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

PHILIP A. MURPHY, JR., *et al.*,	)	
Plaintiffs,	)	**CIVIL ACTION NO. 3:09-CV-2262-G**
v.	)	
VERIZON COMMUNICATIONS INC., *et al.*,	)	**ORAL ARGUMENT REQUESTED**
Defendants.	)	

REPLY BRIEF IN FURTHER SUPPORT OF THE VERIZON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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DEFENDANTS' REPLY

Plaintiffs' opposition to defendants' motion for summary judgment makes a number of critical admissions, wholly fails to engage with many of defendants' arguments and authorities, and does not come close to satisfying plaintiffs' burden on summary judgment to come forward with specific facts in the record creating a genuine and material issue that would stand in the way of summary judgment on any of plaintiffs' claims.

Three deficiencies stand out:

1. Plaintiffs admit that Verizon fully complied with ERISA's detailed rules governing pension plan spinoffs, concede that the "decision to modify or terminate an ERISA plan is a 'settlor' rather than 'fiduciary' function," and fail to confront the ample appellate authority cited in defendants' opening brief holding that the decision to spin off the obligation to pay pension benefits is a settlor function that does not implicate ERISA's fiduciary standards;

2. Plaintiffs re-hash their strained and impractical reading of the terms of the Verizon Pension Plans, without acknowledging that the responsible plan fiduciaries have interpreted the plans to authorize the Idearc pension transfers challenged by plaintiffs or that those fiduciaries' reasonable plan interpretations are entitled to deference from the Court; and

3. Plaintiffs continue to assert that defendants violated statutory and regulatory provisions governing administrative claims for benefits and SPD disclosures, without meaningfully responding to or rebutting defendants' showing, based on undisputed record evidence, that defendants complied with all applicable statutes and regulations.

For these reasons, as well as the reasons set forth below, defendants are entitled to summary judgment.

I. THE UNDISPUTED FACTS

Plaintiffs assert that defendants' motion for summary judgment "gloss[ed] over the record" and suggest that defendants ran afoul of a (nonexistent) local rule requiring a separate "section devoted to the undisputed facts." Dkt. 87, at 1. Plaintiffs are doubly mistaken. Defendants' opening brief contains more than 11 pages setting forth, in great detail, the undisputed (or not genuinely disputable) facts germane to defendants' motion. *See* Dkt. 78, at 8-19. Defendants' brief, moreover, contained detailed appendix citations supporting each assertion regarding the absence of genuine disputes of material fact, and thus fully complied with the requirements of the local rules. *See* Local Rule 56.3(a)(2), 56.5(c).

By contrast, plaintiffs' response falls well short of satisfying those local rule requirements. The rules require that factual assertions "be supported by citations to proper and admissible summary judgment evidence." *See Special Risk Servs. Grp. v. Trumble Steel Erectors, Inc.*, No. 5:04-CV-289-C, 2006 WL 6632286, at *4 (N.D. Tex. Feb. 28, 2006). Plaintiffs' opposition, however, makes numerous unsupported assertions, either without record citation or with citation to materials that do not support the proposition asserted.[1]

Plaintiffs also fail even to attempt to controvert most of the well-supported factual assertions underlying defendants' motion for summary judgment. Plaintiffs thus have not met their "burden of coming forward with evidence in the summary judgment record creating an issue of material fact." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 444 (5th Cir. 1998). Instead, plaintiffs impermissibly rely on "conclusory allegations, unsubstantiated assertions, and unsupported speculation" in opposing defendants' motion for summary judgment. *Crawford v.*

[1] To the extent that plaintiffs' unsupported factual assertions, if credited, might be material to defendants' summary judgment motion, defendants address them either herein or in their brief opposing plaintiffs' motion for partial summary judgment, which defendants incorporate by reference herein.

U.S. Dep't of Homeland Sec., 245 Fed. Appx. 369, 379, Nos. 06-11163, 06-11387, 2007 WL 2348661, at *7 (5th Cir. 2007). Accordingly, plaintiffs have failed properly to establish the existence of any genuine dispute of material fact, and the Court should grant defendants' motion.

II. PLAINTIFFS' FIDUCIARY DUTY CLAIM

The gravamen of plaintiffs' claim in Count IV is that defendants breached their fiduciary duties in connection with Verizon's decision to transfer the obligation to pay their pension benefits to Idearc's pension plans. In their opposition, plaintiffs admit, ignore or fail properly to controvert that (i) the Idearc pension spinoff fully complied with ERISA and governing Treasury regulations, which is all that ERISA requires, (ii) the decision to transfer plaintiffs' benefit obligation was made by Verizon, in its settlor capacity, and so is not subject to ERISA's fiduciary standards, and (iii) the Idearc spinoff was consistent with the pre-amendment terms of the Verizon Pension Plans, as those plans are interpreted by the plans' fiduciaries and was expressly authorized by valid retroactive plan amendments implementing the Idearc spinoff transaction. Accordingly, defendants are entitled to summary judgment on Count IV.

A. The Idearc Pension Spinoff Fully Complied with ERISA and Applicable Treasury Regulations.

Defendants' opening brief established that the Idearc pension transfers at issue in this litigation fully complied with ERISA and governing Treasury regulations concerning pension plan mergers and spinoffs. *See* Dkt. 78, at 4-7, 12-13, 23-26. Although plaintiffs observe that Section 208 of ERISA "places strict limitations on an employer's ability to transfer pension plan liabilities," Dkt. 87, at 6, they neither cite any record evidence suggesting that Verizon failed to comply with these strict limits nor assert that defendants failed to satisfy the applicable rules. Accordingly, it is undisputed that the Idearc pension transfers challenged by plaintiffs fully complied with the statutes and regulations governing pension plan spinoffs.

