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

WILLIAM LEE and JOANNE McPARTLIN Individually, and as Representatives of plan Participants and plan beneficiaries of the VERIZON MANAGEMENT PENSION PLAN,	§	
Plaintiffs,	§	
vs.	§	**CIVIL ACTION NO. 3:12-CV-04834-D**
VERIZON COMMUNICATIONS INC., VERIZON CORPORATE SERVICES GROUP INC, VERIZON EMPLOYEE BENEFITS COMMITTEE, VERIZON MANAGEMENT INVESTMENT CORP, VERIZON MANAGEMENT PENSION PLAN and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA	§	
Defendants.	§	

PLAINTIFFS' REPLY MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

Curtis L. Kennedy
Texas State Bar No. 11284320
Colorado State Bar No. 12351
Curtis L. Kennedy, Esq.
8405 East Princeton Avenue
Denver, Colorado 80237-1741
Tele: 303-770-0440
CurtisLKennedy@aol.com

Robert E. Goodman, Jr.
Texas State Bar No. 08158100
Kilgore & Kilgore, PLLC
3109 Carlisle
Dallas, Texas 75204
Tele: 214-379-0823
Fax: 214-379-0840
reg@kilgorelaw.com

COUNSEL FOR PLAINTIFFS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

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

WILLIAM LEE and JOANNE McPARTLIN Individually, and as Representatives of plan Participants and plan beneficiaries of the VERIZON MANAGEMENT PENSION PLAN,	§	
Plaintiffs,	§	
vs.	§	**CIVIL ACTION NO. 3:12-CV-04834-D**
VERIZON COMMUNICATIONS INC., VERIZON CORPORATE SERVICES GROUP INC, VERIZON EMPLOYEE BENEFITS COMMITTEE, VERIZON MANAGEMENT INVESTMENT CORP, VERIZON MANAGEMENT PENSION PLAN and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA	§	
Defendants.	§	

PLAINTIFFS' REPLY MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs William Lee and Joanne McPartlin, by and through their counsel, pursuant to the Court's November 29, 2012 order setting briefing schedule (Docket 12), submit this reply to Defendants' responses separately filed on December 5, 2012, both opposing Plaintiffs' application for temporary restraining order (Docket 6) and motion for preliminary injunction (Docket 18).

I.
SUMMARY OF ARGUMENT

On December 5, 2012, Defendant The Prudential Insurance Company of America ("Prudential") filed an opposition to Plaintiffs' request for immediate injunctive relief (Docket 28), essentially arguing that its commercial interests associated with the anticipated transaction with the Verizon Defendants should triumph over the legal rights, interests and expectations of Plaintiffs and the other retirees affected by the transaction, while only slightly and misleadingly addressing the merits of Plaintiffs' claims.

On December 5, 2012, the Verizon Defendants likewise filed an opposition to Plaintiffs' request for immediate injunctive relief (Docket 29), arguing that its commercial interests also trump any rights of affected retirees, but also that Plaintiffs' claims are not potentially meritorious, or even if meritorious, should not prevent the Verizon/Prudential transaction from being consummated.[1]

Both falsely insist that the transaction is one permitted by ERISA and make other fallacious arguments to support denial of injunctive relief. For reasons stated in Section II, the requested injunctive relief is appropriate.

---

[1] Prudential suggests that Plaintiffs could have acted earlier than they did in pursuing injunctive relief. Prudential response, n.1. However, Plaintiffs would have been acting in the dark, not in possession of the Definitive Purchase Agreement by which the transaction is being carried out (even in a redacted form) and likewise not aware of other pertinent aspects of the transaction disclosed by Verizon Defendants only after the making by Plaintiffs' counsel, on behalf of the Association of BellTel Retirees Inc., of a formal ERISA request for pertinent documents, upon announcement of the transaction. Verizon Defendants know this to be true, and so do not make an argument of unwarranted delay.

