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

SUPERMEDIA INC., ET AL.,	§	
	§	
Plaintiffs,	§	
	§	**CIVIL ACTION NO.**
v.	§	**3:12-CV-2034-G**
	§	
LINTON BELL, ET AL.,	§	
	§	
Defendants.	§	

PLAINTIFFS' REPLY TO RESPONSE TO MOTION TO DISMISS THE COUNTERCLAIM BY DEFENDANTS MENTZER, NOE, OHNSTAD, PALMER AND ZENUS

Plaintiffs SuperMedia Inc., SuperMedia LLC, SuperMedia Services Inc., SuperMedia Sales Inc., SuperMedia Employee Benefits Committee and Idearc Inceptor LTD (collectively, "SuperMedia" or "Plaintiffs") file their Reply to the Response to the Motion to Dismiss the Counterclaim by Defendants Mentzer, Noe, Ohnstad, Palmer and Zenus (collectively, the "Mentzer Counterclaimants" or "Counterclaimants") and respectfully show the Court as follows:

I. INTRODUCTION

SuperMedia seeks dismissal of each of the Mentzer Counterclaimants' causes of action against SuperMedia for failure to state a claim upon which relief can be granted under Rule 12(b)(6). In their first claim, the Mentzer Counterclaimants implausibly allege that the SuperMedia Employee Benefits Committee ("EBC") breached a fiduciary duty by amending SuperMedia's welfare benefits plans (the "Plans") and filing the instant action to verify the validity of its amendments ("Amendments"). It is undisputed that these actions are not fiduciary in nature. Nonetheless, Counterclaimants seek to circumvent dismissal by inaccurately asserting

that, unlike actions by employers, *all* actions by the EBC are fiduciary in nature. This argument fails, however, because the plain language of ERISA, the Plan documents, and the Supreme Court make clear that any person—including a plan administrator such as the SuperMedia EBC—taking action to amend or terminate a plan acts outside of its fiduciary capacity in doing so. Second, Counterclaimants allege that SuperMedia violated ERISA Section 510 by filing the instant action. However, the Mentzer Counterclaimants fail to allege SuperMedia's interference with any protected right, which is a required element of such a claim. Thus, both claims fail under Rule 12(b)(6).

II.
ARGUMENTS AND AUTHORITIES

A. THE SECTION 404 CLAIM FAILS BECAUSE THE SUPERMEDIA EBC'S ACTIONS WERE NOT FIDUCIARY IN NATURE

Although the amendment of a plan is outside the scope of a fiduciary, the Mentzer Counterclaimants argue that the EBC was acting within a fiduciary capacity because EBCs are always subject to fiduciary requirements. Response at p. 6. This is incorrect. First, it is undisputed that a Section 404 claim requires that a breach occur while the defendant is acting in a fiduciary capacity under ERISA. *See Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 250-251 (5th Cir. 2008) ("The Supreme Court has noted that the first question pertinent to establishing ERISA liability is whether the defendant is in fact a fiduciary.") (citing *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000)). ERISA Section 3(21) defines "fiduciary" for purposes of this claim. Although the Counterclaimants suggest that ERISA treats employers differently from their benefits committees, Section 1002 instead applies to all "person[s]" and establishes that a

person is a fiduciary only when performing certain functions. 29 U.S.C.S. § 1002(21)(A)[1], *see also Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("'only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration,' does a person become a fiduciary under § 3(21)(A).") (quoting *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (1995)); *see also Mary Kay Holding Corp. v. Fed. Ins. Co.*, 309 Fed. Appx. 843, 849 (5th Cir. 2009) ("One is a 'fiduciary' under ERISA only 'to the extent . . . he exercises any discretionary authority or discretionary control respecting management . . . or disposition of [plan] assets . . .'") (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999)).

