

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. Background	1
II. Argument	2
A. Rule 12(b)(6) Motion to Dismiss Standard	2
B. The First Claim for Relief Should Not be Dismissed Because Plaintiffs Assert a Plausible Claim That Their Administrative Claim Was Within the Reach of ERISA Section 502(a)(1)(B), and SuperMedia EBC Chose Not to Render Any Decision Addressing the Merits of the Administrative Claim	4
C. Plaintiffs State a Viable Fifth Claim for Relief for a Declaration that SuperMedia EBC Violated ERISA Section 104(b)(1)(A)	9
D. SuperMedia EBC is a Proper Defendant for Plaintiffs' Relief Sought Under ERISA Section 502(a)(3)	12
III. Conclusion and Request for Oral Argument	14

TABLE OF AUTHORITIES

<u>CASES</u>	PAGE
<i>Aiken v. Policy Mgmt. Sys. Corp.</i> , 13 F.3d 138, 141-42 (4 th Cir. 1993)	11
<i>Andersen v. Chrysler Corp.</i> , 99 F.3d 846, 859 (7 th Cir. 1996)	10
<i>Ashcroft v. Iqbal</i> , ___ U.S. ___, 129 S.Ct. 1937, 1949-50 (2009)	3
<i>Bell Atlantic Corporation v. Twombly</i> , 550 U.S. 544, 127 S.Ct. 1955, 1974 (2007)	2
<i>Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough</i> , 354 F.3d 348, 354 (5 th Cir. 2003), <i>cert. denied</i> , 541 U.S. 1072, 124 S.Ct. 2412 (2004)	13
<i>Bourgeois v. Pension Plan for Employees of Santa Fe Int'l Corp.</i> , 215 F.3d 475, 479 (5 th Cir. 2000)	5
<i>Branch v. G. Bernd Co.</i> , 955 F.2d 1574, 1578-79 (11 th Cir. 1992)	10
<i>Burns v. Marley Co. Pension Plan for Hourly Employees at Stockton, Ca.</i> , 663 F. Supp. 2d 135, (E.D. N.Y. 2009)	11
<i>Carder-Cowin v. Unum Life Ins. Co. of Am.</i> , 560 F. Supp. 2d 1006, 1014 (W.D. Wash. 2008)	10
<i>Chiles v. Ceridian Corp.</i> , 95 F.3d 1505, 1519 (10 th Cir. 1991)	11
<i>Denton v. First National Bank</i> , 765 F.2d 1295, 1300-03 (5 th Cir. 1985)	5
<i>Govoni v. Bricklayers, Masons & Plasterers Int'l Union of Am., Local No. 5 Pension Fund</i> , 732 F.2d 250, 252 (1 st Cir. 1984)	10

Great Plains Trust Co. v. Morgan Stanley Dean Witter,
313 F.3d 305, 312 (5th Cir. 2002) 3

Gridley v. Cleveland Pneumatic Co.,
924 F.2d 1310, 1319 n.8 (3rd Cir. 1991) 10

In re Katrina Canal Breaches Litigation,
495 F.3d 191, 205 (5th Cir. 2007),
cert. denied, ___, U.S. ___, 128 S.Ct. 1230 (2008) 2

Martin K. Eby Construction Company v. Dallas Area Rapid Transit,
369 F.3d 464, 467 (5th Cir. 2004) 3

Murphy v. Keystone Steel & Wire Co.,
61 F.3d 560, 569 (7th Cir. 1995) 10

Palmisano v. Allina Health Sys., Inc.,
190 F.3d 881, 887-888 (8th Cir. 1999) 11

Paris v. Profit Sharing Plan,
637 F.2d 357, 361 (5th Cir. 1981),
cert. denied, 454 U.S. 836, 102 S.Ct. 140 (1981) 5

Pompano v. Schiavone & Sons, Inc.,
680 F.2d. 911, 916 (2nd Cir. 1982) 6

Risch v. Waukesh Title Co., Inc.,
588 F. Supp. 69, 72 (E.D. Wis. 1984) 10

Robbins v. N.Y. State Elec. & Gas,
2010 WL 1038495, at *5 (N.D. N.Y. March 19, 2010) 11

Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst.,
404 F.3d 167, 171-72 (2nd Cir. 2005) 11

Woolsey v. Marian Labs, Inc.,
934 F.2d 1452 (10th Cir. 1991) 6

United States ex rel. Riley v. St. Luke’s Episcopal Hosp.,
355 F.3d 370, 376 (5th Cir. 2004) 3

Verizon Employee Benefits Committee v. Adams,
Not Reported in F.Supp.2d,
2006 WL 66711 (N.D. Tex. January 11, 2006) 13

STATUTES

Employee Retirement Income Security Act of 1974 (ERISA)
as amended, 29 U.S.C. § 1001 et seq. *passim*
ERISA Section 104(b)(1)(A), 29 U.S.C. § 1124(b)(1)(A) 9, 11
ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) 4, 5
ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2) 12
ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3) 1, 8, 9, 10, 12, 13
ERISA Section 503(2), 29 U.S.C. § 1133(2) 8

REGULATIONS & RULES

29 C.F.R. § 2520-104b-2(a)(1) 9
Fed.R.Civ.P. Rule 8(a)(2) 3
Fed.R.Civ.P. Rule 12(b)(6) 1, 2, 3, 14
Fed.R.Civ.P. Rule 23(c)(1)(B) 1

Plaintiffs PHILIP A. MURPHY, JR., SANDRA R. NOE, and CLAIRE M. PALMER, by and through their counsel, file their brief in opposition to Docket No. 68, SuperMedia EBC's Rule 12(b)(6) motion to dismiss Claims One, Five and Six of the Second Amended Complaint.

I. BACKGROUND

On November 25, 2009, Philip A. Murphy, Jr., Sandra R. Noe and Claire M. Palmer (Collectively, "Plaintiffs"), filed this civil action against the Verizon Defendants and the Idearc/SuperMedia Defendants on behalf of themselves and others similarly situated, alleging that the suit should be certified as a class action. All of the asserted claims are governed by a single federal law, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. All claims will be tried to the Court. On March 3, 2011, the Court class certified this case and set forth in the order a Fed.R.Civ.Proc Rule 23(c)(1)(B) description of the claims as, *inter alia*, "[w]hether plaintiffs and the class are entitled to 'other appropriate equitable relief' under ERISA § 502(a)(3) as a result of the transfer of plaintiffs and class members to Idearc pension plans.'" (Docket 55, Order at p. 2). On June 21, 2011, plaintiffs filed their "Second Amended Complaint for Proposed Class Action Relief Under ERISA." (Docket No. 64).

Plaintiffs' claims arise out of actions by Verizon Defendants during November-December 2006 to involuntarily transfer Plaintiffs and Class members out of Verizon's long established pension plans into pension plans of a newly formed, highly leveraged spin-off company, Idearc, Inc., now known as SuperMedia Inc.¹ As a result, SuperMedia EBC became

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.

the plan administrator of Plaintiffs' and Class members' pension and retiree welfare benefits.

(*Id.*, Second Amended Complaint ¶¶ 30-32, 214, 226). The involuntary transfer of Plaintiffs and

Class members proved to be a huge 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 welfare benefit

plans. (*Id.*, Second Amended Complaint ¶¶ 79-80).

On July 12, 2011, in response to the Second Amended Complaint, SuperMedia EBC filed

a Rule 12(b)(6) motion to dismiss arguing that Claims One, Five and Six asserted against the

defendant fail to state any claim for relief. (Docket 68, SuperMedia EBC motion to dismiss).

For the following reasons, SuperMedia EBC's motion to dismiss should fully be denied.

