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

WILLIAM LEE, *et al.*, **Plaintiffs,** **v.** **VERIZON COMMUNICATIONS INC., *et al.*,** **Defendants.**	**CIVIL ACTION NO. 3:12-cv-04834-D**

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF UNDER ERISA

Defendants hereby move to dismiss Plaintiffs' Second Amended Complaint For Declaratory And Injunctive Relief Under ERISA for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) and for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The grounds for the motion are set forth in Defendants' Memorandum of Law.

Respectfully submitted,

/s/ Thomas L. Cubbage III

Jeffrey G. Huvelle (admitted *pro hac vice*)
Thomas L. Cubbage III (Texas State Bar No. 00783912)
Christian J. Pistilli (admitted *pro hac vice*)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel.: (202) 662-6000
Fax: (202) 662-6291
jhuvelle@cov.com
tcubbage@cov.com
cpistilli@cov.com

Matthew D. Orwig (Texas State Bar No. 15325300)
Joanne R. Bush (Texas State Bar No. 24064983)
JONES DAY
2727 North Harwood Street
Dallas, TX 75201
Tel.: (214) 220-3939
Fax: (214) 969-5100
morwig@jonesday.com
jrbush@jonesday.com

Attorneys for the Verizon Defendants

Dated: July 25, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2013, I caused a true and correct copy of the foregoing to be served on all counsel who have appeared in this action to date via the Court's electronic filing system pursuant to Local Rule 5.1(d). Those counsel are:

Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, CO 80237-1741
CurtisLKennedy@aol.com

Robert E. Goodman, Jr.
Kilgore & Kilgore Lawyers
3109 Carlisle St.
Dallas, TX 75204
reg@kilgorelaw.com

/s/ Thomas L. Cubbage III
Thomas L. Cubbage III

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

Matthew D. Orwig
Joanne R. Bush
JONES DAY
2727 North Harwood Street
Dallas, TX 75201

Jeffrey G. Huvelle
Thomas L. Cubbage III
Christian J. Pistilli
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004

Attorneys for the Defendants

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Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants Verizon Communications Inc. ("Verizon"), Verizon Investment Management Corp. ("VIMCO"), and the Verizon Employee Benefits Committee ("VEBC") submit this memorandum in support of their motion to dismiss Plaintiffs' Second Amended Complaint ("SAC").[1]

After dismissing Plaintiffs' amended complaint for failure to state a claim, this Court granted Plaintiffs leave to re-plead to "cure the defects that the court ha[d] identified" in their pleadings. Dkt. 77 ("Prior Order"), at 24. But the Second Amended Complaint does not cure any of the pleading defects that were fatal to the prior complaint. Rather, it merely makes minor tweaks to the prior complaint. Many of Plaintiffs' new allegations, moreover, are either entirely irrelevant or wholly conclusory, and none provides a basis to alter the Court's prior conclusion that Plaintiffs' claims fail as a matter of law. Accordingly, the Court should again dismiss Plaintiffs' claims – this time, without leave to re-plead.

BACKGROUND

In late 2012, the Verizon Management Pension Plan ("Plan") purchased a group annuity contract from Prudential Insurance Company of America ("Prudential"). As part of the transaction, the Plan transferred billions of dollars in assets to Prudential, which irrevocably assumed the obligation to pay annuity benefits to approximately 41,000 Verizon management retirees who until that time were participants in the Plan (the "Prudential annuity transaction").

In August 2012, in anticipation of a possible annuity purchase, VIMCO retained Fiduciary Counselors Inc. (the "Independent Fiduciary") to "represent the interests of the Plan and the participants and beneficiaries in connection with the selection of the insurance company

[1] Although a number of other parties are listed as defendants in the caption of the Second Amended Complaint, Plaintiffs only assert claims against Verizon, VIMCO and the VEBC.

(or insurance companies) to provide an annuity, and the terms of the annuity contract or contracts, so that such selection and terms comply with the fiduciary standards, prohibited transaction restrictions, and all other applicable provisions of ERISA." SAC ¶ 29; *see* Dkt. 1-3 ("Pls. Appx."), at 37-39.

In October 2012, acting solely in its capacity as plan sponsor and settlor, Verizon's board of directors acted to amend the terms of the Plan to provide for an annuity transaction. *See* Pls. Appx. 54-56. The amendment directed the Plan to "purchase one or more annuity contracts pursuant to the following provisions":

> (i) The annuity contract shall fully guarantee and pay each pension benefit earned by a "Designated Participant. . . ."[2]
>
> (ii) The annuity contract shall provide for the continued payment of the Designated Participant's pension benefit . . . in the same form that was in effect under the Plan immediately before the annuity purchase. . . .
>
> (iii) [VIMCO], acting as a named fiduciary of the Plan, shall select the annuity provider (or providers) and determine the terms of the annuity contract (or contracts), or, in its discretion, shall retain an independent fiduciary to discharge all or any portion of these duties. A certificate under the annuity contract (or contracts) shall be issued to each such participant. . . . The terms of the annuity contract shall provide that the benefits are legally enforceable by the sole choice of the individual against the insurance company issuing the contract.
>
> (iv) After the annuity purchase . . ., the Plan shall have no further obligation to make any payment with respect to any pension benefit of a Designated Participant. . . .

[2] "Designated Participant[s]" generally include all Plan participants who retired before January 1, 2010, and were then receiving an annuity benefit from the Plan, except certain former union-represented and other employees. *See* Pls. Appx. 61-62. The universe of Designated Participants is co-extensive with the "Transferee Class" as that term is used in the Second Amended Complaint.

Pls. Appx. 61-62. Also in October 2012, the Independent Fiduciary certified that its selection of Prudential as the sole annuity provider, as well as the terms and conditions of the annuity contract, satisfied all applicable requirements of ERISA. *See* SAC ¶ 110; Pls. Appx. 63.

In December 2012, the Prudential annuity transaction was finalized. SAC ¶ 1. Under the annuity contract issued in connection with the transaction, the amount of each affected retiree's annuity benefit is the same as the amount of the retiree's pension benefit before the transaction.

PROCEDURAL HISTORY

Plaintiffs' Original Complaint. Plaintiffs Lee and McPartlin filed their original complaint on November 27, 2012, alleging that the Prudential annuity transaction would violate various provisions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq*. ("ERISA"). Dkt. 1. The next day, they applied for a temporary restraining order, seeking to prevent the closing of the Prudential annuity transaction and the transfer of benefit obligations to Prudential. Dkt. 6. At their request, the application was later converted into a motion for preliminary injunction. On December 7, 2012, this Court denied the motion, explaining that Plaintiffs had "failed to carry their burden of showing a substantial likelihood of success on the merits." Dkt. 44, at 14. On January 4, 2013, Defendants filed a motion to dismiss Plaintiffs' original complaint. *See* Dkt. 54.

Plaintiffs' Amended Complaint. On January 25, 2013, Plaintiffs filed their first amended complaint, thereby mooting Defendants' original motion to dismiss. *See* Dkt. 59 ("FAC"). The amended complaint asserted three claims on behalf of former Plan participants whose benefit obligations were transferred to Prudential (the "Transferee Class"). In Count I, Plaintiffs alleged that Defendants violated ERISA's summary plan description ("SPD") disclosure rules by failing to include a statement that participants "could be involuntarily removed from enrollment in the Plan and transferred to either Prudential or any other insurance

company." FAC ¶ 79. In Count II, Plaintiffs alleged that Defendants breached fiduciary duties owed to the Transferee Class, including a purported duty not to transfer the obligation to pay their benefits to Prudential without their consent. *See, e.g., id.* at ¶ 101. In Count III, Plaintiffs alleged that Defendants violated Section 510 of ERISA by depriving them of the "right[] to continued participation in the Plan." *See id.* at ¶ 115.

The amended complaint also asserted a claim on behalf of Plan participants whose benefit obligations were *not* transferred to Prudential (the "Non-Transferee Class"). Specifically, in Count IV, the amended complaint asserted that the Plan was harmed as a result of the alleged misuse of Plan assets in connection with the Prudential annuity transaction. *See* FAC ¶¶ 121-24.