Thus, a defendant who may be considered a plan fiduciary when taking certain actions, does not act in a fiduciary capacity when taking steps to amend a plan. *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 250-251 (5th Cir. 2008) ("An ERISA fiduciary for one purpose is not necessarily a fiduciary for other purposes."); *Spink*, 517 U.S. at 890 ("sponsors who alter the terms of a plan do not fall into the category of fiduciaries"). The Mentzer Counterclaimants seek to circumvent this standard by arguing, without any supporting authority at all, that while an employer may "wear two hats" as fiduciary or settlor, other persons such as SuperMedia's Employee Benefits Committee ("EBC") can only act in a fiduciary capacity. Response at p. 10. The Supreme Court does not recognize such a distinction. *See, e.g., Pegram*, 530 U.S. at 225 ("Nor is there any apparent reason in the ERISA provisions to conclude [. . .] that this tension is permissible only for the employer or plan sponsor, to the exclusion of persons who provide

[1] *See* 29 USCS § 1002(21)(A) ("a person is a fiduciary with respect to a plan to the extent (i) he exercises discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.").

services to an ERISA plan."). Instead, consistent with ERISA, various persons—not merely employers—may amend benefits plans and do not act as fiduciaries when they do. *See Spink*, 517 U.S. at 890 ("employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."); *see also Mushalla v. Teamsters Local No. 863 Pension Fund*, 152 F. Supp. 2d 613, 626 (D.N.J. 2001) ("in considering allegations of breach of fiduciary duty, employers and trustees are to be treated identically") (aff'd by *Mushalla v. Teamsters Local No. 863 Pension Fund*, 300 F.3d 391 (3rd Cir. 2002). Indeed, SuperMedia's plan documents expressly reserve the right to amend the plans to both SuperMedia and the EBC. *See* Pre-65 Summary Plan Description, Am. Comp. Exhibit E at p. 29 ("The Plan Administrator is the: Idearc Employee Benefits Committee"); *id.* at p. 2 ("The Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate these Plans in whole or in part at any time").

Thus, Counterclaimants' Section 404 breach of fiduciary duty claim must be dismissed because the SuperMedia EBC was not acting in a fiduciary capacity when amending the plan or filing a declaratory judgment suit to affirm the validity of those amendments. *Spink*, 517 U.S. at 890; *Mary Kay Holding Corp.*, 309 Fed. Appx. at 850 ("ERISA's fiduciary duty requirement simply is not implicated . . . [in] a decision regarding the form or structure of the Plan such as who is entitled to receive Plan benefits") (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999)). Therefore, the Mentzer Defendants fail to state a claim for relief against the SuperMedia EBC for breach of fiduciary duty.

B. THE SECTION 510 CLAIM FAILS BECAUSE SUPERMEDIA HAS NOT INTERFERED WITH A PROTECTED RIGHT

Additionally, Counterclaimants allege that the instant action violates ERISA Section 510. This claim, too, is implausible because (i) Counterclaimants possess no permanent, enforceable

rights under the Plans and (ii) SuperMedia's suit for declaratory judgment would not constitute an interference with any rights, even if Counterclaimants had protected rights under the Plans. *See McGann v. H & H Music Co.*, 946 F.2d 401, 405 (5th Cir. 1991). Ignoring these requirements, Counterclaimants instead argue that (i) SuperMedia's decision to name certain—but not all—objecting participants as defendants constitutes discrimination and (ii) that they have incurred significant legal expenses as a result of this suit. Response at p. 10. Despite these allegations, the Counterclaimants still fail to state a claim for relief under Section 510.

First, SuperMedia filed this suit as a class action complaint because joinder of all potential defendants—including more than approximately 900 retirees who have objected to SuperMedia's right to amend—is impracticable. *See* Fed. R. Civ. P. 23(a) (requiring that "the class is so numerous that joinder of all members is impracticable").[2] Also, all objecting participants are not necessary parties to the instant action such that joinder of each participant is required. *See* Fed. R. Civ. P. 19. Thus, SuperMedia's inclusion of certain, but not all, potential parties in the instant action is consistent with the Federal Rules of Civil Procedure and does not constitute prohibited discrimination.

