IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

JOANNE C. JACOBSEN., *et al.*, **Plaintiffs,** **v.** **VERIZON COMMUNICATIONS INC., *et al.*,** **Defendants.**	**CIVIL ACTION NO. 3:11-CV-555**

DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants Verizon Communications Inc. and the Verizon Employee Benefits Committee, (collectively, the "Verizon Defendants") hereby move to dismiss with prejudice Plaintiffs' Complaint. The ground for this motion is that Plaintiffs' claim is time-barred.

Pursuant to Local Rule 7.1(d), the Verizon Defendants submit herewith a memorandum of law in support of their motion.

Respectfully submitted,

By: */s/ Christopher L. Kurzner*

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2011, I caused a true and correct copy of the foregoing instrument to be served on counsel for Plaintiffs via the Court's electronic filing system as set forth in Miscellaneous Order 61 as follows:

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Plaintiffs,	
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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This case was transferred to this Court from the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. § 1404. Plaintiffs in this case seek to bring precisely the same class action claim under Section 510 of ERISA that this Court has already dismissed as time-barred in *Murphy v. Verizon Communications Inc.*, No. 3:09-CV-2262 (the "*Murphy* Action"). This Court should reject Plaintiffs' forum-shopping attempt to manipulate federal law by filing an identical claim in another jurisdiction as an end-run around this Court's statute of limitations ruling.

BACKGROUND

A. The Related Texas ERISA Actions

On November 13, 2009, Plaintiff Jacobsen -- together with Sandra Noe and Claire Palmer -- filed a putative class action lawsuit against Verizon, the Verizon EBC and various Verizon pension plans in the Unites States District Court for the Northern District of Texas. Dkt.

15, Ex. A. Plaintiff Jacobsen's Texas lawsuit challenged the propriety of Verizon's decision to transfer assets and/or obligations relating to former employees of Verizon's directories business from Verizon-sponsored employee benefit plans to Idearc plans. *See id.* On November 24, 2009, Plaintiff Jacobsen -- by and through counsel Curtis L. Kennedy -- voluntarily dismissed her Texas action.

On November 25, 2009, Ms. Noe, Ms. Palmer and Philip Murphy -- by and through counsel Curtis L. Kennedy -- filed a new class action complaint in this Court (the "*Murphy* Action"). Dkt. 1, at ¶ 6; *see* Dkt. 15, Ex. B. On January 6, 2010, plaintiffs in the *Murphy* Action filed an amended complaint. *See* Dkt. 15, Ex. C. Like Plaintiff Jacobsen's Texas lawsuit, both of the complaints in the *Murphy* Action relate to Verizon's decision to spin off its directories business to Idearc and to transfer the assets and liabilities associated with the pensions of former directories business employees to Idearc pension plans. *See id.*; Dkt. 15, Ex. B.

One of the putative class claims pursued by the plaintiffs in the *Murphy* Action was the claim that certain defendants violated Section 510 of ERISA, which prohibits "discriminat[ion] against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan." 29 U.S.C. § 1140. Specifically, the *Murphy* plaintiffs alleged that "when Verizon reclassified Plaintiffs and putative class members so as to treat them as being transferred into Idearc's pension plans, Verizon was motivated in part to interfere with retirees' rights to continue receiving payment of their protected Verizon pension benefits, as well as their welfare benefits." Dkt. 15, Ex. C, at ¶ 143.

On October 18, 2010, this Court dismissed the *Murphy* plaintiffs' Section 510 claim on statute of limitations grounds. *See Murphy v. Verizon Communications, Inc.*, 2010 WL

4248845, at *11-12 (N.D. Tex. Oct. 18, 2010). This Court held that (i) the statute of limitations applicable to the *Murphy* plaintiffs' claims was two years, and (ii) the *Murphy* plaintiffs' claims relating to the November 2006 Idearc transfers were barred by the applicable, two-year limitations period. *See id.*

On March 3, 2011, this Court certified a non-optout class in the *Murphy* Action. Dkt. 15, Ex. C. Plaintiffs Jacobsen and Burke are both members of the *Murphy* class.