On June 24, 2013, the Court granted Defendants' motion to dismiss the amended complaint. With respect to Plaintiffs' SPD disclosure claim, the Court held that (i) ERISA's disclosure rules "only requires a description of existing plan terms, not a disclosure of future plan changes, such as the [October 2012 Plan] amendment," and (ii) "plaintiffs had failed to allege or show that the annuity transaction would result in a loss of the amount or right to benefits," as required to trigger Section 102(b)'s disclosure obligations. Prior Order at 5. Regarding Plaintiffs' breach of fiduciary duty claims, the Court held that "Verizon did not engage in a fiduciary function when it amended the Plan" to require an annuity transaction. *Id.* at 9. To the extent Plaintiffs sought to challenge the Plan fiduciaries' *implementation* of Verizon's settlor decision to remove the Transferee Class from the Plan, the Court concluded that Plaintiffs' allegations were conclusory. *Id.* at 12. With respect to Plaintiffs' Section 510 discrimination claim, the Court held that the Transferee Class did not have a right to continued participation in the Plan, and Defendants therefore did not unlawfully interfere "with the attainment of any right to which" class members were "entitled." *See id.* at 14 (quoting 29 U.S.C. § 1140).

Finally, addressing Plaintiffs' claims on behalf of the Non-Transferee Class, the Court held that the amended complaint failed adequately to allege the existence of an Article III "case or controversy," and so dismissed Count IV for lack of standing. As the Court explained, for "defined benefit plans such as the Plan, a decrease in the value of plan assets does not necessarily result in an injury in fact because the benefit amount is fixed regardless of the value of assets in the Plan." Prior Order at 19. Thus, in order for Plaintiffs to establish standing, the Non-Transferee Class would need to "show an effect on its members' benefits payments" as a result of the Prudential annuity transaction. *Id.* at 20. Finding that Plaintiffs had failed to make this showing, the Court dismissed Count IV. *Id.* at 21-22.

Although the Court dismissed Plaintiffs' claims, the Prior Order granted Plaintiffs leave to plead their claims a third time. Prior Order at 23.

Plaintiffs' Second Amended Complaint. On July 12, 2013, Plaintiffs filed their Second Amended Complaint. It asserts the same four Counts as the prior complaint, and its factual allegations do not differ materially from the allegations of the amended complaint. The Second Amended Complaint, moreover, re-asserts a number of claims that this Court has already rejected – including the erroneous claim that Verizon's settlor decision to enter into an annuity transaction implicates fiduciary duties under ERISA. *E.g.*, SAC ¶ 102.

In the Second Amended Complaint, Plaintiffs call to the Court's attention 21 allegations that purportedly "address the pleading issues with respect to the Amended Complaint that were noted in the [Prior Order]." SAC ¶ 6 n.3. Attached hereto as Appendix A is a table setting forth these 21 allegations, as well as a blackline showing (as applicable) materially similar allegations contained in the prior complaint. As this chart demonstrates, many of the 21 allegations identified by Plaintiffs merely make immaterial tweaks to their prior pleadings. *See, e.g.*, SAC

¶¶ 50, 52, 59, 60, 69, 73, 124, 132, 137. Some of the new allegations merely quote the provisions of ERISA or Plan documents already before the Court. *See id.* ¶¶ 51, 91. Others are entirely conclusory, s*ee, e.g.*, *id.* at ¶¶ 109, 112-13, 120-24, 133, or are wholly irrelevant to any issue before the Court, *see, e.g.*, *id.* ¶¶ 60, 68, 108. For the reasons explained herein, none provides any basis for this Court to alter its prior conclusions that (i) the Non-Transferee Class does not have Article III standing, and (ii) the Transferee Class has failed to state a claim.

In an effort to streamline the presentation of issues to the Court, this memorandum focuses principally on the handful of genuinely new allegations contained in the Second Amended Complaint and demonstrates that they do not provide any basis for the Court to alter its previous conclusion that Plaintiffs' claims should be dismissed. To the extent Plaintiffs mean to renew any of the legal theories or claims already rejected by the Court in the Prior Order, Defendants incorporate by reference their prior motion to dismiss briefing. *See* Dkt. 64; Dkt. 69; Dkt. 76.

ARGUMENT

The Second Amended Complaint fails to address any of the infirmities identified by this Court in its Prior Order dismissing Plaintiffs' claims in their entirety. For substantially the same reasons as set forth in the Prior Order, the Court should again dismiss Plaintiffs' claims. Moreover, because Plaintiffs have "repeatedly failed to cure deficiencies by amendments previously allowed," the Court should now enter final judgment in favor of Defendants. *Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 387-88 (5th Cir. 2003) (holding that "district court did not abuse its discretion in denying leave to amend complaint [a] third time").

I. PLAINTIFFS DO NOT HAVE STANDING TO ASSERT CLAIMS ON BEHALF OF THE NON-TRANSFEREE CLASS.

In Count IV, Plaintiffs allege that the Non-Transferee Class was harmed because Plan assets were allegedly used to pay an unspecified amount of "settlor expenses, including commissions and legal fees," in connection with Prudential annuity transaction that "should have been charged to Verizon's operating revenues." SAC ¶ 132.

In the Prior Order, this Court held that Plaintiffs had failed "to establish the injury in fact necessary for Article III standing" for their claims on behalf of the Non-Transferee Class. *See* Prior Order at 21-22. As the Court explained, "for the Non-Transferee Class to establish a particularized, concrete, and actual or imminent injury, it must show more than the mere loss of Plan assets. *It must show an effect on its members' benefits payments*." *Id.* at 20 (emphasis added). Accordingly, the Court dismissed the claims of the Non-Transferee Class for lack of subject matter jurisdiction.[3]

Plaintiffs' Second Amended Complaint does nothing to establish that the Prudential annuity transaction had or is likely to have an effect on the Plan's ability to pay benefits to its remaining participants. As demonstrated by Appendix A, none of the changes made by Plaintiffs in the most recent iteration of their complaint even attempts to show that Verizon "'is financially compromised and thus unable to adequately fund the Plan so that it may meet its future obligations to pay all vested benefits.'" Prior Order at 22 n.13 (quoting *Perelman v. Perelman*, No. 10-5622, 2013 WL 271817, at *5 (E.D. Pa. Jan. 24, 2013)). Like the prior complaints, the

[3] In their prior motion to dismiss, Defendants presented both facial and factual challenges to subject matter jurisdiction over the claims of the Non-Transferee Class. *See* Dkt. 64-2 (Hartnett Declaration); *see also* Dkt. 64-1, at 20; Dkt. 69, at 8; Dkt. 76, at 2-3. The Court did not address the factual challenge, ruling that Plaintiffs' allegations were facially insufficient. *See* Prior Order at 21. Should it become necessary, Defendants respectfully request the opportunity to renew their factual challenge to subject matter jurisdiction.

Second Amended Complaint fails to allege that members of the Non-Transferee Class "have not received the plan benefits to which they are entitled, or, for example, that Verizon as plan sponsor cannot make the necessary contributions to the Plan." *Id.* at 21. To the contrary, like the prior complaints, the Second Amended Complaint avers that Verizon is a "very wealthy, solid Fortune 5 U.S. corporation." SAC ¶ 66. Thus, even assuming (contrary to fact) that Plan assets were improperly used to pay for unspecified "settlor expenses," the Non-Transferee Class has failed to demonstrate that it was thereby harmed in any way.[4]

Moreover, the allegation that settlor expenses were improperly charged to the Plan is entirely conclusory. The Second Amended Complaint does not identify any specific expenses that Plaintiffs claim were improperly paid out of Plan assets or attempt to *show* that Plan assets were used for any purpose other than paying benefits and "defraying reasonable expenses of administering the plan." *See* 29 U.S.C. § 1104(a)(1). For this additional reason, Count IV is subject to dismissal. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").[5]

In sum, the Court should once again dismiss Count IV for lack of standing.