II. ARGUMENT

A. Rule 12(b)(6) Motion to Dismiss Standard

SuperMedia EBC moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

“To survive a Rule 12(b)(6) motion, the plaintiff must plead ‘enough facts to state a claim to

relief that is plausible on its face.’” *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205

(5th Cir. 2007) (quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955,

1974 (2007)), *cert. denied*, 552 U.S. 1182, 128 S.Ct. 1230 (2008). “Factual allegations must be

enough to raise a right to relief above the speculative level, on the assumption that all the

allegations in the complaint are true (even if doubtful in fact).” *Katrina Canal*, 495 F.3d at 205

(quoting *Twombly*, 127 S.Ct. at 1965). “The court accepts all well-pleaded facts as true,

As of January 4, 2010, Idearc, Inc. emerged from Chapter 11 bankruptcy proceedings and changed its name to SuperMedia, Inc. (Docket No. 64, Second Amended Complaint ¶ 29).

viewing them in the light most favorable to the plaintiff.” *Id.* (internal quotation marks omitted) (quoting *Martin K. Eby Construction Company v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid claim when it is viewed in the light most favorable to the plaintiff. *Great Plains Trust Co. v. Morgan Stanley Dean Witter*, 313 F.3d 305, 312 (5th Cir. 2002).

The United States Supreme Court has prescribed a “two-pronged approach” to determine whether a complaint fails to state a claim under Rule 12(b)(6). See *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949-50 (2009). The trial court must “begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Id.* at 1950. The trial court should then assume the veracity of any well-pleaded allegations and “determine whether they plausibly give rise to an entitlement of relief.” *Id.* The plausibility principle does not convert Fed.R.Civ.Proc. Rule 8(a)(2) notice pleading to a “probability requirement,” but “a sheer possibility that a defendant has acted unlawfully” will not defeat a motion to dismiss. *Id.* at 1949. A plaintiff need only “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The trial court, drawing on its judicial experience and common sense, must undertake the “context-specific task” of determining whether the plaintiff’s allegations “nudge” its claims against the defendant “across the line from conceivable to plausible.” See *id.* at 1950, 1952. The trial court does not evaluate the plaintiff’s likelihood of success; instead, it only determines whether the plaintiff has pleaded a legally cognizable claim. *United States ex rel. Riley v. St. Luke’s Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004).

B. The First Claim for Relief Should Not be Dismissed Because Plaintiffs Assert a Plausible Claim That Their Administrative Claim Was Within the Reach of ERISA Section 502(a)(1)(B), and SuperMedia EBC Chose Not to Render Any Decision Addressing the Merits of the Administrative Claim.

Before filing this case, Plaintiffs unsuccessfully tried to get SuperMedia EBC to address their proposed class-wide administrative claim. (Docket 33, Order p. 6; Docket 64, Second Amended Complaint ¶¶ 82-115). Plaintiffs asked both Verizon EBC and SuperMedia EBC to grant retirees a rescission of their involuntary transfer from Verizon's sponsored pension plans into SuperMedia's sponsored pension plans. Plaintiffs made very clear in their administrative claim that they wanted to be removed from SuperMedia's pension plans and reinstated into Verizon's pension plans. (*Id.*, Second Amended Complaint, ¶ 82; Docket 69-3, Exhibit C at pp 8-9). SuperMedia EBC chose not to make any decision on any aspect of Plaintiffs' administrative claim. (Docket 64, Second Amended Complaint ¶¶ 87, 96, and 120).² SuperMedia EBC did not explain to Plaintiffs whether there was any opposition to Plaintiffs' claim and, if so, the basis for such opposition. (*Id.*, Second Amended Complaint ¶ 121). SuperMedia EBC completely thwarted the administrative process and did not give Plaintiffs a full and fair review of their request to be removed from SuperMedia's custody, restored into Verizon's custody and resume receiving Verizon's sponsored pension benefits. (*Id.*, Second Amended Complaint ¶¶ 122-123).

Although Plaintiffs were not seeking payment of additional benefits from SuperMedia's pension plans, Plaintiffs' attempted class-wide administrative claim should have been treated by

² SuperMedia EBC acknowledges receipt of Plaintiffs' September 15, 2009 appeal letter complaining on page 2 that "Idearc did not send Named Claimants a formal written response to the merits of their administrative claim." (Docket 69-5, Deft's Exhibit E at p. 2, filed in support of their memorandum brief).

SuperMedia EBC as one arising under ERISA Section 502(a)(1)(B), 29 U.S.C. § 502(a)(1)(B).³ Since Plaintiffs sought removal from SuperMedia's pension plans and restoration into Verizon's pension plans, they were seeking a determination or clarification of their "rights to future benefits under the terms of the plan[s]". See ERISA Section 502(a)(1)(B).