Numerous courts have recognized that compliance with this statutory and regulatory regime necessarily forecloses any claim that a pension plan spinoff violates ERISA's fiduciary standards. *E.g.*, *Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1190 (3d Cir. 1993) ("[C]ompliance with ERISA's provisions for the funding of merged, transferred or acquired pension plans as set forth in [Section 208] preclude[s] a finding that a fiduciary breach had occurred."); *Bigger v. Am. Commercial Lines*, 862 F.2d 1341, 1344 (8th Cir. 1988) (noting that "Section [208] provides a specific standard that employers can rely upon in allocating assets to spunoff plans" and rejecting the proposition that ERISA's "general standard of fiduciary duty supersedes and imposes a higher standard than section [208]" in structuring a plan spinoff); *Sys. Council EM-3 v. AT&T Corp.*, 972 F. Supp. 21, 30-31 (D.D.C. 1997) (holding that Section 208 of ERISA provides "the specific means by which to challenge a plan spin-off," and rejecting the assertion of retired plan participants that "ERISA's fiduciary duties . . . apply to the . . . transfer of assets pursuant to a spin-off"), *aff'd*, 159 F.3d 1376 (D.C. Cir. 1998). For this reason alone, defendants are entitled to summary judgment on Count IV.

B. Verizon's Decision to Spin Off the Plans Was Not Made in a Fiduciary Capacity.

Plaintiffs have conceded that the "decision to modify or terminate an ERISA plan is a 'settlor' rather than 'fiduciary' function." Dkt. 87, at 5. And defendants have cited ample authority establishing that plaintiffs' breach of fiduciary duty claim fails for the fundamental reason that the decision to transfer pension obligations from one plan to another – or from one sponsor to another – likewise is a settlor function not subject to ERISA's fiduciary standards. Dkt. 78, at 26-30; Dkt. 93, at 4-7. In response, plaintiffs assert that "the cited case law" holding that spinoffs do not implicate ERISA fiduciary duties "only concerns non-vested contingent benefits." Dkt. 87, at 21. Curiously, however, plaintiffs then go on to distinguish a case on

which defendants *do not rely*, and (with one exception) do not even attempt to distinguish the opinions of six circuit courts cited by defendants holding that the decision to undertake a pension plan spinoff is not subject to ERISA's fiduciary standards. Contrary to plaintiffs' assertion, *none* of the cases actually relied on by defendants involved only "non-vested contingent benefits," and most involved factual circumstances very similar to those presented here. *E.g.*, *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1066-67, 1076 (9th Cir. 2009) (decision to spinoff retiree pension benefit obligations is not a fiduciary act); *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 87-88 (2d Cir. 2001) (ERISA's fiduciary duty rules do not apply to the decision to spinoff off a portion of a defined benefit pension plan); *Blaw Knox Ret. Income Plan*, 998 F.2d at 1189-90 (similar).

While plaintiffs attempt to distinguish the D.C. courts' *AT&T* decisions, their efforts are not successful. *See* Dkt. 87, at 23. Like plaintiffs here, the retiree plaintiffs in *AT&T* urged that ERISA's standards of fiduciary conduct should govern "AT&T's decisions to restructure itself and to spin-off its pension . . . plans as part of [a corporate] restructuring." 972 F. Supp. 21, 32 (D.D.C. 1997). The D.C. courts rejected that argument, explaining that "under prevailing ERISA case law," those "decisions and the actions necessary to implement them are not subject to ERISA's fiduciary standards." *Id.*; *accord AT&T*, 159 F.3d at 1379 ("The District Court found, and we agree, that appellants have failed to state a legally cognizable claim under ERISA's fiduciary provisions, because there has been no showing that AT&T acted in a fiduciary capacity in taking the actions at issue in this case."). Thus, the *AT&T* decisions stand squarely for the proposition that the transfer of the obligation to pay vested pension benefits to retired plan participants does not implicate ERISA's fiduciary standards.

According to plaintiffs, the *AT&T* case is distinguishable because plaintiffs here challenge not the "transfer and allocation of pension assets and liabilities," but the "transfer of

. . . retirees." Dkt. 87, at 23. Plaintiffs' argument is far off base. *First*, to the extent plaintiffs mean to suggest that the "non-consensual" transfer of the benefit obligations for "retirees" with "vested non-forfeitable rights" to pension benefits is a *per se* violation of ERISA, *see id.*, any such suggestion is belied by Section 208 of ERISA and the Treasury regulations governing pension plan spinoffs. These provisions expressly authorize plan mergers and spinoffs involving vested pension benefits without imposing any consent requirement or prohibiting the transfer of the obligation to pay benefits to retirees. *See* 29 U.S.C. § 1058; 26 U.S.C. § 414(*l*); 26 C.F.R. § 1.414(*l*)-1; *id.* § 1.411(d)-4 A-3; *see AT&T*, 972 F. Supp. at 33 ("Congress has specifically allowed plan spin-offs. . . ."); *see also Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 668 n.8 (6th Cir. 1998) (explaining that imposing a participant consent requirement for plan transfers would be "an anomaly within the case law governing the scope of employer action subject to ERISA's fiduciary standards").[2]