II.
ARGUMENT

A. Standard for Temporary Restraining Order and Preliminary Injunction.

Defendants' responses reflect the parties' agreement to the applicable standard for issuance of a temporary restraining order and a preliminary injunction to prevent Defendants from consummating the proposed Verizon/Prudential annuity transaction pending trial. Prudential response, pp. 3-4; Verizon Defendants' response, passim.

B. Plaintiffs Will Suffer Imminent, Irreparable Harm Not Subject to a Legal Remedy Absent a Temporary Restraining Order and Preliminary Injunction.

All Defendants agree that the Verizon/Prudential annuity transaction is imminent, although now telling the Court that the real deadline is December 17, 2012, not December 10, 2012. Prudential response, p.2; Verizon Defendants' response, p. 7. Remarkably, however, Defendants disagree with Plaintiffs' contention that, should the transaction go forward, the retirees will suffer an irreparable harm that cannot be remedied at law by payment of damages.

Prudential suggests that there is no harm whatsoever because affected retirees' monthly benefits will continue.[2] Prudential response, pp. 4, 6-12. It ignores Plaintiffs' related federal rights and remedies, however, on the basis that any such rights and remedies are associated with a hypothetical future injury. Id., p. 5. In fact, Plaintiffs and putative class members will immediately lose all ERISA and PBGC rights.[3]

---

[2] Prudential refers to its transaction with GM as involving similar circumstances, but in that transaction, as Prudential fails to admit, retirees were given a choice of taking a cash payment in lieu of future benefits, and 30% of them did so. See http://www.pionline.com/article/20121031/DAILYREG/121039968#. (Copy attached as Exhibit A).

[3] *Flanigan v. GE*, 242 F. 3d 78 (2d Cir. 2001), one of only two decisions cited by

Prudential likewise suggests that it is financially more secure than Verizon Defendants because the Verizon Management Pension Plan (the "Plan") is underfunded at this time. Id., p. 5. However, Prudential admits (Prudential response, p. 9, n. 4) that, at the very time the Verizon/Prudential annuity transaction is being consummated, any deficiency in funding under the Plan is being corrected, such that it will become overfunded, while failing to admit that margin between assets and liabilities of Prudential will actually be made more razor thin by the liabilities it is assuming in the transaction. See footnote 10, below.

All Defendants suggest that the transaction must go forward because any delay will frustrate their selfish financial expectations, but insist that doing so will not preclude subsequent relief for Plaintiffs and other retirees should the transaction be found illegal. Prudential response, pp. 5, 12-14; Verizon Defendants' response, pp. 29-31. At the same time, no Defendant indicates exactly how 41,000 retirees can be compensated for the significant change in the legal status quo and the retirees' unanticipated loss of numerous federal law protections. No Defendant cites any authority for the proposition that a damages remedy exists in preference to, or in substitution for, equitable relief in the form of an unwinding of the transaction, a remedy which Defendants would necessarily abhor and oppose. In fact, it is clear that no legal damages remedy exists given the state of the law under ERISA.[4] There is, indeed, no doubt, should this action go forward, that

---

Prudential involving pension plans, is distinguishable, as it involved a transfer of an ERISA-covered pension plan from one entity to another, not the removal of individuals from a pension plan. *Harley v. 3M,* 284 F. 3d 901 (8th Cir. 2002), is likewise obviously distinguishable as involving retention in an overfunded ERISA-covered pension plan.

[4] *Amschwand v. Spherion Corp.*, 505 F.3d 342 348 (5th Cir. 2007) (monetary relief limited to situations such as disgorgement of ill-gotten profits); *Central States, Southeast and Southwest Areas Health and Welfare Fund ex rel.*, Slip Copy, 2012 WL 1570981 at *3 (N.D.Tex., May 4, 2012) (Fitzwater, CJ).