[2] Counterclaimants also allege that SuperMedia has abandoned its class action because more than 90 days have passed since the filing of SuperMedia's Original Complaint—Class Action for Declaratory Judgment ("Original Complaint"). Response at p. 3. Importantly, this argument is not relevant to SuperMedia's Motion to Dismiss and has no bearing on whether Counterclaimants have asserted claims upon which relief can be granted. Regardless, Plaintiffs have not abandoned or waived their class allegations. Federal Rule 23 states that the court "must determine by order" whether to certify the class "at an early practicable time". The language of Rule 23 recognizes "that there may be many valid reasons justifying the deferral . . . including that the opposing party may prefer to win dismissal or summary judgment as to the individual plaintiffs". Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1785.3 (3d ed.) (2012). Local Rule 23.2 provides that a party shall move for class certification within 90 days of filing "or at such other time as the presiding judge by order directs". Because motions to dismiss are currently before the Court, a Scheduling Order has not yet been entered. Therefore, the deadlines corresponding to class-related discovery and certification, which will be set forth in the Court's Scheduling Order, have neither been set nor expired. Additionally, it has been impractical to move to certify a defendant class when multiple defendants, both individual and organized unions, have been dismissed following agreements between the parties. Once the universe of defendants is finalized, the various motions to dismiss are decided and the Court enters a scheduling order, Plaintiffs will move for class certification within the time period set forth in the Court's order.

Additionally, although Counterclaimants complain of SuperMedia's decision to file the Original Complaint, SuperMedia acted consistent with its right to seek a declaratory judgment. *See* Response at p. 9; *cf.* 28 U.S.C. § 2201, *et seq.; Mayflower Transit v. Troutt*, 332 F. Supp. 2d 971, 975-976 (W.D. Tex. 2004) ("If there is an underlying ground for federal court jurisdiction, the Declaratory Judgment Act allows parties to precipitate suits that otherwise might need to wait for the declaratory relief defendant to bring a coercive action.); *Halliburton Co. Benefits Comm. v. Graves,* 463 F.3d 360 (5th Cir. 2006); *KLLM, Inc. v. Ontario Community Hosp*., 947 F. Supp. 262, 269 (S.D. Miss. 1996)*; Janakes v. United States Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985); *Halliburton Co. Benefits Comm. v. Mem'l Hermann Hosp. Sys.*, 2006 U.S. Dist. LEXIS 3184, *7, 2006 WL 148901 (S.D. Tex. Jan. 19, 2006). Indeed, this action and a resulting declaration of the parties' rights by the Court will likely prevent numerous unnecessary and repetitive lawsuits, which could otherwise occur after damages have accrued.

Ignoring SuperMedia's right to a declaratory judgment to resolve the controversies between the parties, Counterclaimants further argue that the instant suit is impermissible because SuperMedia provided claim forms, failed to warn Counterclaimants of prospective litigation, and allegedly "thwarted" the claims process in doing so. Response at pp. 8-9. This argument is refuted by the alleged facts. First, before SuperMedia filed suit against any of the Counterclaimants, each one submitted an aggressive and identical claim form distinct from the claim form SuperMedia included in participants' mailings. *See, e.g.*, Robert Mentzer Claim Form, Am. Comp. Exhibit AE (Dkt. No. 133-60). All claims for benefits were denied after a full and fair review. Because the Counterclaimants were all participants in the Plans, and each of the Plans explicitly reserved to SuperMedia the right to amend or terminate, the Counterclaimants had no valid claim for benefits. Additionally, although Counterclaimants now argue that they