Second, to the extent plaintiffs meant to draw a distinction between the transfer of assets and liabilities and the transfer of "retirees," any such distinction is meaningless. Here, as authorized by Section 208 of ERISA and the regulations governing pension spinoffs, Verizon transferred the liability for class members' pension benefits to Idearc's pension plans. As a result of that transfer, class members ceased being participants in Verizon-sponsored pension plans and became participants in Idearc-sponsored plans by operation of law. *See* Dkt. 93, at 14-

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[2] Plaintiffs rely primarily on the Eighth Circuit's decision in *Howe v. Varity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994), to support their assertion that the involuntary "transfer of retirees" violates ERISA's fiduciary standards. Dkt. 87, at 20. As explained in defendants' opposition to plaintiffs' motion for partial summary judgment, the Eighth Circuit's anomalous decision in *Varity* was subsequently overruled by the Supreme Court and is readily distinguishable on its facts. Dkt. 93, at 7-13.

15.[3] Furthermore, to the extent the Idearc pension spinoff is appropriately characterized as involving a transfer of people, that in no way distinguishes this case from the myriad cases holding that pension plan spinoffs do not implicate ERISA's fiduciary standards. *E.g.*, *Paulsen*, 559 F.3d at 1076 (rejecting request by plaintiffs to be "reinstate[d]" into prior plan because the "decision to spin a plan off . . . is not a fiduciary act"); *Flanigan*, 242 F.3d at 82, 89 (affirming district court's rejection of plaintiffs' assertion that "they had a 'right' to remain in the GE plan").

In sum, plaintiffs' effort to distinguish the *AT&T* case fails, and plaintiffs do not even attempt to distinguish the holdings of at least five other circuits that the decision to spin off a pension plan is a settlor function that does not implicate ERISA's fiduciary standards. This Court should hold, consistent with the overwhelming weight of appellate authority, that plaintiffs' breach of fiduciary duty claim fails as a matter of law.

C. Defendants Did Not Violate the Plan Documents Rule.

Plaintiffs assert that the VEBC violated its duty under ERISA to act in accordance with the terms of the Verizon Pension Plans. Dkt. 87, at 8-18. Plaintiffs' assertion is incorrect for at least two, independently sufficient reasons. *First*, the plans' fiduciaries have interpreted the pre-November 2006 plan terms to permit pension transfers like that at issue here, and their interpretation is entitled to deference. *Second*, plan amendments indisputably requiring the

[3] Plaintiffs assert that defendants "distort portions of Treasury Regulation § 1.414(*l*)-1(o) and falsely suggest it defines liabilities so as to encompass the transferred employees." Dkt. 87, at 10 (citing Dkt. 78, at 31). Not so. Defendants do not argue that class members are liabilities (or assets). Rather, defendants merely observe that the Treasury regulations contemplate – as common sense would suggest – that the transfer of pension assets and liabilities from Plan A to Plan B will normally entail "the transfer of one or more employees" from participation in Plan A to participation in Plan B, 26 C.F.R. § 1.414(*l*)-1(o), which is precisely what happened here.

Idearc pension transfers were adopted in December 2006, and plaintiffs are wrong to assert that these amendments were impermissibly retroactive or should not be given effect.

1. The Pre-Amendment Plan Terms Did Not Preclude the Idearc Pension Transfers.

Defendants' opening brief established that the terms of the pre-November 2006 Verizon Pension Plans – most notably, Section 11.3 of the management plans and Section 20.6 of the union plans – authorized the transfer of pension assets and liabilities to other plans. Dkt. 78, at 15-17, 30-31. In responding to plaintiffs' motion for partial summary judgment, defendants have already explained in detail why plaintiffs' reading of these plan provisions is unreasonable – most notably, because the terms of Sections 11.3 and 20.6 closely track the language of ERISA § 208 and IRC § 414(*l*), which indisputably authorize pension plan mergers and spinoffs like the Idearc transaction at issue here. *See* Dkt. 93, at 14-17. At a minimum, the interpretation of these plan provisions by the responsible plan fiduciaries is entitled to deference, *e.g.*, *Conkright v. Frommert*, 130 S. Ct. 1640 (2010), and those fiduciaries have interpreted the pre-amendment plan terms as providing "sufficient authority for the transfer of assets and liabilities relating to the [plaintiffs] to the applicable Idearc pension plans," *see* Appx. 501.

In their brief seeking summary judgment, plaintiffs also asserted that Section 15.1(b) of the two union plans precluded Verizon from undertaking the Idearc pension benefit transfer without first obtaining the (unanimous) consent of all affected plan participants. Dkt. 83, at 15-16. Defendants have already explained why the Court should not credit this strained, impractical and internally inconsistent reading of the union plans. Dkt. 93, at 19-22. Moreover, after learning of plaintiffs' novel interpretation of Section 15.1(b), the responsible plan fiduciaries submitted a sworn statement explaining that they interpret Section 15.1(b) to prohibit only a nonconsensual change to a participant's accrued pension or benefits, *not* a change to the

plan responsible for paying those pensions or benefits. Resp. Appx. 6-7 (Chiffriller Decl. ¶¶ 16-19.) This interpretation of Section 15.1(b) is reasonable and is entitled to deference. *E.g.*, *Conkright*, 130 S. Ct. at 1644-45 (interpretation of plan provisions offered by plan administrator in an affidavit during the course of litigation entitled to deference); *see also Worthy v. New Orleans S.S. Ass'n*, 342 F.3d 422, 427-28 (5th Cir. 2003) (deferring to ERISA trustee's interpretation of trust language in a suit alleging that trust administrators violated their fiduciary duties).