Defendants will uniformly posit that ERISA does not allow the retirees to recover an award against the Defendants for monetary damages. Verizon actually abjures "conjecturing" any relief while noting that a request for reinstatement in the Plan is relief sought by former retirees under the Plan in another case in this District. Id., p. 30. However, no such relief of reinstatement would be possible here without unwinding the Verizon/Prudential annuity transaction. Indeed, Verizon Defendants reserve the right to oppose any relief. Verizon Defendants' response, p. 31. Both as to the availability of equitable relief other than an injunction and the availability of legal relief, Defendants should not be able to so argue out of both sides of their mouths.

Worse, indeed, Defendants effectively concede, even if there were a remedy, there is a risk that countless retirees, not residing within the Fifth Circuit, would, as soon as their pension participation in the Plan ends, no longer even have standing to sue under ERISA.[5] Prudential and Verizon Defendants argue that Plaintiff's and other retirees would at least have standing to bring a claim against Prudential based on certain provisions of ERISA, but that is incorrect, for reasons discussed below in Section II(C)(1), and such a remedy would not be one for violation of ERISA. Prudential further insists that retirees would not lack standing to make a claim of breach of fiduciary duty against Verizon Defendants, but without offering any authority other than in the Fifth Circuit (Prudential response, pp. 12-13. That leaves most of the 41,000 completely in the cold.

---

[5] *E.g. Wolf v. Coca-Cola*, 200 F.3d 1337, 1342 (11th Cir. 2000); *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463, 474 (10th Cir. 1990) (rejecting ERISA standing test that "but for actions" of defendant, plaintiff would have been a participant or beneficiary of an ERISA covered plan); *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1535 (10th Cir. 1993) (same); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 433 (4th Cir. 1986) (same).

Finally, no Defendant addresses the impossibility of computing the monetary value of the harm to be caused to Plaintiffs and putative class members by loss of ERISA and PBGC rights. Verizon Defendants actually attribute no harm, claiming that a change in legal status is not harm. Verizon Defendants' response, pp. 29-30. In making that claim, however, Verizon Defendants ignore the loss of rights carefully crafted within ERISA for pensioners and the heightened risks posed to Plaintiffs and other affected retirees by the loss of ERISA and PBGC protections.[6] Verizon Defendants, based on their own argument of no harm, necessarily agree that one simply cannot attribute a definite, reliable value to the loss of ERISA protections, including Department of Labor oversight, the PBGC uniform protection and ready access to the federal courts which Plaintiffs and other retirees would suffer if Defendants are allowed to consummate the Verizon/Prudential annuity transaction. Because any such loss could not be accurately calculated, injunctive relief on that additional ground is available and appropriate.[7]

1. <u>The Retirees Will Lose All Rights to Receive ERISA's Mandated Disclosures.</u>

Not one Defendant has addressed the retirees' major contention that Prudential, the recipient of all of the funds previously dedicated to payment of their pensions, will not be required to provide retirees with ERISA's mandated annual funding notices. Defendants argue that the retirees must simply have blind faith that everything will be fine, while losing all the rights information concerning the status of funding of their benefits that Congress mandates they

---

[6] Verizon Defendants' citation of *Schmidt v. Entertec Corp.*, 598 F. Supp. 1528 (S.D.N.Y. 1984) at page 30 of their response is inapposite. As acknowledged, that issue involved only financial rights. The rights under ERISA go well beyond that.

[7] *See Ross-Simons of Warwick, Inc., v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996).

regularly receive under ERISA. Defendant's omission to address this issue concedes its validity and its significance.

2. Prudential's Annuities Issued to the Retirees Will Not be Protected by the Uniform Federal PBGC Guaranty Scheme.

Once Prudential's annuity is issued, affected retirees will not be protected by the uniform federal PBGC guaranty scheme which has existed and been invoked on numerous occasions since the inception of ERISA. A suggestion by Prudential (Prudential response, pp. 10–11) to the contrary, Defendants have no basis for assuming the PBGC will fail and that retirees will be better off with Prudential; it is non-governmental organizations, including another particularly large insurance company, AIG, which failed, and governmental organizations which came to their rescue, in 2008, and the reverse will never be true. There is no effort within Defendants' responses to refute the contention that the affected retirees did not bargain for this scenario in the middle of their golden retirement years. Indeed, there is no opposition to Plaintiffs' contention that no retirees were either consulted or asked for their consent to the Verizon/Prudential annuity transaction despite a gestation process of two and one-half years.