were surprised by litigation, in fact the Counterclaimants themselves warned SuperMedia of litigation and made far-reaching legal demands that went beyond typical benefits claims. *See* Robert Mentzer Claim Form, Am. Comp. Exhibit AE (Dkt. No. 133-60), ("I hereby expressly *object* and give notice that I fully disagree with SuperMedia's proposed changes [. . .] The basis for my position has been amply expressed in numerous court filings submitted in the lawsuit filed in the Dallas federal court [. . .] SuperMedia has no right to amend, modify, revoke or terminate any of my retiree benefits. [. . .] I expressly demand that, immediately, I be transferred out of SuperMedia's retiree benefits plans and reinstated into Verizon's retiree benefit plans").[3] Indeed, Counterclaimant Sandra Noe serves as a class representative in a current suit against SuperMedia in this very Court. *See Murphy, et al. v. Verizon Communications, Inc., et al*, Civil Action No. 3:09-cv-2262-G, Dkt. No. 42. SuperMedia's filing of a suit for declaratory judgment was a necessary response to the substantial controversy that erupted after SuperMedia enacted the Amendments, and the suit does not interfere with any rights under the Plans—even if those rights were enforceable—because SuperMedia has complied with all terms of the Plans and because the Plans do not prohibit this suit for declaratory judgment.[4] *See,* Am. Comp. Exhibits E, F, and G.

Importantly, regardless of their above-described arguments, Counterclaimants fail to name any protected right with which SuperMedia or the instant action have interfered. Because the Plans are welfare plans and their terms are subject to termination at any time,

[3] *See* identical language in Ohnstad Claim Form, Am. Comp. Exhibit AF (Dkt. No. 133-61); Palmer Claim Form, Am. Comp. Exhibit AG (Dkt. No. 133-62); Zenus Claim Form, Am. Comp. Exhibit AI (Dkt. No. 133-64).

[4] Counterclaimants also request that this Court sanction all counsel for Plaintiffs for filing the instant action. A request for sanctions contained in a response to a motion to dismiss is improper as "[a] motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). Fed. R. Civ. P. 11(c)(2). Additionally, the notice requirements of Rule 11 have not been followed. Regardless, for the reasons discussed herein, the filing of this suit for declaratory judgment is proper and not in violation of Rule 11.

Counterclaimants cannot allege the sort of enforceable right required by Section 510. *See* Am. Comp. Exhibits E, F, and G; *McGann v. H & H Music Co.*, 946 F.2d 401, 405 (5th Cir. 1991) (holding that an employer's modification of a medical benefits plan was not a violation of Section 510 because the employees did not have a right to continued or permanent welfare benefits); *see also Bodine v. Emplrs. Cas. Co.*, 352 F.3d 245, 252 (5th Cir. 2003) ("This requirement for 'entitlement' to a § 510 action is only satisfied if the employer has promised the employee a benefit that is eventually denied."). SuperMedia's modification of the Plans and the subsequent suit for declaratory judgment is consistent with all Plan terms and the law of this Circuit. *Id.* Neither Section 510 nor the Plan documents prohibit SuperMedia from filing the instant action for declaratory relief. Therefore, SuperMedia has not violated ERISA in filing this action, and Counterclaimants cannot state a claim for relief under Section 510.

III.
CONCLUSION

All causes of action asserted by the Mentzer Counterclaimants must be dismissed for failure to state a valid claim for relief. Disregarding the plain language of ERISA and the law of the Supreme Court and the Fifth Circuit, the Mentzer Counterclaimants incorrectly assert that (i) the SuperMedia EBC has breached a fiduciary duty because, unlike an employer, it can act only in a fiduciary capacity and (ii) SuperMedia's decision to file a declaratory judgment suit against the Counterclaimants constitutes retaliation and violates ERISA Section 510. Response at pp. 6, 10. Both arguments are defeated as a matter of law. Even accepting all of Counterclaimants' non-conclusory allegations as true, SuperMedia's filing of the instant action simply does not amount to a violation of ERISA. On the contrary, SuperMedia initiated this permissible action so that the Court may declare the parties' rights under ERISA. Thus, neither these arguments nor the allegations contained in the Counterclaim give rise to a plausible right to relief under ERISA

Sections 404 or 510. Accordingly, all counterclaims against SuperMedia should be dismissed in their entirety.

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Respectfully submitted,

s/ Richard S. Krumholz

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2012, I electronically filed the foregoing document with the clerk of 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 attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

s/ *Richard S. Krumholz*