Finally, plaintiffs assert in passing that the Idearc pension transfers violated Section 11.2 of the management plans, which provides that "no amendment shall reduce any benefit . . . that is vested." Dkt. 87, at 18. Plaintiffs are mistaken. Like Section 15.1(b), this provision prohibits a change to the amount of a participant's vested benefit, not a change to the plan responsible for paying that benefit or to the employer sponsoring the plan. Because class members' accrued benefits were not reduced as a result of the Idearc amendments, Section 11.2 was not violated. *See* Dkt. 78, at 32-33; Dkt. 93, at 23-24 (explaining that a pension plan spinoff or merger does not violate ERISA provisions prohibiting reductions of "accrued benefits").

In sum, for substantially the reasons set forth in defendants' opposition to plaintiffs' request for summary judgment, the Court should reject plaintiffs' unreasonable construction of the plans' terms and defer to the plan fiduciaries' reasonable interpretation of the plans as authorizing the Idearc pension transfers. Dkt. 93, at 13-22.

2. The December 2006 Pension Plan Amendments Were Not Impermissibly Retroactive.

It is undisputed that the pre-November 2006 plan terms gave Verizon the right to amend those plans at will. Appx. 365, 383, 399, 407. It is also undisputed that, in December 2006, each of the Verizon Pension Plans was amended expressly to provide for the Idearc

pension transfers challenged by plaintiffs. Appx. 358, 371, 391-92, 413-14. Thus, unless the December amendments may not be given effect, it is clear that the Idearc pension transfers did not violate the terms of the Verizon Pension Plans, irrespective of the pre-amendment plan terms.

While plaintiffs appear to argue that the terms of the December 2006 amendments should be disregarded because ERISA prohibits the retroactive amendment of pension plans, *see* Dkt. 87, at 13-14, they are mistaken. *First*, plaintiffs ignore the fact that the regulations implementing ERISA themselves expressly contemplate that plan amendments may be given "retroactive application." *See* 29 C.F.R. § 2520.104b-3(a). As defendants have already explained in detail, ERISA permits retroactive plan amendments so long as the amendment does not reduce a participant's accrued benefits. Dkt. 78, at 32-33, Dkt. 93, at 23-24; *see also Spacek v. Mar. Ass'n ILA Pension Plan*, 134 F.3d 283, 288-90 (5th Cir. 1998) (holding that ERISA permits the retroactive amendment of plan terms where the amendment does not violate ERISA's anti-cutback rule, ERISA § 204(g), 29 U.S.C. § 1054(g)).[4] Here, because class members' accrued benefits were not reduced by the Idearc amendments, retroactive application of those amendments does not violate ERISA. Dkt. 78, at 32-33; Dkt. 93, at 23-24.

Second, plaintiffs' attempt to distinguish the cases cited by defendants is unavailing. Plaintiffs assert that a decision of this Circuit, *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1104 (5th Cir. 1990), is distinguishable because the amendment in that case "did not result in a lessening of" the plaintiff's "accrued benefit." Dkt. 87, at 14. That, however, is no distinction at all, because class members' accrued benefits were not reduced by the Idearc

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[4] The Supreme Court subsequently held, contrary to the Fifth Circuit, that a plan amendment like the one at issue in *Spacek* violates ERISA's anti-cutback rule. *See Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 746-47 (2004). That abrogation of *Spacek*, however, does not disturb the Fifth Circuit's separate conclusion that retroactive amendments that do not reduce accrued benefits are permissible.

pension transfers at issue here. Dkt. 78, at 32-33; Dkt. 93, at 23-24. Similarly, plaintiffs attempt to distinguish *Dyce v. Salaried Employees' Pension Plan of Allied Corp.*, 15 F.3d 163 (11th Cir. 1994), on the ground that "the second parent company had effectively stepped into the shoes of the prior parent company, and the employees had not experienced any loss or change in benefits." Dkt. 87, at 15. Here too, however, Idearc's pension plans stepped into the shoes of the Verizon plans for purposes of ERISA, and no class member's entitlement to pension benefits was reduced or changed as a result of the spinoff. *See* Dkt. 93, at 20-21 & n.11.[5]

Third, plaintiffs' opposition fails to respond at all to defendants' argument that the retroactivity issue is ultimately a red herring. Dkt. 78, at 33. Plaintiffs concede that, at all times prior to December 31, 2006, class members in fact received all of the pension benefits to which they were entitled, and they received them *from a Verizon Pension Plan* as a transition service provided to Idearc and the Idearc pension plans. *See* Pls. Appx. 524, at ¶ 8; Pls. Appx. 530, at ¶ 8; Pls. Appx. 536, at ¶ 8; Appx. 500-01; Resp. Appx. 2, 11-12 (Chiffriller Decl., ¶ 6 & Ex. A, at 3-4). Nor do plaintiffs offer any authority to support their implicit assertion that the December 22, 2006 pension plan amendments may not at least be given effect *prospectively*. Because class members suffered no legally cognizable harm during November and December of 2006 – the only two months during which the plan amendments were given retroactive effect – defendants are entitled to summary judgment on Count IV even if the Idearc plan amendments may not be given retroactive effect.