There can be no doubt that the Fifth Circuit requires exhaustion of administrative remedies with respect to claims made under ERISA Section 502(a)(1)(B). On numerous occasions, the Fifth Circuit has ruled that plaintiffs asserting ERISA Section 502(a)(1)(B) benefit determinations must first exhaust available administrative remedies under the plan before bringing suit. See, e.g., *Bourgeois v. Pension Plan for Employees of Santa Fe Int'l Corp.*, 215 F.3d 475, 479 (5th Cir. 2000); *Denton v. First National Bank*, 765 F.2d 1295, 1300-03 (5th Cir. 1985). The Fifth Circuit has held that a claim arising under ERISA does not accrue until an administrative claim has been filed and denied. *Paris v. Profit Sharing Plan*, 637 F.2d 357, 361 (5th Cir. 1981), *cert. denied*, 454 U.S. 836, 102 S.Ct. 140 (1981).

To be clear, Plaintiffs are not complaining about the "mode or manner" in which their pension benefits are being paid to them. (Docket 64, Second Amended Complaint ¶ 118). Plaintiffs are not seeking from SuperMedia a lump sum pension payment instead of a monthly annuity form of payment. And Plaintiffs are not seeking an alternative form of benefit, such as payment in the form of SuperMedia stock. Therefore, all of the case decisions cited by SuperMedia EBC in its memorandum brief are inapposite. (See generally, Docket 69, Deft's

³ ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), states in relevant part: "**(a) Persons Empowered to Bring Civil Action.**— A civil action may be brought — **(1)** by a participant or beneficiary — **(B)** to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;" (emphasis original).

Memorandum Brief at pp. 9-12).

For instance, SuperMedia EBC cites *Pompano v. Schiavone & Sons, Inc.*, 680 F.2d. 911, 916 (2nd Cir. 1982). That case decision is inapposite since therein the plaintiff was complaining that he wanted a lump sum pension payment rather than a monthly annuity, the regular method of payment required by the terms of the pension plan. Moreover, the appellate court found the plaintiff's request for special lump sum treatment was properly refused because the "request could be detrimental to the other beneficiaries of the Plan and the Committee owed a fiduciary duty to them (as well as to appellant) to insure a stable retirement fund." *Id.* at 915. In contrast, Plaintiffs claimed they were entitled to be paid Verizon pension benefits and they requested a determination by SuperMedia EBC that they should be restored into Verizon's pension plans. Had SuperMedia EBC granted the administrative claim and declared Plaintiffs' and Class members' rights to future benefits in accordance with ERISA Section 502(a)(1)(B), such action would not have proven detrimental to any other plan participant who rightfully belonged in Idearc/SuperMedia's sponsored pension plans.

Likewise, SuperMedia EBC misplaces reliance upon the appellate court decision in the case of *Woolsey v. Marian Labs, Inc.*, 934 F.2d 1452 (10th Cir. 1991). *Woolsey* is inapposite because therein the plaintiff wanted to receive his benefit in the forms of both cash and employer stock, whereas the plan's terms only allowed a distribution to be made in the form of cash. That is not even remotely the essence of either Plaintiffs' complaint or their prior administrative claim submitted to SuperMedia EBC for a full and fair review.

All of the cases cited by SuperMedia EBC, indeed, are inapposite because in none of them was there a plaintiff complaining that he or she had wrongfully been removed from one

plan sponsor's pension plan and involuntarily made a participant in another plan sponsor's pension plan. Plaintiffs contend they are wrongfully being forced to accept payment of SuperMedia pension plan benefits in lieu of payment of Verizon pension plan benefits.

Unlike the prototypical ERISA administrative claim where the complainants seek continuation of employee benefits or to be paid enhanced or additional benefits by the current sponsor of an employee benefit plan, Plaintiffs seek discontinuance of SuperMedia's benefits to them. Plaintiffs and the retiree Class do not want to remain as participants in SuperMedia's employee benefit plans, a status that was involuntarily foisted upon them. Plaintiffs and the retiree Class all had long-term vested rights to Verizon's pension plans, and those plans continue to exist. Plaintiffs and Class members want to be removed from SuperMedia's employee benefit plans and returned to Verizon's employee benefit plans where they were and will remain much better off.