B. The Instant Lawsuit

Plaintiffs Jacobsen and Burke filed a complaint in the United States District Court for the Middle District of Florida on November 12, 2010 -- almost one year *later* than the complaint in the *Murphy* Action was filed. Like the plaintiffs in the *Murphy* Action, Plaintiffs in this case are represented by Curtis L. Kennedy.

Plaintiffs' complaint contains a single count, which alleges that Verizon violated Section 510 of ERISA by improperly "reclassify[ing] Plaintiffs and putative class members so as to treat them as being transferred into Idearc's pension plans" in November 2006. Dkt. 1, at ¶ 85. The complaint expressly acknowledges that Plaintiffs "seek to pursue the very same ERISA Section 510 claim that the *Murphy* case plaintiffs attempted to pursue on behalf of the putative class" in the *Murphy* Action. Dkt. 1, at ¶ 99.

On March 15, 2011, Verizon moved to transfer this case pursuant to 28 U.S.C. § 1404, on the ground that the directly related *Murphy* Action was already pending in this Court. Plaintiffs consented to Verizon's motion and, on March 16, 2011, the case was transferred.

ARGUMENT

This Court should reject Plaintiffs' forum-shopping efforts and again dismiss as untimely any claim under Section 510 of ERISA arising out of the November 2006 Idearc transfers. As Plaintiffs acknowledge in their complaint, they seek to bring precisely the same

class action claim that this Court already dismissed once in the *Murphy* Action through the stratagem of filing the claim in a different jurisdiction. Now that this case is back where it belongs, in a Texas federal court, both equity and well-established rules regarding the law applicable to transferred claims arising under federal statutes unite in requiring that Plaintiffs' Section 510 claims again be dismissed.

I. PLAINTIFFS' CLAIM IS TIME-BARRED.

This Court has already held that Plaintiffs' Section 510 claims are time-barred under the applicable two-year statute of limitations, which is borrowed from Texas law. *See Murphy v. Verizon Communications, Inc.*, 2010 WL 4248845, at *11-12 (N.D. Tex. Oct. 18, 2010) (citing *McClure v. Zoecom, Inc.*, 936 F.2d 777, 778 (5th Cir. 1991)). Plaintiffs likely will argue that this Court should borrow a Florida statute of limitations, rather than a Texas statute of limitations, because this case was transferred from a Florida federal court pursuant to 28 U.S.C. § 1404. Plaintiffs, however, are mistaken. Because the applicable statute of limitations under Section 510 is a question of federal law -- albeit federal law that "borrows" from the law of the forum state -- it is clear that the law of the "transferee" jurisdiction applies to this action.

As Plaintiffs' complaint itself expressly acknowledges, they "seek to pursue the very same ERISA Section 510 claim that the *Murphy* case plaintiffs attempted to pursue on behalf of the putative class." Dkt. 1, at ¶ 99. On October 18, 2010, this Court held that the *Murphy* plaintiffs' Section 510 was time-barred under the applicable statute of limitations. *See Murphy*, 2010 WL 4248845, at *12. Because Plaintiffs' complaint was filed more than a year *after* the *Murphy* plaintiffs' complaint, it follows *a fortiori* that Plaintiffs' Section 510 claim, too, is time-barred unless a longer statute of limitations applies.

Plaintiffs cannot assert that a four-year statute of limitations, borrowed from Florida law, should be applied in this case. "When a case is transferred from a district in another

circuit, the precedent of the circuit court encompassing the transferee district court applies to the case on matters of federal law." *Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992). And in cases where statutes of limitations for federal law claims are "borrowed" from state law, the statutes of limitations are matters of *federal* law. *See DelCostello v. Int'l Broth. of Teamsters*, 462 U.S. 151, 159 n.13 (1983) ("[T]he choice of a limitations period for a federal cause of action is itself a question of federal law."). In light of the foregoing principles, this Court should apply the law of the transferee court to determine the applicable statute of limitations.