[5] Plaintiffs also assert that certain provisions of the union pension plans preclude giving retroactive effect to the Idearc plan amendments. Dkt. 87, at 15-18. This near-frivolous argument fails for the reasons explained in defendants' opposition to plaintiffs' request for partial summary judgment. Dkt. 93, at 25-26.

III. PLAINTIFFS' PROHIBITED TRANSACTION CLAIM

Defendants' opening brief demonstrated that plaintiffs' prohibited transaction claim fails, among other reasons, because such claims apply *only* to acts taken in a fiduciary capacity, and there is no evidence here that the decision to spin off Verizon's directories business was made in a fiduciary capacity. *See* Dkt. 78, at 36-37. Plaintiffs' attempts to escape from this conclusion fail, and defendants are entitled to summary judgment on Count III.

In *Lockheed Corp. v. Spink*, 517 U.S. 882, 892 (1996), the Supreme Court held that Section 406(a) of ERISA applies only to actions taken by someone with "fiduciary status." Plaintiffs assert that this and other authority relied on by defendants is inapplicable because plaintiffs bring suit under Section 406*(b)* of ERISA. Dkt. 87, at 27. This, however, is a distinction without a difference. Both Sections 406(a) and 406(b), by their terms, provide that a "*fiduciary* with respect to a plan shall not" engage in, or cause a plan to engage in, specified types of transactions. *See* 29 U.S.C. § 1106 (emphasis added). Thus, plaintiffs' attempt to draw a distinction between these subparts of Section 406 is contrary to the plain language of the statute. Moreover, the Supreme Court's reasoning in *Spink* strongly suggests that its holding applies equally to claims under Section 406(b). *See AT&T*, 972 F. Supp. at 29 (rejecting as "unpersuasive" the argument "that *Spink* is inapposite" to a claim under Section 406(b)). Accordingly, the courts have had little trouble concluding that a cause of action under Section 406(b) does not arise in the absence of a proof that the action complained of was made by a defendant acting in a fiduciary capacity.[6]

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[6] *AT&T*, 972 F. Supp. at 29; *Flanigan*, 242 F.3d at 87 (29 U.S.C.§ 1106(b) applies "only to decisions by an employer acting in its fiduciary capacity"); *see DeLuca v. Blue Cross Blue Shield of Mich.*, 628 F.3d 743, 748 (6th Cir. 2010) ("Because [defendant] was not acting in a fiduciary capacity when it negotiated the rate changes at issue in this case, [defendant] did not violate § 1106(b)(2)."); *Chicago Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 472 n.4 (7th Cir. 2007) ("Carpenters alleged that Caremark violated section 1106(b) when it

Plaintiffs also assert that Section 406 of ERISA "extends the scope of liability beyond fiduciaries." Dkt. 87, at 29 (citing *Reich v. Compton*, 57 F.3d 270, 286-87 (3d Cir. 1995)). It is true that ERISA authorizes suit against nonfiduciaries who knowingly participate in a violation of ERISA's prohibited transaction requirements. *E.g.*, *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245-46 (2000); *Reich*, 57 F.3d at 286-87. To the extent that plaintiffs mean to suggest that Section 406(b) gives rise to a cause of action for non-fiduciary acts, however, they are mistaken. Rather, the line of cases cited above stands only for the more limited and entirely inapposite proposition that redress for a fiduciary's violation of Section 406(b) may in certain circumstances be sought from nonfiduciary parties to the prohibited transaction. *See id.*; *see also DeLuca v. Blue Cross Blue Shield of Mich.*, 628 F.3d 743, 748 (6th Cir. 2010) (rejecting argument that Section 406(b) "imposes liability on a fiduciary even when *not* acting in a fiduciary capacity" (emphasis in original)). Here, because the decision to spin off the obligation for class members' pension benefits was not a fiduciary act, plaintiffs' prohibited transaction claim against the VEBC fails as a matter of law.

For this reason, as well as for the additional reasons set forth in defendants' prior briefs, defendants are entitled to summary judgment on Count III. Dkt. 78, at 36-38; Dkt. 93, at 28-31.

IV. PLAINTIFFS' SPD DISCLOSURE CLAIM

In Count II, plaintiffs claim that defendants violated ERISA's SPD disclosure requirements, and seek as a remedy "reinstatement" in the Verizon Pension Plans. Plaintiffs, however, fail to rebut defendants' showing that Verizon's SPDs fully complied with the applicable disclosure statute and regulations. Moreover, even assuming that the Verizon Pension

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engaged in certain transactions. . . . Because we find that Caremark was not a fiduciary when it engaged in any of the relevant transactions, we need not address this section further.").

Plan SPDs were in any way deficient, plaintiffs have failed to establish that they are entitled to the remedy they seek, or to any remedy at all. Accordingly, defendants are entitled to summary judgment on plaintiffs' disclosure claim.[7]

A. Verizon's Pension Plan SPDs Did Not Violate ERISA.

Plaintiffs' opposition repeats their assertion that the Verizon Pension Plan SPDs violated ERISA's statutory and regulatory disclosure requirements, but fails meaningfully to address defendants' arguments to the contrary. Dkt. 87, at 32-36. For substantially the reasons set forth in defendants' prior briefs, plaintiffs' assertions are insufficient and defendants are entitled to summary judgment on Count II. Dkt. 78, at 39-40; Dkt. 93, at 31-33.