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[4] In the amended complaint, Plaintiffs asserted that Defendants violated Section 206(g) of ERISA, 29 U.S.C. ¶ 1156(g), by undertaking the Prudential annuity transaction at a time when the Plan's adjusted funding target attainment percentage, or AFTAP, was less than 80%. *E.g.*, FAC ¶¶ 51-53, 107, 121. In response, Defendants (among other things) demonstrated that the Plan's AFTAP exceeded 100% at the time of the Prudential annuity transaction. *See* Dkt 64-2 (Hartnett Declaration), at ¶ 4 & Ex. B. Consistent with their obligation under Rule 11, Plaintiffs' Second Amended Complaint appears not to assert that the Prudential annuity transaction ran afoul of Section 206(g) and related regulations. To the extent Plaintiffs do mean to re-assert such claims, Defendants incorporate by reference their previously submitted evidence and arguments regarding this allegation. *See* Dkt. 64-1, at 20-23; Dkt 64-2; Dkt. 69, at 9; Dkt. 76, at 2-4.

[5] The Second Amended Complaint also contains a single paragraph asserting that it "would have been in the best interests of [the Non-Transferee Class] for the group annuity contract purchased by the Plan to have remained in the Plan as part of the Plan's portfolio of assets." SAC ¶ 133. This allegation also (i) is entirely conclusory, and (ii) fails to provide a basis for the Court to assert subject matter jurisdiction over the claims of the Non-Transferee Class.

II. PLAINTIFFS' BREACH OF FIDUCIARY DUTY CLAIM ON BEHALF OF THE TRANSFEREE CLASS FAILS AS A MATTER OF LAW.

As this Court has already held, "[b]ecause amending a plan is not a fiduciary function, Verizon was not acting in a fiduciary capacity when it amended the Plan to direct the purchase of an annuity for [members of the Transferee Class]." Prior Order at 11. Thus, Plaintiffs' claims in Count II are necessarily limited to challenging the Plan fiduciaries' "*implementation* of the amendment directing the annuity purchase." *Id.* (emphasis in original). For the reasons explained below, Plaintiffs have failed to state a claim that any Defendant breached a fiduciary duty owed to the Transferee Class in implementing the October 2012 Plan amendment.

A. The Decision Not To Hold The Prudential Annuity Contract As A Plan Asset Was Made By Verizon In Its Settlor Capacity.

Plaintiffs assert that Defendants breached duties owed to the Transferee Class by "not maintaining the purchased Prudential annuity as an asset in the on-going Plan and, thus, preserving the Transferee Class's ERISA protections." SAC ¶ 117. In other words, they argue that the Plan fiduciaries should have held the Prudential annuity contract as a Plan asset, thereby providing class members with the full "panoply of ERISA protections" and "better assur[ing] receipt by the Transferee Class" of benefits. *See id.* This argument fails because the decision whether to hold the annuity contract as a Plan asset is a settlor decision that was made by Verizon, not a fiduciary decision made by VIMCO or the VEBC. *See* Prior Order at 10-11 (citing, *inter alia*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999)).

The Supreme Court's holding in *Beck v. PACE International Union*, 551 U.S. 96 (2007), is instructive. *Beck* involved an employer's decision to end its defined benefit pension plans by undertaking a "standard termination," and to reject a proposal instead to transfer the pension assets and liabilities associated with the employer's union employees to a union-sponsored pension plan through a plan merger. *See id.* at 99-100. Participants in the terminated plan

argued that the employer's choice between a standard termination and a merger implicated ERISA's fiduciary duties. *See id.* at 101. The Supreme Court unanimously rejected this argument, observing that, unlike a pension plan merger, "terminating a plan through purchase of annuities . . . formally severs the applicability of ERISA to plan assets and employer obligations." *Id.* at 106. *Beck* thus makes clear that the decision whether to maintain pension liabilities in an ERISA-covered pension plan or, instead, to remove pension liabilities from ERISA coverage is a fundamental plan design decision that belongs to the settlor of the plan. *See id*. at 101 ("an employer's decision *whether* to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations").

The holding in *Beck* is dispositive here. As in *Beck,* the Transferee Class seek to challenge as a breach of fiduciary duty the decision to "sever[] the applicability of ERISA to plan assets and employer obligations." *Id.* at 106. Because *Beck* makes clear that the decision to remove pension liabilities from ERISA and PBGC coverage is a settlor decision, not a fiduciary one, Plaintiffs' breach of fiduciary duty claim fails.

Contrary to Plaintiffs' unsupported assertions, moreover, the October 2012 Plan amendment *required* that members of the Transferee Class cease to be participants in the Plan – and cease to have any recourse to the Plan or the PBGC for benefits – upon the purchase of the annuity contract. *See* Pls. Appx. 61-62.[6] Because the October 2012 Plan amendment did not

[6] "In deciding a motion to dismiss the court may consider documents attached to or incorporated in the complaint," such as the October 2012 Plan amendment. *Willard*, 336 F.3d at 379. And it "is a well-settled rule that when a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations." *N. Ind. Gun & Outdoor Shows, Inc. v. City of So. Bend*, 163 F.3d 449, 454-55 (7th Cir. 1998); *accord Tritz v. U.S. Postal Serv.*, No. 10-56967, 2013 WL 3388487, at *7 n.1 (9th Cir. July 9, 2013) ("[W]e need not accept as true conclusory allegations that are contradicted by documents referred to in the complaint."); *Young v. Wells Fargo Bank, N.A.*, No. 12-1405, 2013 WL 2165262, at *13 n.1 (1st Cir. May 21, 2013) (same); *Williams v. CitiMortgage, Inc.*, 498 Fed. Appx. 532, 536, 2012 WL 3834776, at (continued…)

vest VIMCO with the discretion to hold the Prudential annuity contract as a Plan asset, its failure to do so could not implicate any fiduciary duties owed to the Transferee Class. *See* 29 U.S.C. § 1002(21)(A) ("a person is a fiduciary with respect to a plan [only] to the extent" he exercises "discretionary authority" with respect to the plan); *see also Pegram v. Herdrich*, 530 U.S. 211, 225-26 (2000).

Department of Labor regulations specify that an "individual *is not a participant covered under an employee pension plan*" if the "entire benefit rights of the individual" —

> (*1*) Are fully guaranteed by an insurance company . . . and are legally enforceable by the sole choice of the individual against the insurance company . . .; and
>
> (*2*) A contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual[.]

29 C.F.R. § 2510.3-3(d)(2)(ii)(A) (emphasis added); *see* 60 Fed. Reg. 12328, 12328 (Mar. 6, 1995) ("Regulations issued by the Department explicitly recognize a transfer of liability from the plan when such an annuity is purchased from an insurance company" (citing 29 C.F.R. § 2510.3-3(d)(2)(ii))). PBGC regulations similarly state that, for purposes of PBGC insurance coverage, "an individual is treated as no longer being a participant" after "[a]n insurer makes an irrevocable commitment to pay all benefit liabilities with respect to the individual." *See* 29 C.F.R. § 4006.6(b)(2)(i).[7]

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*4 (6th Cir. Sept. 4, 2012) (same). Accordingly, the Court need not accept as true Plaintiffs' conclusory allegation that the "Plan amendment did not expressly prohibit VIMCO from purchasing one or more annuities and maintaining that purchase as an asset of the Plan." SAC ¶ 111.

