000 for Idearc/SuperMedia health care benefits, and her peers entitled to health care benefits from Verizon have paid nothing. (App. 479-480 ¶¶ 9-10). None of those material facts which are set forth in Plaintiffs' motion for partial summary judgment (Docket 81, p. 15 ¶ 47) are disputed by the Verizon Defendants.

Second, despite the concerns expressed by the soon-to-become Idearc executives that Verizon not include Plaintiffs and Class members in the Spin-off transaction, Verizon went full speed forward. "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). There is no evidence that any member of Verizon determined that Plaintiffs and

Class members, all retirees who were kept completely in the dark, would react positively to their planned plight. Moreover, 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). This is the epitome of corporate greed and, for the fiduciaries involved, epitome of personal greed. (See Section II.C. hereinbelow).

1. The Verizon Defendants Do Not Refute Plaintiffs' Well-Founded Arguments that Retirees Are Not Property Rights and Cannot be Tied to Any Specific Transfer of Pension "Assets" or "Liabilities".

Nowhere within their Memorandum Brief do the Verizon Defendants take any issue with Plaintiffs' contention and well-grounded arguments that Plaintiffs and Class members are neither assets or liabilities, that they are not property rights, and they cannot be tied or traced to any identifiable pension plan assets that Verizon chose to transfer to Idearc. Accordingly, the Verizon Defendants have conceded all of Plaintiffs' arguments and contentions raised in their opening brief at pp. 11-16. (Docket 83 at pp. 11-16).

2. Neither the Governing Plan Documents Nor the Applicable Statutory Provisions Authorize the Involuntary Removal of Retiree Plan Participants and Placement into Another Plan.

The Verizon Defendants contend that Section 20.6 of the union plans and Section 11.3 of the management plans "tracks the language of Section 208 of ERISA and Section 414(*l*) of the IRC." (Docket 93, p. 15). Then, without quoting any of the federal statutory language, the Verizon Defendants continue, throughout their Memorandum Brief, to invoke the mantra that, since they provided Idearc Inc with the required amount of pension assets (albeit three years

after the Spin-off transaction)[2], in compliance with the federal statutes, they did nothing wrong. To be clear, Plaintiffs' claims are not based upon whether the Verizon Defendants complied with either of the federal statutes. ERISA states:

> **Sec. 208 MERGERS AND CONSOLIDATIONS OF PLANS OR TRANSFERS OF PLAN ASSETS.**
>
> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan, after the date of the enactment of this Act, 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). The preceding sentence shall not apply to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of this Act applies.

(emphasis original). (ERISA Section 208, 29 U.S.C. § 1058). Internal Revenue Code Section 414(*l*), the tax counterpart to ERISA Section 208, states:

> **(*l*) Merger and Consolidations of Plans or Transfers of Plan Assets.--**
>
> **(1) In general.–** A trust which forms a part of a plan shall not constitute a qualified trust under §401 and a plan shall be treated as not described in §403(a) unless in the case of any merger or consolidation of the plan with, or in the case of any transfer of assets or liabilities of such plan to, any other trust plan after September 2, 1974, 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). The preceding sentence shall not apply to any multiemployer plan with respect to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 applies.

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[2] The remaining pension assets required to be transferred by virtue of the November 17, 2006 Spin-off transaction, 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).

(emphasis original). (IRC Section 414(*l*), 26 U.S.C. § 414(*l*). What is clear from a plain reading of both federal statutes is they set forth essentially the same minimum funding standard should a pension asset transfer involving two separate pension plans be carried out. But neither federal statute either expressly or implicitly authorizes a corporation to conduct an *involuntary* transfer of a select group of retirees with vested pension rights. This same conclusion attaches to Treasury Regulation 26 C.F.R. § 1.414(*l*)-1(o), of which a mere snippet is quoted by the Verizon Defendants in their Memorandum Brief at p. 15 (Docket 93, p. 15).[3] Likewise, even accepting Verizon Defendants' argument that Verizon's pension plans were intended to track the aforesaid federal statutory language, there is no term or rule within any of the governing pension plan documents that give license to Verizon to surreptitiously remove Plaintiffs and Class members from Verizon's pension plans and transfer them into another upstart corporations's pension plans.

3. The Verizon Defendants' Arguments in Their Memorandum Brief Prove that the Plan Fiduciaries Did Not Give a Legally Correct Meaning to Governing Plan Terms and Did Not Comply with the Unambiguous Plan Rules.