Plaintiffs assert that defendants violated the requirement that SPDs disclose the circumstances that may "result in disqualification, ineligibility, or denial, loss [or] offset . . . of any benefits." Dkt. 87, at 33 (quoting 29 C.F.R. § 2520.102-3(*l*)). Plaintiffs, however, do not rebut defendants' showing that the Idearc amendments did not result in any denial, loss or offset of any benefits (or any disqualification or ineligibility). Because plaintiffs were entitled to receive (and have received) exactly the same benefits after the spinoff as before, a pension plan spinoff is not a circumstance that must be disclosed under the regulation on which plaintiffs purport to rely. Dkt. 78, at 32-33, 39-40.

Plaintiffs' brief likewise fails to confront the import of governing regulations making clear that an SPD need only disclose the circumstances that might result in the loss or offset of benefits *under existing plan terms*. *See* 29 C.F.R. § 2520.102-3; *see also Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993) ("Section 1022(b) relates to an individual employee's eligibility under then existing, current terms of the Plan and not to the

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[7] To the extent plaintiffs argue that the SPDs promised them that their pension benefits would be paid by Verizon-sponsored plans "for life," they are mistaken. *See* Dkt. 93, at 33-35.

possibility that those terms might later be changed, as ERISA undeniably permits."). Thus, while SPDs generally must disclose existing plan provisions under which benefits may be offset – for example, provisions stating that pension benefits will be offset by Social Security payments – they need not disclose possible future plan terms (regardless of how allegedly foreseeable a future plan amendment might be). Here, the obligation to pay class members' benefits was transferred to Idearc's pension plans pursuant to plan amendments that reflect a "settlor" business decision, and there is simply no requirement in ERISA or the regulations that an SPD disclose a plan amendment before it is adopted. *See* 29 C.F.R. § 2520.104b-3 (plan amendments must be disclosed no later than 210 days after the close of the plan year in which the modification or change was adopted). Thus, plaintiffs' assertion that Verizon's SPDs violated ERISA's disclosure requirements fails as a matter of law, and defendants are entitled to summary judgment on Count II.

B. <u>Plaintiffs Are Not Entitled to a Remedy for Any Disclosure Violation.</u>

Even assuming that Verizon's SPDs violated ERISA's disclosure provisions (and they did not), defendants nevertheless are entitled to summary judgment on Count II for the following reasons:

First, as plaintiffs' acknowledge, the Supreme Court recently made clear that class members must each individually demonstrate "actual harm" caused by a deficient SPD in order to state a claim for an ERISA disclosure violation. *See* Dkt. 87, at 36-37 (citing *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011)). Plaintiffs suggest that the actual harm requirement is satisfied because they "were stripped of their ERISA-protected right to receive accurate information." *See id.* This assertion proves too much. In *every* case where a disclosure violation is found, the plaintiffs will have been deprived of their right to receive an SPD that fully complies with ERISA's disclosure requirements. In other words, under plaintiffs' theory,

the actual harm requirement of *Amara* is entirely superfluous because by definition it would be satisfied in every case finding a disclosure violation. Plainly, that is not what the Supreme Court intended.

Plaintiffs' remaining efforts to create a genuine question of fact regarding "actual harm" are similarly unavailing. The only other purported harm identified by plaintiffs in their brief as stemming from the alleged disclosure violation is that they failed to seek "to cause the union to make a legal challenge so as to prevent" the transfer of retirees. Dkt. 87, at 37. However, as defendants established in their brief opposing plaintiffs' request for partial summary judgment, plaintiffs do not 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. Under these circumstances, plaintiffs' showing of actual harm is far too speculative and contingent to create a genuine issue of material fact. Dkt. 93, at 36-37.

Second, plaintiffs' brief makes clear that the remedy they seek for the asserted notice violation is estoppel. *See* Dkt. 87, at 38 ("[T]he plan administrators and plan sponsors should be prevented or 'estopped' from relying on an undisclosed right to involuntarily transfer Plaintiffs. . . ."). In order to recover for an alleged notice violation on an estoppel theory, plaintiffs must prove "(1) a material misrepresentation; (2) reasonable and detrimental reliance upon the representation; and (3) extraordinary circumstances." *Mello v. Sara Lee Corp.*, 431 F.3d 440, 444-45 (5th Cir. 2005); *see Amara*, 131 S. Ct. at 1881 ("[W]hen a court exercises its authority under § 502(a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made."). Here, plaintiffs have not come forward with any evidence on which a

reasonable trier of fact might find that *any* of these elements have been satisfied. *See* Dkt. 93, at 35-36.

Finally, plaintiffs suggest that they may be entitled to relief under a "surcharge" theory. *See* Dkt. 87, at 38-39. Not so. As *Amara* itself makes clear, "surcharge" may be an appropriate remedy only in cases involving "a trustee's breach of trust." 131 S. Ct. at 1881. Here, unlike *Amara*, there is no evidence that the Verizon SPDs "*intentionally* misled . . . employees." *Id.* at 1874 (emphasis added). Even assuming *arguendo* that Verizon's SPDs did not strictly comply with ERISA's disclosure standards, plaintiffs have not come forward with any evidence on which a reasonable trier of fact might find that the disclosures in Verizon's SPDs constitute an actionable breach of trust.[8] Thus, the assertion of a surcharge theory by plaintiffs cannot save their claim in Count II from summary judgment.