[7] *See also* 29 C.F.R. § 4001.2 (defining an irrevocable commitment as "an obligation by an insurer to pay benefits to a named participant or surviving beneficiary, if the obligation cannot be cancelled under the terms of the insurance contract (except for fraud or mistake) without the consent of the participant or beneficiary and is legally enforceable by the participant or beneficiary"); *id.* § 4041.2 (a participant excludes "any . . . individual to whom an insurer has (continued…)

Here, the October 2012 Plan amendment required the Plan to purchase an annuity contract satisfying these regulatory requirements. The amendment specified that, "[a]fter the annuity purchase . . ., *the Plan shall have no further obligation to make any payment with respect to any pension benefit*" payable to members of the Transferee Class. Pls. Appx. 62 (emphasis added). The amendment, moreover, set forth the means to accomplish this goal: the Plan was required to purchase an annuity contract under which (i) the insurance company would fully guarantee and pay each benefit, (ii) the contract would be enforceable by the sole choice of each participant, and (iii) certificates would be issued to affected participants. *See id.* at 61-62. Under the Department of Labor and PBGC regulations cited above, annuity contracts satisfying these requirements necessarily terminate participation in an ERISA-governed plan and PBGC insurance coverage. Thus, the October 2012 Plan amendment did not give the Plan fiduciaries discretion to hold the Prudential annuity contract as a Plan asset.[8]

In sum, the decision to terminate members of the Transferee Class from on-going participation in an ERISA-governed pension plan was a settlor decision made by Verizon. Under the terms of the October 2012 Plan amendment, moreover, VIMCO did not have the discretion to hold the Prudential annuity contract as a Plan asset. Accordingly, Plaintiffs' claim that Defendants breached fiduciary duties by not holding the Prudential annuity contract as a Plan asset fails as a matter of law.

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made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan").

[8] If there were any doubt regarding Verizon's intent as settlor, it would be resolved by the board resolution directing the adoption of the October 2012 Plan amendment. The resolution states that, "[a]fter the annuity purchase, individuals who receive annuity certificates *shall no longer be participants in or beneficiaries of the Plan* under the Department of Labor's regulation at 29 C.F.R. § 2510.3-3(d)(2)(ii)." SAC ¶ 127 (emphasis added); *see* Pls. Appx. 55.

B. Plaintiffs Fail To State A Claim That The Transferee Class Was Harmed As A Result Of The Alleged Improper Use Of Plan Assets.

Plaintiffs allege that (i) the Plan overpaid Prudential for the annuity contract, and/or (ii) Plan assets were improperly used to defray purported settlor expenses in connection with the Prudential annuity transaction. *See* SAC ¶¶ 114-15. As discussed in Part I above, these allegations are entirely conclusory. To the extent that Plaintiffs actually mean to assert such claims on behalf of the Transferee Class, moreover, they plainly do not have standing to do so.

The gravamen of these allegations is that the Plan was harmed in connection with the Prudential annuity transaction. By definition, however, the Plan no longer has any obligation to pay benefits to members of the Transferee Class as a result of the Prudential annuity transaction. Thus, even assuming *arguendo* that Plan assets were improperly depleted as a result of the Prudential annuity transaction, the members of the Transferee Class self-evidently were not harmed as a result. Thus, the Transferee Class lacks standing to assert this claim on behalf of the Plan. *See* Prior Order at 12 n.11; *see also* Part I, *supra*.[9]

C. Plaintiffs' Claim That The Selection Of Prudential As The Sole Insurer Breached Fiduciary Duties Is Wholly Conclusory.

Plaintiffs allege that Defendants breached fiduciary duties to the Transferee Class by "imprudently selecting" Prudential as the "single group annuity provider," rather than "contract[ing] with several or more insurance providers." SAC ¶ 109. This assertion is far too conclusory to state a claim.

Under ERISA, a fiduciary is obligated to act "solely in the interest of the participants," with the "care, skill, prudence, and diligence" of a "prudent man" acting in like circumstances.

[9] Indeed, if accepted as true, Plaintiffs' allegation that "almost $1 billion more than necessary to cover the transferred liabilities was paid to Prudential" establishes that they were *benefitted* by the purported overpayment, since Prudential is now ultimately responsible for paying the benefits of the Transferee Class. SAC ¶ 114.

29 U.S.C. § 1104(a)(1)(B). As the Fifth Circuit has observed, "the test of prudence is one of conduct, not results." *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 253 (5th Cir. 2008); *see generally Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 299 (5th Cir. 2000). Thus, courts will not second guess the decisions of a disinterested fiduciary made in good faith after following a deliberative process. *See, e.g., Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) ("In evaluating whether a fiduciary has acted prudently, we therefore focus on the process by which it makes its decisions rather than the results of those decisions.").

Here, the Second Amended Complaint is entirely devoid of allegations that the Plan's fiduciaries – including the Independent Fiduciary appointed by VIMCO to represent the interests of Plan participants in any annuity transaction – failed to undertake a thorough, deliberative process in considering whether to contract with multiple annuity providers.[10] Nor does the Second Amended Complaint allege any facts plausibly showing that the payment of benefits to the Transferee Class has been jeopardized by the selection of Prudential as the sole insurer or that using other available annuity providers would have been safer than using Prudential alone.

The only factual allegation in the Second Amended Complaint suggesting that the Plan fiduciaries failed to engage in a prudent process is Paragraph 110. That paragraph alleges that the Plan fiduciaries did not have "a reasonable time period for consideration of whether to choose one or more annuity providers," based entirely on the fact that Prudential was selected by the Independent Fiduciary on the same date as the October 2012 Plan amendment. *See* SAC ¶ 110. The suggestion that the Independent Fiduciary did not have sufficient time, however, is

[10] Nor could Plaintiffs allege that the Independent Fiduciary failed to follow a thorough, deliberative process in selecting Prudential as the sole annuity provider. *See* Dkt. 37(Miller Declaration), at ¶¶ 44-51 (discussing the Independent Fiduciary's consideration of the question whether splitting the annuity across more than one insurer would have provided greater security).

belied by more specific, factual allegations elsewhere in the Second Amended Complaint. As Plaintiffs acknowledge, VIMCO retained the Independent Fiduciary in connection with "the selection of the insurance company (or insurance companies) to provide [the] annuity" no later than August 24, 2012. SAC ¶ 29; *see* Pls. Appx. 37-39. Thus, Plaintiffs' own allegations conclusively disprove their disingenuous suggestion that VIMCO and/or the Independent Fiduciary selected Prudential as the sole insurer in a single day.

In sum, Plaintiffs' claim that Defendants violated fiduciary duties by failing to consider multiple annuity providers is entirely conclusory. The well-pled allegations in the Second Amended Complaint (taken as true) are insufficient to show that any Defendant breached a fiduciary duty in connection with the selection of Prudential as the sole insurer. Thus, Defendants are entitled to dismissal of this claim. *See Iqbal*, 556 U.S. at 683.

III. PLAINTIFFS' "DISCRIMINATION" CLAIMS FAIL AS A MATTER OF LAW.

Section 510 of ERISA makes it unlawful "for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled." 29 U.S.C. § 1140. To state a claim under Section 510, a plaintiff must allege more than that an identifiable group is "being treated differently from [an]other." *McGann v. H & H Music Co.*, 946 F.2d 401, 406-07 (5th Cir. 1991). Rather, "a plaintiff must prove that the defendant had a specific intent to discriminate among plan beneficiaries on grounds . . . proscribed by section 510." Prior Order at 14 (citations and internal quotation marks omitted) (alteration in original).

In the Prior Order, this Court held that Plaintiffs had failed to state a claim for violation of Section 510. Specifically, the Court rejected Plaintiffs' claim that Defendants unlawfully interfered with a purported "right to continued participation in the Plan," explaining that members of the Transferee Class had no such right. *See id.* at 14-16.

In the Second Amended Complaint, Plaintiffs add to their insufficient allegations only the conclusory assertion that Defendants "were motivated" to enter into the Prudential annuity transaction "by a desire to deprive the Transferee Class members of the right to" (i) "ERISA's many protections, including annual disclosures and ready access to the federal courts," and (ii) "the PBGC's uniform financial guarantee and federal protection." SAC ¶¶ 122-23. These new allegations cannot save Plaintiffs' Section 510 claim.

First, these allegations are entirely conclusory. In *Iqbal*, the Supreme Court rejected highly similar allegations of discriminatory intent as too conclusory to be entitled to a presumption of truth. *See Iqbal*, 556 U.S. at 681 ("These bare assertions . . . amount to nothing more than a formulaic recitation of the elements of a . . . discrimination claim, namely, that petitioners adopted a policy because of, not merely in spite of, its adverse effects upon an identifiable group." (internal quotation marks omitted)). As in *Iqbal*, Plaintiffs "would need to allege more by way of factual content to 'nudg[e]' [their] claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Id.* at 683 (citations omitted) (first alteration in original).