In their Memorandum Brief, the Verizon Defendants contend that the pension plan fiduciaries used their discretionary authority to interpret plan terms. The defendants state "the

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[3] 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). There is nothing in the aforesaid regulation that either authorizes or condones a corporation's involuntary transfer of retiree plan participants.

responsible plan fiduciaries have interpreted Sections 20.6 and 11.3 to authorize the *pension transfers* challenged by plaintiffs." (emphasis added) (Docket 93, p. 16). While Sections 20.6 and 11.3 speak about "assets" and "liabilities," no reasonable interpretation of those provisions gives Verizon permission to remove retirees from the pension plans and treat them as if they were transferable personal property.

With respect to certain provisions within the union plans containing the term "Employee," the Verizon Defendants contend the pension plan fiduciaries properly gave their own interpretation to the term. Both union pension plans define "Employee" as "an individual *employed* by the Company or an Affiliate." (emphasis added) (App. 117, Section 2.28; App. 145, Section 2.25). There is nothing ambiguous about the defined term. The definition of "Employee" does not include persons such as Plaintiffs and Class members who are no longer employed and in retirement status. If that were the case, "Employee" would have been defined as "an individual employed or formerly employed by the Company or an Affiliate." Nevertheless, according to the Verizon Defendants, pension plan administrators ignored the plain meaning of the specifically defined term "Employee" and acted as though the defined term meant both persons employed and persons no longer employed. (Docket 93, p. 17, referencing Docket 94, Defts' Appx. 5, Chiffriller Declaration ¶ 13 stating, "the plans' other fiduciaries and I have interpreted the term "Employee" in this context to encompass both current and former employees of Verizon"). This interpretation is indisputably not legally correct and it is not entitled to any deference.[4] The Verizon Defendants get nowhere by whining "[a]t worst for

[4] Plaintiffs contend this interpretation is an afterthought conveniently orchestrated to oppose Plaintiffs' arguments in their opening memorandum brief. Other than Ms. Chiffriller's lawyerly-scripted declaration, there is no documentary evidence in the record to show that the plan fiduciaries

defendants, the relevant plan language is ambiguous." (Docket 93, p. 26 n. 13). The pension plans fiduciaries' interpretation is simply invalid.

Verizon is a very sophisticated pension plan sponsor and it chose to be bound by the following pension rule:

> 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 5.10 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); See also App. 144, Section 1.2(b)). The rule specifically serves to prevent certain pension plan changes with a stated effective date from being applied to persons no longer employed. To date, there has never been any change to the above stated pension plan rule. Thus, the *post hoc* pension plan amendments created after the Spin-off transaction and made retroactive with a stated effective date of November 17, 2006, could be applied "only to Employees who perform services for the Company or Affiliate on or after the stated effective date." The deliberately chosen definition of "Employee" and the rule stating that certain plan provisions with a stated effective date can only be applied to employed persons are not ambiguous. Thus, clearly, pension plan fiduciaries breached their fiduciary duties and acted so as to defeat the vested and protected rights of Plaintiffs and Class members, all retirees, none of whom were performing employment services for either Verizon or an Affiliate on or after November 17, 2006, the stated effective date of the *post hoc* plan

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actually gave the term "Employee" an interpretation different from its specified definition. Indeed, Ms. Chiffriller's contentions were never asserted by the plan administrators in either the initial denial letter or the belated final denial letter addressing Plaintiffs' class-wide administrative claim. (See generally Docket 90, Supp. App. 549-561 and 575-581).

amendments that were wrongly applied to them.

Since Verizon Defendants did not give credit to the existing terms of the pension plan and the rules protective of the retirees, those plan participants who were no longer in active employment status, the Court must rule there was a violation of the plan documents' rules, a violation of ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). In addition, Plaintiffs ask this Court to find that Verizon Defendants' conduct towards Plaintiffs and Class members, all without the retirees' 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). Plaintiffs should be granted summary judgment on their Fourth Claim for Relief.

C. Members of the Verizon EBC, the Pension Plan Administrator, While Acting as Corporate Officers, Violated ERISA Sections 406(b)(2) and (b)(3), the Basis for the Third Claim for Relief.

In their Memorandum Brief at p. 27-30, Verizon Defendants attack Plaintiffs' Third Claim for Relief by ignoring the plain language of ERISA Section 406(b)(2)[5] which prohibits certain actions a fiduciary when acting "in his individual or in any other capacity." Instead, the Verizon Defendants reference ERISA Section 406(a), a separate statutory provision directed at actions taken while serving in only a *fiduciary* capacity.

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[5] 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).

The Verizon Defendants further cite a collage of cases, none of which concern ERISA Section 406(b)(2). For instance, *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S.Ct. 1783 (1996), concerned liability under ERISA Section 406(a)(1) and contains no discussion about ERISA Section 406(b)(2). *Flanigan v. General Elec. Co*., 242 F.3d 78 (2nd Cir. 2001) is of no help to Verizon Defendants because *Flanigan* also contains no discussion about ERISA Section 406(b)(2). *Id.* at 87-88. Likewise, *Hunter v. Caliber System, Inc*., 220 F.3d 702 (6th Cir. 2000), 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.