The very nature of Plaintiffs' internal claim required a decision on necessary administrative action to be taken by two separate named pension plan fiduciaries, as follows: 1) SuperMedia EBC's agreement to return the retirees to Verizon; and 2) Verizon EBC's agreement to reinstate the retirees into the employee benefit plans from which they were expelled. (Docket 64, Second Amended Complaint ¶ 119). The situation for the transferred retirees is analogous to a situation where children are involuntarily removed from the custody and care of their biological parents and placed with foster parents. Any court adjudication with respect to the best interests of the children must not only focus on the interests of the affected parties but take into account the participation of both sets of custodians. Hence, the basis for Plaintiffs' pursuit of their administrative claim before both sets of named pension plan

fiduciaries.

ERISA Section 503(2) requires a pension plan administrator to “afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.” 29 U.S.C. § 1133(2). SuperMedia EBC cites no support for its bald face contention that “the ‘full and fair’ review provisions of ERISA § 503, 29 U.S.C. § 1133 do not encompass this claim.” (Docket 69, Deft’s Memorandum Brief at p. 12). The parties have found no reported case decision directly on point addressing any retiree’s claim to be removed from a current plan sponsor’s pension plan and placed back into a prior plan sponsor’s pension plan.

Since SuperMedia EBC failed to afford Plaintiffs a full and fair review and address the merits of Plaintiffs’ administrative class-wide claim, their only recourse was to commence this civil action and receive judicial relief. In their First Claim for Relief, pursuant to ERISA Section 502(a)(3), 29 U.S.C. Section 1132(a)(3), Plaintiffs ask this Court to grant appropriate equitable relief and declare that both Verizon EBC and SuperMedia EBC failed to provide Plaintiffs with a full and fair review and, as a consequence, Plaintiffs’ claims asserted herein should be deemed tolled during the administrative process and Plaintiffs should recover an award of reasonable attorney’s fees and costs necessarily incurred in this civil action in order to litigate the class certification issue and the merits of Plaintiffs’ administrative claim. (Docket 64, Second Amended Complaint ¶ 132).

Accordingly, the Court should deny Defendants SuperMedia EBC’s motion to dismiss the First Claim for Relief of the Second Amended Complaint.

C. Plaintiffs State a Viable Fifth Claim for Relief for a Declaration that SuperMedia EBC Violated ERISA Section 104(b)(1)(A).

In the Fifth Claim for Relief, Plaintiffs seek “appropriate class-wide relief” under ERISA Section 502(a)(3), including a “declaration that SuperMedia EBC failed to meet and breached its statutory duty” under ERISA Section 104(b)(1) due to defendant’s failure to provide participants a summary plan description (SPD) for the SuperMedia sponsored pension plans within 90 days after they became participants in SuperMedia’s sponsored pension plans. (See generally, Docket 64, Second Amended Complaint ¶¶ 209-221).

ERISA Section 104(b)(1) requires a pension plan administrator to “furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in § 102(a)– (A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits.” 29 U.S.C. § 1024(b)(1)(A). DOL Regulation requires, in part, the SPD to be provided:

on or before the later of: (1) the date which is 90 days after the employee becomes a participant or (in the case of a beneficiary receiving benefits under a pension plan) within 90 days after he or she first receives benefits, . .

29 C.F.R. Section 2520.104b-2(a)(1). (Docket 64, Second Amended Complaint ¶ 211). Neither the statute nor the regulation requires a plan participant to request a SPD.