Second, Plaintiffs' new allegations suffer from the same fundamental infirmity as their original Section 510 claim. As the Second Amended Complaint makes clear, the loss of ERISA procedural rights and PBGC-guaranteed benefits is a necessary consequence of the loss of the purported "right" to continued participation in the Plan. *See* SAC ¶ 79 (alleging that "ERISA protections and uniform PBGC guarantee" are "attendant" to "continued receipt of pension benefits under the Plan"). Because members of the Transferee Class do not have a "right to continued participation in the Plan," Prior Order at 14-16, it follows *a fortiori* that they do not have a right to "attendant" ERISA and PBGC protections.

Third, several circuit courts have held that the decision to adopt a plan amendment "is not actionable under section 510." *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1504 (3d Cir. 1994); *accord Mattei v. Mattei*, 126 F.3d 794, 800 (6th Cir. 1997) ("[Section] 510 offers no protection against an employer's actions affecting the status or scope of an ERISA plan itself."); *Deeming v. Am. Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990) (similar). As the Fifth Circuit has explained, permitting an ERISA discrimination claim based upon the adoption of a plan amendment "would clearly conflict with Congress's intent that employers remain free to create, modify and terminate the terms and conditions of employee benefits plans without governmental interference." *McGann*, 946 F.2d at 407.[11] Because Plaintiffs' Section 510 claim ultimately turns on the permissibility of the October 2012 Plan amendment adopted by Verizon as settlor, it fails to state a claim.

IV. PLAINTIFFS' DISCLOSURE ALLEGATIONS FAIL TO STATE A CLAIM.

Section 102(b) of ERISA requires SPDs to include a description of "circumstances which may result in . . . loss of benefits." 29 U.S.C. § 1022(b). As in the previous two complaints, the Second Amended Complaint continues to assert in Count I that the VEBC violated Section 102(b) and regulations thereunder by failing to disclose in an SPD that participants "could be involuntarily removed from enrollment in the Plan and transferred to either Prudential or any other insurance company." SAC ¶ 79.

[11] While the Fifth Circuit has rejected the proposition that the reach of Section 510 is limited to decisions that affect the "employment relationship," it has never held that Section 510 may be used to challenge a plan amendment. *See Heimann v. Nat'l Elevator Indus. Pension Fund*, 187 F.3d 493, 507 (5th Cir. 1999), *overruled on other grounds*, *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003). Rather, as the Court recognized in the Prior Order, the Fifth Circuit has never addressed whether "plan amendments" are "actionable under § 510." Prior Order at 16 n.12 (citations omitted).

In the Prior Order, this Court concluded that Plaintiffs' SPD disclosure claim failed as a matter of law. Specifically, the Court held that

- "[Section] 102(b) only requires a description of existing plan terms, not a disclosure of future plan changes, such as the [October 2012 Plan] amendment";[12]
- Plaintiffs "failed to allege or show that the annuity transaction would result in a loss of the amount or right to benefits," as required to trigger Section 102(b)'s disclosure obligations; and
- "[A] change in the payer of plan benefits is [not] a circumstance that results in a loss of plan benefits provided by the plan" required to be disclosed under regulations implementing Section 102(b).

Prior Order at 5-7. Nothing in the Second Amended Complaint in any way disturbs these conclusions or points to an actionable disclosure violation on the part of the VEBC.

In large part, the Second Amended Complaint simply re-hashes Plaintiffs' prior (and legally insufficient) allegations. In two new paragraphs, Plaintiffs (i) assert that Verizon's SPD disclosed other "circumstances that might result in participants being removed from the Plan," such as a spin-off or termination, and (ii) suggest that the VEBC therefore had an obligation to inform participants "of a possible involuntary transfer out of the Plan into an insurance annuity while the Plan is ongoing." *See* SAC ¶¶ 76-77. However, it is perfectly reasonable that the SPD disclosed the possibility of a termination or spin-off (but not the Prudential annuity transaction) because pre-existing Plan provisions expressly authorized terminations and spin-offs. SAC ¶ 97; *see* Pls. Appx. 61-62; *see also* Prior Order at 5 n.7. In any event, Plaintiffs fail to explain how other, unrelated disclosures contained in the Verizon SPD could alter this Court's prior

[12] *See Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993) (Section 102(b) "relates to an individual employee's eligibility under then existing, current terms of the Plan and not to the possibility that those terms might later be changed, as ERISA undeniably permits."); *see also* 29 C.F.R. § 2520.102-3 ("The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed.").

conclusion that there was no statutory obligation to disclose the Prudential annuity transaction in an SPD. Accordingly, the Court should again dismiss Count I.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Defendants' motion to dismiss the prior complaint, the Court should again dismiss Plaintiffs' claims in their entirety, and should enter final judgment in favor of Defendants.

Respectfully submitted,

/s/ Thomas L. Cubbage III

Jeffrey G. Huvelle (admitted *pro hac vice*)
Thomas L. Cubbage III (Texas State Bar No. 00783912)
Christian J. Pistilli (admitted *pro hac vice*)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel.: (202) 662-6000
Fax: (202) 662-6291
jhuvelle@cov.com
tcubbage@cov.com
cpistilli@cov.com

Matthew D. Orwig (Texas State Bar No. 15325300)
Joanne R. Bush (Texas State Bar No. 24064983)
JONES DAY
2727 North Harwood Street
Dallas, TX 75201
Tel.: (214) 220-3939
Fax: (214) 969-5100
morwig@jonesday.com
jrbush@jonesday.com

Dated: July 25, 2013

Attorneys for the Verizon Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2013, I caused a true and correct copy of the foregoing to be served on all counsel in this action via the Court's electronic filing system pursuant to Local Rule 5.1(d). Those counsel are:

Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, CO 80237-1741
CurtisLKennedy@aol.com

Robert E. Goodman, Jr.
Kilgore & Kilgore Lawyers
3109 Carlisle St.
Dallas, TX 75204
reg@kilgorelaw.com

/s/ Thomas L. Cubbage III
Thomas L. Cubbage III

***Lee, et al. v. Verizon Communications Inc., et al.*, No. 3:12-cv-04834-D**

Appendix A

Excerpts from the Second Amended Complaint ("SAC")*	**Additions/Deletions To SAC****
45. In late April 2013, the Verizon Defendants disclosed in an annual funding notice sent to Plaintiffs and all other Plan participants that, immediately after the Verizon/Prudential annuity transaction, the fair market value of the Plan's remaining assets was approximately $3.77 billion and the Plan's liabilities were approximately $5.69 billion. Thus, in the immediate aftermath of the Verizon/Prudential annuity transaction, the Plan was not fully funded, but left in a far less stable financial condition and underfunded by almost $2 billion or only about 66% actuarially funded.	45. In late April ~~2012,~~2013, the Verizon Defendants disclosed in an annual funding notice sent to Plaintiffs and all other Plan participants that, ~~on the date~~ immediately ~~before January 1, 2012,~~after the Verizon/Prudential annuity transaction, the fair market value of the Plan's remaining assets was approximately $~~9.7~~3.77 billion~~. On this same date,~~ and the Plan's liabilities were approximately $~~12.8 billion. Thus, whether or not the enrolled actuary had yet certified an updated AFTAP, it was well known by the Verizon Defendants that the Plan had an AFTAP of approximately 76% on the January 1, 2012 valuation date~~5.69 billion. Thus, in the immediate aftermath of the Verizon/Prudential annuity transaction, the Plan was not fully funded, but left in a far less stable financial condition and underfunded by almost $2 billion or only about 66% actuarially funded.
46. To the extent that the Verizon Defendants made contributions to the Plan before the Verizon/Prudential annuity transaction was consummated, those contributions were not sufficient to leave the Plan fully funded after the transaction occurred.	~~52.~~46. To the extent that~~, after January 1, 2012 and before August 15, 2012,~~ the Verizon Defendants made contributions to the Plan ~~to be credited as prior year contributions~~before the Verizon/Prudential annuity transaction was consummated, those contributions were not sufficient to ~~increase the AFTAP so as to avoid the restrictions on prohibited accelerated benefit payments imposed by ERISA Section 206(g)(3)(E)(ii), 29 U.S.C. § 1056(g)(3)(E)(ii); IRC Section 436(d)(3)(A)(i), 26 U.S.C. §~~

* This column includes the text of all paragraphs from the Second Amended Complaint that, according to Plaintiffs, "address the pleading issues with respect to the Amended Complaint that were noted in the Court's Memorandum Opinion and Order entered as Docket 77 on June 24, 2013." *See* SAC ¶ 6 n.3.