Blaw Knox Retirement Income Plan v. White Consolidated Industries, 998 F.2d 1185 (3rd Cir. 1993), another case cited by the Verizon Defendants, actually supports Plaintiffs' position because the decision 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.

The defendants rely upon *DeLuca v. Blue Cross Blue Shield of Michigan,* 628 F.3d 743, 748 (6th Cir. 2010), wherein the split panel of judges ruled that in order for their to be liability, the defendant had to have been acting in his or her fiduciary capacity. Judge Kethridge issued a well-grounded dissenting opinion and noted that "[i]n the plainest conceivable English, the section bars fiduciaries from taking certain actions even in their individual capacities; and yet, we are told, the section "applies only to those who act in a fiduciary capacity. . . Perhaps eventually the [Supreme] Court will take a § 1106(b)(2) case and decide whether the subsection means what it seems clearly to say." *Id.*, at 751-52.

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 or she has dual loyalties, and, therefore, he or she 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). Moreover, 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).

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).[6] 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's sponsored pension plans to Idearc's 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

[6] 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).

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). It is plain to see that Verizon EBC members put themselves in a position where they had dual loyalties, and therefore, could not act exclusively for the benefit of the Plaintiffs and Class members.

Verizon Defendants argue that "class members were not harmed by, and Verizon did not benefit financially from the Idearc pension plan spinoff or its treatment of inactive employees." (Docket 93, p. 29). However, class members were harmed and Verizon did benefit financially from involuntarily removing Plaintiffs and Class members from participation in Verizon's pension plans. Verizon utilized the act of transferring the retirees out of Verizon's pension plans as a proxy to rid itself of significant retiree welfare obligations and that harm has been previously explained in this memorandum brief.

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. This is the exact situation that runs afoul of ERISA Section 406(b)(2). *Reich v. Compton*, 57 F.3d 270, 287-88 (3rd Cir.1995) (holding that a violation of

ERISA Section 406(b)(2) occurs when trustees of an ERISA benefit plan are involved in the decision making process on behalf of the plan in a transaction affecting the benefit plan and the trustees also represent an adverse party to the plan in the same transaction).

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.

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. However, the defendants contend "it is far from clear that receipt of Idearc shares constitutes 'consideration.'" (Docket 93, p. 30). There can be no dispute that Idearc's initial stock trading price of between $26.50 and $34.90 constituted monetary consideration. (http://ir.supermedia.com/worksheet.cfm (Idearc "Cost Basis Worksheet" website maintained by SuperMedia Inc.). Such payment of consideration was *per se* improper under ERISA Section 406(b)(3).

Plaintiffs have 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 grant Plaintiffs summary judgment on that claim.

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

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)(2) 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 Second, Third and Fourth Claims for Relief of their Second Amended Complaint contending that Verizon Defendants violated duties imposed by ERISA and the pension plans. ERISA Section 502(a)(3) authorizes appropriate relief for the purpose of redressing the violations and enforcing the Verizon pension plans' provisions. Plaintiffs ask the Court to enter an order requiring the Verizon 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. In their Memorandum Brief, without any elaboration or explanation, the Verizon Defendants simply whine that "a restatement order would be enormously complex and disruptive." (Docket 93, p. 38). But all such trouble for Verizon could have been avoided had Verizon senior leadership back during year 2006 simply

taken a reasonable time out,[7] reconsidered the plan for inclusion of the retirees in the Spin-off transaction, and acceded to the requests of soon-to-become Idearc executives that the retirees remain within Verizon's pension rolls. As in the case of the involuntarily transferred retirees in the case of *Howe v. Varity*, this Court should, accordingly, grant Plaintiffs a summary judgment on their Sixth Claim for Relief and order the reinstatement of all Plaintiffs and Class members into Verizon's pension plans.

III. CONCLUSION and REQUEST FOR ORAL ARGUMENT

For all the foregoing reasons and those reasons set forth in (Docket 83), Plaintiffs' opening memorandum brief, this Court should grant (Docket 81), Plaintiffs' Motion for Partial Summary Judgment and order judgment in favor of Plaintiffs on their Second, Third, Fourth and Sixth Claims for Relief of the Second Amended Complaint. 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 28th day of October, 2011.

Respectfully submitted,

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[7] See Docket 79, Defts' Appx. 23, Fitzgerald Depo. Tr. 87:15-88:21, wherein Mr. Fitzgerald testifies that his experience has shown that there are Fortune 500 Companies that have proposed deals and made SEC filing and all of a sudden changed their minds for various reasons. "It is not unheard of, but it's a high cost yield. And expensive."

CERTIFICATE OF SERVICE

I hereby certify that on the 28th 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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