On November 17, 2006, Plaintiffs and Class members were involuntarily made participants in SuperMedia’s pension plans. (Docket 64, Second Amended Complaint ¶ 207). Computing the deadline from November 17, 2006— 90 days later is February 15, 2007. In the motion to dismiss, SuperMedia EBC concedes it did not timely fulfill the statutory requirements. (Docket 69, Deft’s Memorandum Brief at p. 15). During the month of March 2007, SuperMedia

EBC sent Plaintiffs and Class members Verizon pension plan SPDs concerning plans in which Plaintiffs and Class members were no longer participating. (Docket 64, Second Amended Complaint ¶ 212).⁴

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). That statute does not specifically require a plan participant to show personal harm before bringing a civil action. SuperMedia EBC argues that Plaintiffs cannot seek any recovery because they have not alleged any personal harm. SuperMedia EBC contends “there is no private right of action to recover a penalty for nondisclosure unless a request for an SPD is first made” (Docket 69, Deft’s Memorandum Brief at p. 14). However, Plaintiffs are not seeking to recover a monetary penalty. SuperMedia EBC cites a string of cases concerning claims of misrepresentations alleged to be contained in SPDs. (*Id.*, Deft’s Memorandum Brief at pp. 15-16).⁵ Not a single one of those cases is on point. Plaintiffs do not contend the *Verizon* SPDs

⁴ It is not alleged in the Second Amended Complaint and it remains unclear today when, if ever, SuperMedia EBC sent Plaintiffs and Class members a SuperMedia SPD.

⁵ *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 569 (7th Cir. 1995) (claim for payment of welfare benefits due to alleged failure to have plan amendment procedure in place); *Risch v. Waukesh Title Co., Inc.*, 588 F. Supp. 69, 72 (E.D. Wis. 1984) (claim that forfeiture clause could not be enforced due to failure to provide SPD); *Carder-Cowin v. Unum Life Ins. Co. of Am.*, 560 F. Supp. 2d 1006, 1014 (W.D. Wash. 2008) (claim for payment of disability benefits due to failure to provide SPD); *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 n.8 (3rd Cir. 1991) (claim for payment of increased life insurance due to faulty plan brochure and SPD); *Andersen v. Chrysler Corp.*, 99 F.3d 846, 859 (7th Cir. 1996) (claim for payment of additional severance benefits due to faulty SPD); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1578-79 (11th Cir. 1992) (claim for payment of health care benefits based upon equitable estoppel); *Govoni v. Bricklayers, Masons & Plasterers*

which SuperMedia EBC gave to them contained misrepresentations. Instead, Plaintiffs contention is that they didn't receive *SuperMedia* SPDs, and a showing of personal harm is not a prerequisite under the statute in order for Plaintiffs to obtain appropriate equitable relief, including declaratory relief, just as Plaintiffs have requested in the Second Amended Complaint. The failure to provide Plaintiffs a SuperMedia SPD is not a "technical violation", as argued by SuperMedia EBC. The failure is a statutory violation and breach of fiduciary duty. SuperMedia EBC, as plan administrator, was obligated to provide Plaintiffs and Class members with a SuperMedia SPD within 90 days after November 17, 2006 without any request being made by anyone. There is no specific provision providing specific relief for violation of ERISA Section 104(b)(1)(A). Therefore, nothing precludes equitable relief for violation of the statute.

In this case, in addition to declaring SuperMedia EBC failed to meet its statutory and fiduciary duty, the Court may be inclined to order SuperMedia EBC to distribute to Plaintiffs and Class members genuine SuperMedia pension plan SPDs with further explanation. For purposes of deciding SuperMedia EBC's Rule 12(b)(6) motion to dismiss, a decision on the appropriate

Int'l Union of Am., Local No. 5 Pension Fund, 732 F.2d 250, 252 (1st Cir. 1984) (claim for payment of larger pension benefit due to alleged inconsistency between SPD and plan terms); *Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141-42 (4th Cir. 1993) (*per curiam*) (claim for lump sum pension benefit instead of monthly annuity due to alleged inconsistency between SPD and plan terms); *Palmisano v. Allina Health Sys., Inc.*, 190 F.3d 881, 887-888 (8th Cir. 1999) (claim for payment of severance benefits due to faulty SPD); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1991) (claim for payment of welfare benefits due to faulty SPD); *Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst.*, 404 F.3d 167, 171-72 (2nd Cir. 2005) (claim for payment of life insurance benefits due to failure to provide SPD); *Burns v. Marley Co. Pension Plan for Hourly Employees at Stockton, Ca.*, 663 F. Supp. 2d 135, (E.D. N.Y. 2009) (claim for payment of disability benefits due to faulty benefit statement concerning earned credits); *Robbins v. N.Y. State Elec. & Gas*, 2010 WL 1038495, at *5 (N.D. N.Y. March 19, 2010) (claim for penalties due to failure to provide updated SPD).

equitable remedy need not be made.