** This column represents a blackline comparing paragraphs excerpted from the Second Amended Complaint to comparable allegations from Plaintiffs' amended complaint.

Excerpts from the Second Amended Complaint ("SAC")*	Additions/Deletions To SAC**
	~~436(d)(3)(A)(i)~~leave the Plan fully funded after the transaction occurred.
50. In order to move forward with the Verizon/Prudential annuity transaction, on October 17, 2012, Verizon purportedly amended the Plan and inserted a new Article 8.3(b), to be effective December 7, 2012. (App. 60-62). The new purported Plan amendment directed the Plan to purchase "one or more annuity contracts" (App. 61) to pay all pension benefits earned by certain designated retirees (i.e., Plaintiffs Lee, McPartlin and Transferee Class members – approximately 41,000 persons who retired prior to January 1, 2010 and were receiving pension benefits under the Plan). (Id.).	~~54.~~50. In order to move forward with the Verizon/Prudential annuity transaction, on October 17, 2012, Verizon purportedly amended the Plan and inserted a new Article 8.3(b), to be effective December 7, 2012. (App. 60-62). The new purported Plan amendment ~~directs~~directed the Plan to purchase "one or more annuity contracts" (App. 61) to pay all pension benefits earned by certain designated retirees (i.e., Plaintiffs Lee, McPartlin and ~~putative class~~Transferee Class members – approximately 41,000 persons who retired prior to January 1, 2010 and were receiving ~~payment in the form of an annuity under the Plan) and, thus, extinguish the designated participants' rights to~~ pension benefits ~~payable~~ under the Plan ~~and extinguish the Plan's obligation to make pension payments to the designated retirees~~). (Id.).
51. The new purported Plan amendment, Article 8.3(b)(iii), directed that "Verizon Investment Management Corp., acting as a named fiduciary of the Plan, shall select the annuity provider (or providers) and determine the terms of the annuity contract (or contracts), or, in its discretion, shall retain an independent fiduciary to discharge all or any portion of these duties." (Id.).	
52. The new purported Plan amendment, Article 8.3(b), conflicts with Articles 8.5, 11.3, 12.3 and 12.7 of the Plan and the aforesaid limited disclosures made in the SPDs issued to Plaintiffs and Transferee Class members.	~~55.~~52. The new purported Plan amendment, Article 8.3(b), ~~creates an ambiguity concerning the authority under the Plan for the Verizon/Prudential annuity transaction because it~~ conflicts with Articles 8.5, 11.3, 12.3 and 12.7 of the Plan and the aforesaid limited disclosures made in the SPDs issued to Plaintiffs and ~~putative class~~Transferee Class members ~~prior to August 24, 2012.~~.
59. As a result of the consummation of the Verizon/Prudential annuity transaction, Plaintiffs Lee and McPartlin and the Transferred Class have been injured and they have lost valuable benefits in the form of federal ERISA law protections and a uniform financial guarantee through the PBGC, now replaced, in	~~62.~~59. As a result of the consummation of the Verizon/Prudential annuity transaction, Plaintiffs Lee~~, Plaintiff~~ and McPartlin and ~~all other transferred retirees~~the Transferred Class have been injured and they have lost ~~all federal protection~~valuable benefits in the form of federal ERISA law protections and a uniform financial

Excerpts from the Second Amended Complaint ("SAC")*	**Additions/Deletions To SAC****
the event of the inability of Prudential to make payments to them, by the following insufficient and varying insurance guaranty coverage amounts determined by the retirees' respective states of residence, as follows….	guarantee through the PBGC, now replaced, in the event of the inability of Prudential to make payments to them, by the following insufficient and varying insurance guaranty coverage amounts determined by the retirees' respective states of residence, as follows….
60. Individual coverage limits under state guaranty statutes vary from $100,000 to $500,000 per person and are generally determined by the state of residency at the time of impairment or insolvency of an insurance company. (App. 270, Stone Aff. ¶ 12). Most state guaranty associations are underfunded or unfunded, relying on future premium assessments to fund unknown liabilities. (Id.). Insurance guaranty associations are funded by assessments on insurance companies. They are not guaranteed by state governments. (Docket 30, Jacobs' Declaration, p. 48 of 53, ¶ 26). State guaranty association coverage amounts and rules of the game can be subject to change without notice. (App. 270, Stone Aff. ¶ 14). Relocating retirees may unwittingly divest themselves of guaranty association coverage. For example, an annuitant living in Connecticut with $500,000 of potential coverage, after relocating residence to Arizona, could find himself or herself with just $100,000 of coverage.	~~63.~~60. Individual coverage limits under state guaranty statutes vary from $100,000 to $500,000 per person and are generally determined by the state of residency at the time of impairment or insolvency of an insurance company. (App. 270, Stone Aff. ¶ 12). Most state guaranty associations are underfunded or unfunded, relying on future premium assessments to fund unknown liabilities. (Id.). ~~-~~Insurance guaranty associations are funded by assessments on insurance companies. They are not guaranteed by state governments. (Docket 30, Jacobs' Declaration, p. 48 of 53, ¶ 26). State guaranty association coverage amounts and rules of the game can be subject to change without notice. (App. 270, Stone Aff. ¶ 14). Relocating retirees may unwittingly divest themselves of guaranty association coverage. For example, an annuitant living in Connecticut with $500,000 of potential coverage, after relocating residence to Arizona, could find himself or herself with just $100,000 of coverage.
68. The Verizon/Prudential annuity transaction is not what Plaintiffs and the Transferee Class bargained for when they loyally served Verizon and predecessor companies, including the business entities comprising the former old Bell System. Those retirees chose to receive their retirement benefits in the form of a federally protected monthly annuity pension, not an insurance annuity. Many Transferee Class members had a choice of electing a lump sum distribution or receiving a federally protected annuity upon commencement of retirement.	~~71.~~68. The Verizon/Prudential annuity transaction is not what ~~the~~ Plaintiffs and the ~~putative class of management retirees~~Transferee Class bargained for when they loyally served Verizon and predecessor companies, including the business entities comprising the former old Bell System. Those retirees chose to receive their retirement benefits in the form of a federally protected monthly annuity pension, not an insurance annuity~~…~~. Many Transferee Class members had a choice of electing a lump sum distribution or receiving a federally protected annuity upon commencement of retirement.

Excerpts from the Second Amended Complaint ("SAC")*	**Additions/Deletions To SAC****
69. The involuntary removal of Plaintiffs Lee, McPartlin and the Transferee Class of retirees from the Plan and their transfer to Prudential's control is not in the retirees' best longterm financial interests and they do not consent to this change. (App. 243, Lee Aff. ¶ 8; App. 248, McPartlin Aff. ¶ 7; App. 263, Jones Aff. ¶¶ 10-11).	~~71. ….~~69. The involuntary removal of Plaintiffs Lee, McPartlin and the ~~putative class~~Transferee Class of retirees from the Plan and their transfer to Prudential's control is not in the retirees' best ~~long-term~~longterm financial interests and they do not consent to this change. (App. 243, Lee Aff. ¶ 8; App. 248, McPartlin Aff. ¶ 7; App. 263, Jones Aff. ¶¶ 10-11).
73. ERISA Section 102(b) requires, in part, that a pension plan administrator provide each plan participant with an SPD which describes the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 102(b). U.S. Department of Labor regulations require, in part, that an SPD contain a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reductio or recovery. . . of any benefits that a participant or beneficiary might otherwise reasonably expect the *plan* to provide on the basis of the description of benefits. . . (emphasis added). 29 C.F.R. § 2520.102-3-(l).	~~75.~~73. ERISA Section 102(b) requires, in part, that a pension plan administrator provide each plan participant with an SPD which describes the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 102(b). U.S. Department of Labor regulations require, in part, that an SPD contain a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reductio or recovery. . . of any benefits that a participant or beneficiary might otherwise reasonably expect the *plan* to provide on the basis of the description of benefits. . . (emphasis added). 29 C.F.R. § 2520.102-3-(l).
76. The Verizon Defendants' own clearly stated position is that they ought to disclose the circumstances that might result in participants being removed from the Plan. For example only, the last SPD issued to Plaintiffs and the Transferee Class before they were transferred out of the Plan informed them that either a full termination of the Plan or a spin-off of the Plan into another ERISA-regulated plan constitute circumstances under which retirees would no longer participate in the Plan or receive benefits under the Plan. (App. 20-22). However, in the same SPD, there is no mention of a possible involuntary transfer out of the Plan into an insurance annuity while the Plan is ongoing as a circumstance under which retirees would no longer participate in the Plan or receive benefits under the Plan.	
77. The Plan did not purchase the Prudential annuity and	