V. PLAINTIFFS' CLAIM FOR BENEFITS DUE UNDER THE PLAN

In Count VII, plaintiffs seek benefits purportedly due to them under the terms of the Verizon Pension Plans pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). However, it is undisputed that amendments to the Verizon Pension Plans were adopted, with a stated effective date of November 17, 2006, expressly authorizing and implementing the Idearc pension transfers challenged by plaintiffs. Dkt. 86, at ¶ 37; *see* Appx. 358, 371, 391-92, 413-14. Plaintiffs do not argue (and could not argue) that they are entitled to pension benefits under the terms of the Verizon Pension Plans *as amended*. Rather, the gravamen of their argument appears to be that (i) the December 22, 2006 Idearc amendments

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[8] Moreover, the surcharge remedy is limited to "monetary 'compensation' for a loss resulting from a trustee's breach of duty" or the prevention of "the trustee's unjust enrichment." *Amara*, 131 S. Ct. at 1880. Here, there is no evidence in the record that any member of the VEBC was unjustly enriched by the Idearc pension transfers, and the undisputed record establishes that plaintiffs have not suffered any monetary loss as a result of the Idearc pension spinoff, *e.g.*, Appx. 558-60.

violated ERISA and/or pre-existing plan terms, (ii) the Idearc amendments therefore should be ignored or suppressed, and (iii) the Court should thus "enforce[] the plan terms as actually existed before December 22, 2006." Dkt. 87, at 43.

For substantially the reasons explained in Part I, above, plaintiffs' assertion that the Idearc amendments violated either ERISA or the terms of the plans fails as a matter of law. The Verizon Pension Plans are therefore entitled to summary judgment on Count VII.

VI. PLAINTIFFS' "FULL AND FAIR REVIEW" CLAIM

In Count I, plaintiffs assert that defendants violated ERISA's "full and fair review" requirement, ERISA § 503(2), 29 U.S.C. § 1133(2). Plaintiffs' opposition implicitly concedes that only "substantial" compliance with Section 503(2) is required, *see* Dkt. 78, at 43-44, and fails effectively to rebut defendants' showing – based on undisputed record evidence – that the responsible plan fiduciaries more than substantially complied with the requirements of Section 503(2) and the regulations thereunder.[9]

First, plaintiffs assert that defendants improperly failed to provide them with certain materials they requested, including various "demand letters . . . from other retirees." Dkt. 87, at 43-45. However, the governing regulations require defendants to provide plaintiffs only with "relevant" documents and information, not everything they request. 29 C.F.R. § 2560.503-1(h)(2)(*iii*); *Weeks v. Unum Grp.*, No. 2:07-CV-00577DAK, 2008 WL 2224832, at *10 (D. Utah May 27, 2008) "([I]nformation that [claimant] considers relevant is not necessarily relevant

[9] While plaintiffs acknowledge that the failure to comply with Section 503(2) "does not give rise to a substantive damages remedy," they continue to seek relief in connection with Count I that is inappropriate and/or unavailable under ERISA. *See* Dkt. 87, at 46. In the event that defendants' request for summary judgment on Count I is denied, defendants respectfully request the opportunity to make a further submission to the Court regarding the scope of permissible remedies. In any event, because plaintiffs have not moved for summary judgment on Count I, they are not entitled to any relief whatsoever at this time.

information under the law."). Because plaintiffs have not come forward with any evidence that they were denied access to any materials meeting the regulation's definition of "relevant," *see* 29 C.F.R. § 2560.503-1(m)(8), their claim fails as a matter of law. *See, e.g.*, *Parker v. Kraft Foods Global, Inc.*, No. 3:07cv87, 2010 WL 1929555, at *16 (W.D.N.C. May 12, 2010) (granting summary judgment on Section 503(2) claim for documents where plaintiff "does not even allege that the documents sought meet th[e] regulatory standard for production").[10]

Second, plaintiffs assert that defendants "refused to respond to Plaintiffs' claim for classwide relief." Dkt. 87, at 43. Plaintiffs, however, do not cite any authority for the surprising proposition that an individual plan participant is entitled to assert administrative claims for benefits on behalf of other participants. The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). ERISA's administrative claim procedures do not provide for judicial oversight, include any procedures for absent claimants to opt out or receive notice, require or involve any mechanism for making findings regarding whether the claimant and his counsel will fairly, adequately and competently represent the asserted class, or afford any of the other procedural protections provided to absent class members in litigation. *See* Fed. R. Civ. P. 23. Moreover, nothing in ERISA even remotely suggests that individual administrative claimants may seek to assert the claims of other plan participants. To the contrary, in enacting ERISA, Congress sought to "to create a system that is [not] so complex that administrative costs, or litigation expenses, [would] unduly discourage employers from offering [ERISA] plans in the

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[10] Any suggestion that the demand letters of other claimants might be "relevant" pursuant to 29 C.F.R. § 2560.503-1(m)(8)(*iii*) would be incorrect as a matter of law because those letters were not "specifically generated in connection with [plaintiffs'] *particular* adverse benefit determination[s]." *See, e.g.*, *Brooks v. Metro. Life Ins. Co.*, 526 F. Supp. 2d 534, 537 (D. Md. 2007) (collecting authority).

first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). Accordingly, the Court should reject plaintiffs' novel assertion that an individual plan participant has the right to assert a "classwide" administrative claim for benefits.

Third, plaintiffs assert that there "were no special circumstances justifying the . . . failure to provide a . . . decision within 60 days" of their "administrative appeal letter." Dkt. 87, at 43. However, plaintiffs' opposition ignores the principal reason offered by defendants for the extension in their opening brief – namely, that plaintiffs' counsel had delayed for nearly a month in responding to a letter "requesting clarification on several matters relating to [plaintiffs'] appeal." Appx. 496. Under these circumstances, there can be no genuine dispute that, at the very least, the Verizon plan fiduciaries "substantially complied" with the timing requirements of the regulations. *See* Dkt. 78, at 45-46.