Accordingly, the Court should deny Defendant SuperMedia EBC's motion to dismiss the Fifth Claim for Relief of the Second Amended Complaint.

D. SuperMedia EBC is a Proper Defendant for Plaintiffs' Relief Sought Under ERISA Section 502(a)(3).

In an argument set forth in a single paragraph, SuperMedia EBC asserts that in order for Plaintiffs to receive relief under ERISA Section 502(a)(3) for their Sixth Claim for Relief, Plaintiffs must allege conduct by SuperMedia EBC that violated a duty imposed by ERISA or the plans. Defendant cites no legal authority for its proposition. (Docket 69, Deft's Memorandum Brief at p. 18). This Court has previously correctly noted that Plaintiffs seek equitable relief under ERISA section 502(a)(3) against SuperMedia EBC for the involuntary transfer of the plaintiff class from the Verizon pension plans. (Docket 33, Order at p. 11).

Verizon's transfer of Plaintiffs and class members from participation in Verizon's pension plans violated the terms of Verizon's pension plans and, as a consequence of Verizon's November 2006 spin-off transaction, SuperMedia EBC is the current plan administrator and has assumed responsibilities for Plaintiffs' and Class members' pensions and welfare benefits. (Docket 64, Second Amended Complaint ¶ 226). Both SuperMedia, Inc. and SuperMedia EBC should remove Plaintiffs and Class members from SuperMedia's pension plans and restore them back into Verizon's pension plans. However, SuperMedia, Inc. and SuperMedia EBC will not take such action absent a directive and order issued by this Court. (*Id.*, Second Amended Complaint ¶ 227). Therefore, Plaintiffs request, pursuant to ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. Sections 1132(a)(2) and (a)(3), appropriate equitable relief, including an order

requiring SuperMedia EBC and the plan sponsor, SuperMedia, Inc., to transfer Plaintiffs and class members back into Verizon's sponsored pension and welfare benefit plans. (*Id.*, Second Amended Complaint ¶ 229 and Prayer at ¶ C.8).

A cause of action under § 502(a)(3) must assert an equitable remedy. *Verizon Employee Benefits Committee v. Adams*, Not Reported in F.Supp.2d, 2006 WL 66711 (N.D. Tex. January 11, 2006). For their Sixth Claim for Relief, Plaintiffs have asserted an equitable remedy. This Court has already correctly ruled that “[s]ince the plaintiffs seek to have SuperMedia EBC, as their plans’ administrator, remove them from the SuperMedia pension plans and restore them back into the Verizon pension plans, they have stated a viable claim for equitable relief under ERISA section 502(a)(3). (Docket 33, Order at pp. 23-24).

The Fifth Circuit has observed and ruled that there is no limitation on the set of proper defendants to a § 502(a)(3) action. *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 354 (5th Cir. 2003), *cert. denied*, 541 U.S. 1072, 124 S.Ct. 2412 (2004). SuperMedia EBC previously conceded it is a proper defendant party. SuperMedia EBC states “[t]o the extent the Court determines a SuperMedia Defendant is needed to effectuate an order transferring retirees back to Verizon pension plans, the plans’ administrator is the appropriate party -- SuperMedia EBC.” (Docket 29, SuperMedia EBC’s Reply Brief at p. 3, n.4). Therefore, the Court should rule that SuperMedia EBC is a necessary party to this case and the Sixth Claim for Relief properly states a claim for relief against it as defendant.

Accordingly, the Court should deny Defendant SuperMedia EBC’s motion to dismiss the Sixth Claim for Relief of the Second Amended Complaint.

III. CONCLUSION and REQUEST FOR ORAL ARGUMENT

WHEREFORE, Plaintiffs request an order denying Docket 68, SuperMedia EBC's Rule 12(b)(6) motion to dismiss Claims One, Five and Six of the Second Amended Complaint. 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 27th day of July, 2011.

Respectfully submitted,

s/ Curtis L. Kennedy

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 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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