Excerpts from the Second Amended Complaint ("SAC")*	**Additions/Deletions To SAC****
maintain it as an asset and part of the Plan. Prudential is not providing the Transferee Class benefits under the Plan, as would have occurred had the Plan purchased the single group annuity and maintained it as an asset under the Plan. Hence, the Transferee Class's retirement benefits are being provided outside of the Plan, not under the Plan.	
79. In none of the SPDs issued to Plaintiffs and Transferee Class members by the Plan administrators is there any discussion, disclosure or notice that either a single retiree or large group of retirees with vested rights could be involuntarily removed from enrollment in the Plan and transferred to either Prudential or any other insurance company and, thereby, made ineligible for continued receipt of pension benefits under the Plan with the attendant ERISA protections and uniform PBGC guarantee.	79. In none of the SPDs issued to Plaintiffs and ~~putative class~~Transferee Class members by the Plan administrators is there any discussion, disclosure or notice that either a single retiree or large group of retirees with vested rights could be involuntarily removed from enrollment in the Plan and transferred to either Prudential or any other insurance company and, thereby, made ineligible for continued receipt of pension benefits under the Plan with the attendant ERISA protections and uniform PBGC guarantee.
91. ERISA defines the scope of a plan fiduciary role as follows: [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets ... or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. 29 U.S.C. § 1002(21)(A).	
108. In June 2013, a federal regulatory agency, the U.S. Treasury's Financial Stability Oversight Council ("FSOC"), decided to designate Prudential as a "systemically important financial institution" because Prudential could trigger massive financial havoc to the whole nation, should Prudential's economic fortunes change. Prudential has decided and will challenge that designation because Prudential does not want any federal oversight put in place. Prudential's position to challenge FSOC's planned designation of Prudential is consistent with	

Excerpts from the Second Amended Complaint ("SAC")*	**Additions/Deletions To SAC****
Prudential's complicity with VIMCO's and Plan fiduciaries' decision that the Transferee Class lose all ERISA federal protections and the PBGC uniform guarantee under the terms of the single group annuity provided by Prudential outside the Plan. Prudential has not and will not act in the best interest of the Transferee Class, 41,000 persons whom were unknowingly sent into the sole care of Prudential.	
109. When implementing the Plan sponsor's decision directing the Plan to purchase one or more annuities from one or more insurance companies, the Verizon Defendants had a fiduciary obligation to do what was in the best interests of all Plan participants. VIMCO and the Plan fiduciaries breached fiduciary duties by imprudently selecting a single group annuity provider, thus placing everyone in jeopardy of losing retirement benefits based upon the fortunes of a single insurer. It would have been best, more prudent, not to put all of the Plan's eggs in one basket but to contract with several or more insurance providers. The Transferee Class should have been allowed a choice in the matter.	
110. Ironically, on the very same date the Plan was amended by the Plan sponsor – October 17, 2012 – directing VIMCO to select one or more insurance annuity providers, VIMCO and the Plan fiduciaries selected a single insurer, Prudential, for the massive annuity transaction. Self evidently, VIMCO and Plan fiduciaries did not prudently allow any period of time, much less a reasonable time period for consideration of whether to choose one or more annuity providers. The amendment directing VIMCO in that regard was a ruse, as it was predetermined that Prudential would be the only provider. VIMCO's implementation of the amendment was, therefore, a breach of fiduciary duty. Also, VIMCO and Plan fiduciaries breached their fiduciary duties by not adequately considering the wishes of any	

Excerpts from the Second Amended Complaint ("SAC")*	**Additions/Deletions To SAC****
of the Transferee Class members. Indeed, no retiree was ever consulted about his or her wishes with respect to the annuity transaction.	
111. The Plan amendment instructing VIMCO to purchase one or more annuities did not mandate that the purchase be made outside of the Plan. (App. 60-62). The Plan amendment did not expressly prohibit VIMCO from purchasing one or more annuities and maintaining that purchase as an asset of the Plan as part of the ongoing Plan's portfolio of assets.	
112. VIMCO should have exercised its discretion in favor of the best interests of the Transferee Class when VIMCO was determining the terms of the purchased annuity, and VIMCO and Plan fiduciaries should have required the purchased annuity be maintained as an asset of the Plan, perhaps, designated as an asset to be used solely to fund the retirement payment obligations for the Transferee Class.	
113. VIMCO and the Plan fiduciaries should have acted prudently and insured that all retirees maintained ERISA's federal protections and the uniform guarantee provided by the PBGC. That would have been possible if the annuity was purchased and maintained as an asset in the ongoing Plan so that all retirees continued to enjoy ERISA's federal protections and the PBGC uniform financial guarantee.	
114. Prior to the Verizon/Prudential annuity transaction, Section 8.5 of the Plan required that Plan assets be used for the "exclusive benefit" of participants to "provide benefits under the terms of the Plan" and pay "reasonable expenses" of administering the Plan. (App. 25). However, almost $1 billion more than necessary to cover the transferred liabilities was paid to Prudential by the Plan for amounts other than benefits and reasonable expenses of administering the Plan. The extra $1 billion payment was applied towards expenses, not for	~~108.~~114. Prior to the Verizon/Prudential annuity transaction, Section 8.5 of the Plan required that Plan assets be used for the "exclusive benefit" of participants to "provide benefits under the terms of the Plan" and pay "reasonable expenses" of administering the Plan. (App. 25). However, almost $1 billion more than necessary to cover the transferred liabilities was paid to Prudential by the Plan for amounts other than benefits and reasonable expenses of administering the Plan. The extra $1 billion payment was applied towards ~~excessive and unreasonable~~ expenses, not for

