

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PHILIP A. MURPHY, JR. §
SANDRA R. NOE, and §
CLAIREE M. PALMER, et al. §
Plaintiffs, §
§
v. § Civil Action No. 3:09-cv-2262-G
§
VERIZON COMMUNICATIONS, INC., et §
al. §
Defendants. §
§

**DEFENDANT SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE'S REPLY BRIEF
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Defendant SuperMedia Employee Benefits Committee (“SuperMedia EBC”) files this Reply in Support of its Motion for Summary Judgment and respectfully shows as follows:

I. ARGUMENT AND AUTHORITIES

Nothing in Plaintiffs’ Opposition to SuperMedia EBC’s Motion for Summary Judgment allows Plaintiffs to escape summary judgment. Claim One still fails because no evidence exists that Plaintiffs were denied any claim for benefits, and as such, no right to a full and fair review of Plaintiffs’ purported “administrative claim” exists. Claim Five still fails because no evidence exists that Plaintiffs suffered *any* prejudice as a result of failing to receive SuperMedia EBC’s SPD within 90 days of the spin-off date. Claim Six still fails because Claims One and Five fail; that is, without a surviving claim for breach of fiduciary duty upon which such relief could be granted, there is no violation remaining to redress by way of equitable relief. Accordingly, summary judgment should be granted as to all of Plaintiffs’ claims against SuperMedia EBC.

A. Claim One: SuperMedia EBC was not required to provide a “full and fair review” because no benefits were denied.

ERISA requires plans to “afford a reasonable opportunity to any participant whose *claim*

SuperMedia EBC’s Reply Brief in Support of Motion for Summary Judgment

for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.” ERISA § 503(2) (emphasis added). The numerous cases cited in SuperMedia EBC’s Motion for Summary judgment simply illustrate and exemplify this plainly stated statutory requirement. *See* SuperMedia EBC’s Mot. for Summary Judgment at 8 (citing numerous cases holding Section 502(a)(3) requires a denial of a claim for benefits before a plan participant is entitled to a full and fair review).

Plaintiffs attempt to distinguish the authority cited in SuperMedia EBC’s Motion by pointing out that the plaintiffs in those cases, unlike the Plaintiffs here, did not complain about their being moved from one plan to another. Plaintiffs’ arguments amount to a distinction without a difference. Section 503(2), the provision under which Plaintiffs have brought Claim One, simply does not address the transfer of participants from one plan to another. The statute speaks to denial of claims for benefits and the resulting requirement for a full and fair review of such a denial. Plaintiffs do not allege or provide evidence that any claim for benefits was denied, and lacking such a denial, no full and fair review is required. Claim One thus fails as a matter of law.

This conclusion is bolstered by Plaintiffs’ admission that no authority exists addressing a claim for “wrongful removal” from one plan to another. *See Pls.’ Brief in Support of Opposition* at 11. Plaintiffs (and SuperMedia EBC) have failed to discover any authority supporting a “wrongful removal” claim because such a claim is not legally cognizable under Section 503(2).

Plaintiffs’ attempt to analogize this case to “a situation where children are involuntarily removed from the custody and care of their biological parents and placed with unfamiliar foster parents” is puzzling and strains credibility. As an initial matter, family law jurisprudence has no bearing on this matter or the application of Section 503(2). Even accepting Plaintiffs’ analogy,

SuperMedia EBC fails to understand how foster parents would be subject to a civil action for merely accepting children who were placed into their care by the acts of a third party.

B. Claim Five: Plaintiffs/Class members were not prejudiced—and allege no prejudice—by receiving SPDs more than 90 days after the spin-off date.

Plaintiffs have provided no evidence that they were in any way prejudiced by receiving SPDs over 90 days from the spin-off date.¹ This remains the case, and Claim Five is subject to summary judgment.

Causation is an essential element of any cause of action, and courts have had little trouble applying this fundamental underpinning of tort law in the context of ERISA claims. To obtain relief under Section 502(a)(3), an ERISA plaintiff must establish that the plan fiduciary's breach caused the plaintiff an injury. *See Hobbs v. Baker Hughes Oilfield Operations*, 2007 WL 4223666, at *5 (S.D. Tex. Nov. 28, 2007), *aff'd* 294 Fed. Appx. 156 (5th Cir. 2008) (citing cases). Similarly, a technical and/or procedural violation of Section 104(b)(1) does not provide a viable claim without detrimental reliance or prejudice. *See Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 569 (7th Cir. 1995) ("[T]echnical violations of ERISA requirements do not justify relief absent a showing of bad faith, active concealment, or detrimental reliance.").