Finally, plaintiffs' "full and fair review" claim fails because plaintiffs do not dispute that the VEBC – the only Verizon party named in Count I – was not the "appropriate named fiduciary" responsible for deciding plaintiffs' administrative appeals. Rather, under the terms of the plans in which plaintiffs participated, this responsibility was vested in (and was exercised by) the Verizon Claims Review Committee, which is not a party to this lawsuit. *See* Appx. 373-74, 382, 402-05, 498-504; *see also* Resp. Appx. 1-2 (Chiffriller Decl. ¶¶ 3-6).

VII. <u>PLAINTIFFS' "EQUITABLE RELIEF" CLAIM</u>

The parties appear to agree that plaintiffs are not entitled to "equitable relief" unless defendants "violated duties imposed by ERISA [or] the [Verizon] pension plans." Dkt. 87, at 48. For substantially the reasons that defendants are entitled to summary judgment on Counts II through IV of the complaint, plaintiffs have failed to come forward with any evidence supporting their request for equitable relief. Accordingly, defendants are entitled to summary judgment on Count VI.

VIII. PLAINTIFFS' CLAIM FOR WELFARE BENEFITS

In their opposition, plaintiffs concede that "a company does not act in a fiduciary capacity when deciding to amend or terminate" a welfare plan and that "plan sponsors are generally free to make changes to welfare benefits." Dkt. 87, at 6. In light of these concessions, defendants are entitled to summary judgment on any claim by plaintiffs that they should be "reinstated" in Verizon-sponsored welfare benefit plans. Neither of plaintiffs' arguments to the contrary has any merit.

First, plaintiffs assert that the plan amendment implementing the transfer of class members' welfare benefits may not be given effect because it violated an amendment procedure specified in a Verizon retiree medical plan SPD. Dkt. 87, at 49. That SPD states that the "plans may be amended," *inter alia*, by a "communication relating to the plans, as approved by . . . an individual in a director level position or above in the associate benefit design or delivery or the communications branch of the company's Human Resources organization." Appx. 445. It is undisputed, however, that by no later than February 2007, class members received precisely such a communication from Verizon's Vice President for Corporate Benefits. *See* Pls. Appx. 321-22 ("As a result of the spinoff, Idearc has assumed both the responsibility and the obligation for the benefit plans of its employees as well as retirees and other former employees whose final Verizon service was with [VIS] or an associated company."); *see also* Dkt. 86, at ¶¶ 43-44. Thus, the undisputed evidence makes clear that the amendments to Verizon's welfare plans did not violate any applicable plan amendment procedure.

Nor can plaintiffs be heard to complain about the gap between the effective date of the Idearc welfare plan transfers and the early 2007 date of the letter informing them of the transfers. This is because, at all times prior to December 31, 2007, class members received all of the medical and other welfare benefits to which they would have been entitled under the Verizon

plans, and they received them through Verizon as a transition service provided to Idearc and the Idearc welfare plans.[11]

Second, plaintiffs assert that "retiree health care benefits are intertwined with retiree pension benefits" because a Verizon medical plan SPD stated that "[y]ou are eligible for coverage if . . . [y]ou retired with a service or disability pension under the provisions of the [NY/NE Plan]." Dkt. 87, at 48-49 (quoting Appx. 446). However, that same SPD made clear that Verizon "reserve[d] the right to amend, modify, suspend or terminate the plans at any time, at its discretion, with or without advance notice to participants." Appx. 445. Thus, nothing in either ERISA or the SPD on which plaintiffs rely prevented Verizon from amending its welfare plans to terminate Verizon-paid medical and other benefits for previously eligible participants, which is precisely what it did here. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans"); *see also* Dkt. 93, at 34-35.

In sum, defendants are entitled to summary judgment insofar as plaintiffs assert that defendants violated ERISA or the terms of any Verizon plan document by transferring the obligation to pay class members' welfare benefits to Idearc and/or Idearc's welfare benefit plans.

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[11] Appx. 236 (Wiley Dep. at 124:14-18) ("[A]s of November 17th through the year 2007, there was a transition services agreement through which the Idearc employees and retirees participated in the . . . benefits that they were enrolled in" prior to the spinoff.); *see* Pls. Appx. 321-22 ("[T]here are no changes to retiree benefits as a result of this divestiture. In fact, Idearc has established benefit plans that mirror the Verizon Plans and you will continue to participate in those mirror plans. Additionally, we [Verizon] are continuing to assist in administering many of the Idearc benefits for the balance of [2007]."); *see also* Pls. Appx. 525, at ¶ 9 (failing to assert any change in welfare benefits prior to 2008); Pls. Appx. 531, at ¶ 9 (failing to assert any change in welfare benefits prior to 2008); Pls. Appx. 537, at ¶ 9 (affirmatively asserting receipt of "healthcare under the Verizon plan" during period "from 2006-2007").

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in defendants' opening memorandum and in defendants' brief in opposition to plaintiffs' motion for partial summary judgment, the Court should grant defendants' motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2011, I caused a true and correct copy of the foregoing to be served on counsel for all other parties via the Court's electronic filing system as set forth in Miscellaneous Order 61 as follows:

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