Excerpts from the Second Amended Complaint ("SAC")*	Additions/Deletions To SAC**
administering the ongoing Plan, but to enable avoidance of payment of such expenses by the Plan sponsor, Verizon Communications Inc. and corporate subsidiaries, thus violating Section 8.5 and the terms of the Master Trust.	administering the ~~on-going Plan, but for commissions and excessive legal fees generated by many third parties, including consultants to the Verizon/Prudential annuity transaction, thus,~~ongoing Plan, but to enable avoidance of payment of such expenses by the Plan sponsor, Verizon Communications Inc. and corporate subsidiaries, thus violating Section 8.5 and the terms of the Master Trust~~…~~.
115. The extra $1 billion payment was used to pay Verizon's-the settlor's obligations for third-party costs related to the annuity transaction, including fees paid to outside lawyers, accountants, actuaries, financial consultants and brokers. Those expenses and fees should have been charged to Verizon's corporate operating revenues, not charged to the Plan and Master Trust.	~~108. …~~115. The extra $1 billion payment was used to pay Verizon's-the settlor's obligations for third-party costs related to the annuity transaction, including fees paid to outside lawyers, accountants, actuaries, financial consultants and brokers. Those ~~unreasonable and excessive~~ expenses and fees should have been charged to Verizon's corporate operating revenues, not charged to the Plan and Master Trust.
117. Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs ask this Court to grant appropriate class-wide equitable relief, including a declaration that the Verizon EBC and VIMCO each failed to meet and breached statutory fiduciary duties under ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1) and the terms of the Plan, by, among other conduct as alleged herein, not maintaining the purchased Prudential annuity as an asset in the ongoing Plan and, thus, preserving the Transferee Class's ERISA protections and the uniform guarantee provided by the PBGC. Pursuant to ERISA Section 502(a)(9), 29 U.S.C. § 1132(a)(9), Plaintiffs ask this Court to grant appropriate class-wide relief, requiring the purchased annuity to be maintained under the Plan so as to restore the Transferee Class's panoply of ERISA protections and the uniform PBGC guarantee and better assure receipt by the Transferee Class of the amounts provided or to be provided by the Prudential annuity. Plaintiffs request the Court grant Plaintiffs and Transferee Class members temporary, preliminary and permanent injunctive and other	~~110.~~117. Pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), Plaintiffs ask this Court to grant appropriate class-wide equitable relief, including a declaration that the Verizon EBC and VIMCO ~~each failed to comply with the restrictions and limitations imposed by ERISA Section 206 and IRS Section 436 on making accelerated benefit distributions, and~~ each failed to meet and breached ~~its~~ statutory fiduciary ~~duty~~duties under ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1)~~, and grant Plaintiffs and putative class~~ and the terms of the Plan, by, among other conduct as alleged herein, not maintaining the purchased Prudential annuity as an asset in the ongoing Plan and, thus, preserving the Transferee Class's ERISA protections and the uniform guarantee provided by the PBGC. Pursuant to ERISA Section 502(a)(9), 29 U.S.C. § 1132(a)(9), Plaintiffs ask this Court to grant appropriate class-wide relief, requiring the purchased annuity to be maintained under the Plan so as to restore the Transferee Class's panoply of ERISA protections and the uniform PBGC guarantee and better assure receipt by the Transferee Class of the amounts provided or to be

Excerpts from the Second Amended Complaint ("SAC")*	**Additions/Deletions To SAC****
appropriate equitable relief.	provided by the Prudential annuity. Plaintiffs request the Court grant Plaintiffs and Transferee Class members temporary, preliminary and permanent injunctive and other appropriate equitable relief.
120. As participants in the Plan, Plaintiffs and the Transferee Class had a right to ERISA's federal protections and the uniform guarantee provided by the PBGC.	
121. The Verizon Defendants were motivated by a desire to deprive the Transferee Class members of the right to continued participation in the ongoing Plan. This is a valuable right with which the Verizon Defendants interfered.	
122. The Verizon Defendants were motivated by a desire to deprive the Transferee Class members of the right to ERISA's many protections, including annual disclosures and ready access to the federal courts. This is a valuable right with which the Verizon Defendants interfered.	
123. The Verizon Defendants were motivated by a desire to deprive the Transferee Class members of the right to the PBGC's uniform financial guarantee and federal protection. This is a valuable right with which the Verizon Defendants interfered.	
124. By choosing to remove from the Plan the pensions of approximately 41,000 retirees and entering into the Verizon/Prudential annuity transaction without there being a standard termination of the Plan, Verizon, the Verizon EBC and VIMCO had the specific intent to violate ERISA, to discriminate against and expel Plaintiffs Lee and McPartlin and the Transferee Class from ongoing participation in the Plan and interfere with retirees' rights and protections accorded by the terms of the Plan, ERISA and the PBGC.	~~113.~~124. By choosing to remove from the Plan the pensions of approximately 41,000 retirees and entering into the Verizon/Prudential annuity transaction without there being a standard termination of the Plan, Verizon, the Verizon EBC and VIMCO had the specific intent to violate ERISA, to discriminate against and expel Plaintiffs Lee~~,~~ and McPartlin and the ~~putative class of retirees~~Transferee Class from ongoing participation in the Plan and interfere with retirees' rights and protections accorded by the terms of the Plan ~~and~~, ERISA and the PBGC.
132. When the Verizon/Prudential annuity transaction was consummated, there were no excess or surplus Plan assets to be utilized in the transaction. Section 8.5 of the Plan required that	~~122.~~132. When the Verizon/Prudential annuity transaction was consummated, there were no excess or surplus Plan assets to be utilized in the transaction. Section 8.5 of the Plan required that

Excerpts from the Second Amended Complaint ("SAC")*	**Additions/Deletions To SAC****
Plan assets be used for the "exclusive benefit" of participants to "provide benefits under the terms of the Plan" and pay "reasonable expenses" of administering the Plan. (App. 25). However, the Verizon Defendants permitted the Plan to excessively pay Prudential approximately $1 billion more than was actually necessary to fully support the approximately $7.4 billion in liabilities that were transferred to Prudential. (Docket 32, Waldeck Declaration, p. 5 of 12, ¶ 20). The extra $1 billion payment was applied towards expenses, not for administering the ongoing Plan, but for settlor expenses, including commissions and legal fees generated by many third parties, including consultants to the Verizon/Prudential annuity transaction, thus, violating Section 8.5 and the terms of the Master Trust. There was a breach of the general ERISA duty to use Plan monies to pay only reasonable expenses of Plan administration. Those expenses and fees should have been charged to Verizon's operating revenues, not charged to the Plan and Master Trust. All losses to the Plan should be restored.	Plan assets be used for the "exclusive benefit" of participants to "provide benefits under the terms of the Plan" and pay "reasonable expenses" of administering the Plan. (App. 25). However, the Verizon Defendants permitted the Plan to excessively pay Prudential approximately $1 billion more than was actually necessary to fully support the approximately $7.4 billion in liabilities that were transferred to Prudential. (Docket 32, Waldeck Declaration, p. 5 of 12, ¶ 20). The extra $1 billion payment was applied towards ~~excessive and unreasonable~~ expenses, not for administering the ~~on-going~~ongoing Plan, but for settlor expenses, including commissions and ~~excessive~~ legal fees generated by many third parties, including consultants to the Verizon/Prudential annuity transaction, thus, violating Section 8.5 and the terms of the Master Trust. There was a breach of the general ERISA duty to use Plan monies to pay only reasonable expenses of Plan administration. Those ~~unreasonable and excessive~~ expenses and fees should have been charged to Verizon's operating revenues, not charged to the Plan and Master Trust. All losses to the Plan should be restored.
133. It would have been in the best interests of all remaining Plan participants not transferred to Prudential (the "Non-Transferee Class") for the group annuity contract purchased by the Plan to have remained in the Plan as part of the Plan's portfolio of assets. The Verizon Defendants breached their fiduciary duty to the Non-Transferee Class when implementing the settlor's decision to purchase a single group annuity and remove that purchase from the ongoing Plan's financial portfolio.	
137. **Class Definition.** Plaintiffs bring this action on behalf of two classes and the Court has already entered an order for class certification, Docket 68:	~~126.~~137. **Class Definition.** Plaintiffs bring this action on behalf of two classes and the Court has already entered an order for class certification, Docket 68:

Excerpts from the Second Amended Complaint ("SAC")*	**Additions/Deletions To SAC****
Transferee Class: All retirees, plan participants and their beneficiaries of the Verizon Management Pension Plan (approximately 41,000 persons) with respect to whom Verizon and Prudential reached agreement to have the retirees' pensions removed from the Plan and be issued annuities by The Prudential Insurance Company of America; and Non-Transferee Class: All remaining Plan participants and beneficiaries not included in the group transferred to Prudential pursuant to the Verizon/Prudential annuity transaction that was consummated on December 10, 2012. The two classes are easily identifiable by both Verizon's business records and Prudential's business records.	Transferee Class ~~No. One~~: All retirees, plan participants and their beneficiaries of the Verizon Management Pension Plan (approximately 41,000 persons) with respect to whom Verizon and Prudential reached agreement to have the retirees' pensions removed from the Plan and be issued annuities by The Prudential Insurance Company of America; and Non-Transferee Class ~~No. Two~~: All remaining Plan participants and beneficiaries not included in the group transferred to Prudential pursuant to the Verizon/Prudential annuity transaction that was consummated on December 10, 2012. The ~~putative~~two classes are easily identifiable by both Verizon's business records and Prudential's business records.