Numerous courts, confronted with similar circumstances, have reached the same conclusion. In a case transferred from Florida to New York pursuant to 28 U.S.C. § 1407, the Second Circuit rejected plaintiffs' argument that the Eleventh Circuit's statute of limitations borrowing rule should apply to their claim when borrowing a state statute of limitations under the federal securities laws. *See Menowitz v. Brown*, 991 F.2d 36, 39-40 (2d Cir. 1993).[1] Starting from the proposition that "a transferee federal court should apply its interpretations of federal law," the Second Circuit had little trouble concluding that its own law should govern:

> Whether or not courts apply a state limitations period to a federal claim, "the choice of a limitations period for a federal cause of action is itself a question of federal law. . . ."
>
> Once a state limitations period is borrowed and applied to a federal cause of action, the borrowed limitations period is no longer an element of state law. . . . *Given that the choice of the statute of*

[1] The argument for applying the law of the transferee forum in a case transferred under 28 U.S.C. § 1404 is even stronger than in cases transferred under 28 U.S.C. § 1407. Section 1407 contemplates that the case will eventually be returned to the district in which it was originally filed for trial. By contrast, in cases -- like this one -- where the transfer is made pursuant to Section 1404, the transfer is permanent. Since this case no longer has any connection to Florida, and will be litigated to final judgment in Texas, it is especially clear that Fifth Circuit law should apply to all questions of federal law in this case, including the appropriate statute of limitations for Plaintiffs' claims.

> *limitations period applicable to [plaintiffs'] claims is a matter of federal law, the statute of limitations doctrine of the transferee Second Circuit applies. . . .*

Id. at 41 (quoting *DelCostello*, 462 at 159 n.13) (emphasis added).

At least one district court in the Fifth Circuit has similarly concluded that the applicable statute of limitations should be "borrowed" from the law of the transferee forum. *See In re Taxable Mun. Bond Securities Litig.*, 796 F. Supp. 954 (E.D. La. 1992). In that case, the court recognized that "the law of the transferee forum . . . govern[ed] plaintiffs' federal claims," and so "appl[ied] the statute of limitations law of the forum state . . . to all plaintiffs' . . . claims," regardless of the forum from which the claims were transferred. *Id.* at 963-64; *see also Wegbreit v. Marley Orchards Corp.*, 793 F. Supp. 965, 969 (E.D. Wash. 1992) (borrowing statute of limitations from transferee forum in action arising under federal securities laws); *TBG, Inc. v. Bendis*, No. 89-2423, 1992 WL 80622, at *4 (D. Kan. Mar. 5, 1992) (holding that the law of the transferee forum "will govern the limitations issue in this case"); *In re Litigation Involving Alleged Loss of Cargo from Tug Atlantic Seahorse*, 772 F. Supp. 707, 711 (D.P.R. 1991) (borrowing choice of law rules from transferee forum in admiralty action).

CONCLUSION

It is well-established that, in applying federal law, the law of the transferee forum controls. And the applicable statute of limitations in an ERISA Section 510 action is a question of federal law, notwithstanding the fact that it is borrowed from the law of the forum. Accordingly, this Court should "borrow" from Texas law in determining the statute of limitations applicable to Plaintiffs' claims.

This Court, moreover, has already held that the "borrowed" statute of limitations applicable to Plaintiffs' claims is two years. *See Murphy*, 2010 WL 4248845, at *12. Because Plaintiffs' claim accrued in late 2006 --substantially more than two years before November 12,

2010, when Plaintiffs filed their Complaint -- Plaintiffs' claim should be dismissed as time-barred. *See id.*

Respectfully submitted,

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