Plaintiffs have provided no evidence of any denial of benefits or any other form of quantifiable harm. Plaintiffs' allusions to Verizon's allegedly more well-funded and/or secured benefits pool are belied by the fact the Plaintiffs have suffered no denials of benefits. Similarly, any insinuation that Plaintiffs' benefits are now in jeopardy based of Idearc's bankruptcy (from

¹ To the extent Plaintiffs argue that they never received SPDs because they were posted on a website rather than mailed directly to participants, (1) no iteration of Plaintiffs' Complaint contains this allegation, *see Pls.' Second Am. Comp. ¶ 216*, and (2) making the SPDs available online was "reasonably calculated to ensure actual receipt of the material" as required by 19 C.F.R. § 2520.104(b)-(1)(c). *See Custer v. Murphy Oil USA, Inc.*, 503 F.3d 415, 419 (5th Cir. 2007) (noting that the question is not whether there was actual receipt by the plaintiffs, but rather whether the plan administrator used measures reasonably calculated to ensure actual receipt). Finally, SuperMedia EBC's argument regarding prejudice applies with equal force regardless of whether some of the Plaintiffs did not receive the SPDs.

which it has emerged) is simply a red herring. As noted in SuperMedia EBC's Motion, the Idearc Inc. Master Trust (the entity which holds the assets associated with the plans) is a separately maintained and independently managed entity, which was not a part of Idearc Inc.'s bankruptcy. *See Gist Decl.* ¶ 10, attached to SuperMedia EBC's Mot. for Summary Judgment (App. 3); *Garza Decl.* ¶ 7, attached to SuperMedia EBC's Mot. for Summary Judgment (App. 338). Simply put, Plaintiffs have marshaled no evidence of prejudice and instead have merely offered rumor and innuendo concerning the security of benefits that have at no time in their history been denied.

In an attempt to identify *some* form of injury, Plaintiffs argue they "lost an opportunity [to] sooner [] take the most timely appropriate preventative and legal action." *See Pls.' Brief in Support of Opposition* at 16. Of course, Plaintiffs fail to specifically identify what more timely "preventative and legal action" they might have otherwise taken or any benefit such earlier action would have bestowed upon them.² As SuperMedia EBC understands Plaintiffs' contention, Plaintiffs may have filed suit earlier had they been given the SPDs within 90 days. But Plaintiffs haven't suggested that any of their claims are time barred. Accordingly, nothing SuperMedia EBC did or did not do caused any prejudice concerning Plaintiffs' ability to take timely and appropriate legal action. Based on the forgoing, no injury or causation of injury exists, and summary judgment is appropriate.

C. Claim Six: Without Claims One and Five, Claim Six is not viable.

Plaintiffs' response to SuperMedia EBC's grounds for summary judgment as to Claim Six misses the mark. By its own terms, Section 502(a)(3) merely supplies a mechanism for

² As noted in SuperMedia EBC's Motion for Summary Judgment, any reliance or prejudice is undermined by the letters sent by Verizon to plan participants within 90 days of the spin-off, which notified Plaintiffs that the new SuperMedia EBC pension plans were identical mirror images to the Verizon pension plans in which they were formerly participants. *See Exs. B-1 & B-2*, attached to SuperMedia EBC's Mot. for Summary Judgment (App. 77-80).

determining standing and enabling those who file suit to obtain an injunction or “other appropriate equitable relief” to redress plan violations or enforce other ERISA provisions.³

Idearc/SuperMedia EBC did not so much as exist when Verizon initiated the spin-off and resulting transfer of plan participants. Thus, SuperMedia EBC could not have violated any of the Verizon plan provisions. And because Claims One and Five fail as discussed above, Plaintiffs have no remaining substantive claim against SuperMedia EBC based in ERISA. Thus, no basis exists upon which to base application of Section 502(a)(3).

II. PRAYER

SuperMedia EBC respectfully submits that Plaintiffs’ claims against SuperMedia Employee Benefits Committee fail as a matter of law and should be dismissed on summary judgment.

³ Section 502(a)(3) provides that a civil action may be brought “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.”

Respectfully submitted,

ANDREWS KURTH LLP

/s/ David P. Whittlesey

David P. Whittlesey
State Bar No. 00791920
Martha M. Hopkins
State Bar No. 24059970
111 Congress, Suite 1700
Austin, Texas 78701
Telephone: (512) 320-9200
Facsimile: (512) 320-9292

Marc D. Katz
State Bar No. 00791002
1717 Main Street, Suite 3700
Dallas, Texas 75201
Telephone: (214) 659-4400
Facsimile: (214) 659-4401

**ATTORNEYS FOR DEFENDANT
SUPERMEDIA EMPLOYEE BENEFITS
COMMITTEE**

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October 2011, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all counsel of record, each of whom has registered as a user of the ECF system. A courtesy copy has also been sent to the following counsel of record via E-Mail:

Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, Colorado 80237-1741

Robert E. Goodman, Jr.
KILGORE & KILGORE
3109 Carlisle St.
Dallas, Texas 75204

Christopher L. Kurzner
KURZNER PC
1700 Pacific Avenue, Suite 3800
Dallas, Texas 75201

Jeffrey G. Huvelle, Esq.
Christian J. Pistilli
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

ATTORNEYS FOR PLAINTIFFS

ATTORNEYS FOR DEFENDANTS
VERIZON COMMUNICATIONS, INC.,
VERIZON EMPLOYEE BENEFITS
COMMITTEE
VERIZON PENSION PLAN FOR NEW
YORK AND
NEW ENGLAND ASSOCIATES;
VERIZON MANAGEMENT
PENSION PLAN

/s/ Martha Hopkins

Martha Hopkins