3. Prudential's Annuities Issued to the Retirees, While Possibly Protected Against Prudential's Creditors, are Not Uniformly Protected Against the Retirees' Creditors.

In their responses, Defendants proclaim that the funds used to purchase the annuity from Prudential will be placed in a separate account supposedly shielded from Prudential's creditors. Prudential response, pp. 11-12. Tellingly, however, Defendants fail to discuss the fact that ERISA fully protects every retiree's defined benefit pension from attachment by his or her creditors, whether in bankruptcy or otherwise, but that every retiree's interest in the Prudential annuity will not be similarly protected. Specifically, ERISA's non–assignment provision

precludes pension benefits from being obtained by creditors in satisfaction of debts. ERISA Section 206(d)(1), 29 U.S.C. § 1054(d)(1); see also I.R.C Section 401(a)(13), 26 U.S.C. §401(a)(13); *Patterson v. Shumate*, 504 U.S. 753, 755, 112 S.Ct. 2242, 2245 (1992). As soon as the pension rights of retirees take the form of an allocated annuity, their interest in the annuity becomes subject to attachment or judgment by creditors based upon the vagaries of nonuniform state law. See table of state laws attached as Exhibit B.

C. There is a Substantial Likelihood that Plaintiffs Will Prevail in a Trial on the Merits.

Prudential and Verizon Defendants insist that there is no substantial likelihood of success on the merits of Plaintiffs' claims premised upon the false proposition that the Verizon/Prudential annuity transaction is one specifically contemplated under ERISA. Verizon Defendants' response makes additional arguments with respect to Plaintiffs' claims, and for reasons discussed hereinbelow, the additional arguments are also inadequate.

1. The Transaction Is Not One Contemplated and Permitted by ERISA

All Defendants argue that transfer of pension liabilities into an annuity is permitted under ERISA. In fact, however, as reflected in the very regulation invoked by Defendants, referred to by Verizon Defendants as the Annuitization Regulation, that is not the case. It speaks of annuitization upon termination of a plan or "upon separation or retirement of a participant." 29 C.F.R. 2509.95-1(c). As Verizon Defendants recognize, those are the only circumstances in which the regulation authorizes the purchase of an annuity in connection with an "ongoing plan" as opposed to termination of a plan. Verizon Defendants' response, pp. 11-13. Moreover, the regulation contemplates purchase of an annuity by a plan, not outside of a plan. Verizon Defendants acknowledges the significance of this fact when referring to the permissibility of a

transfer of liabilities "when a plan terminates or when the annuity contract is purchased by an ongoing plan" and by recognizing that, "in the case of an ongoing plan, annuities might be purchased for participants." Id., p. 12.

The purchase of an annuity is not being contemplated here either in connection with a termination of a plan or at the time of separation or retirement of retirees, or as an asset of a pension plan, as the regulation contemplates, but after retirees have separated or retired, while the Plan remains in existence and outside the pension plan at issue. As Verizon acknowledges (Verizon Defendants' response, p. 13), ERISA and applicable ERISA case law have not, in addressing transfer of pension plan obligations, addressed such circumstances, but only transfers of a pension plan to a different employer sponsor's qualified pension plan by merger, transfer or acquisition of pension plans. Accordingly, this is simply not a transaction validated by ERISA, as Defendants insist, and the issue is thus not whether Prudential was appropriately chosen as the insurer in connection with such an ERISA-approved transaction. Rather, the transaction is distinctive, and for the reasons indicated in Plaintiffs' earlier memorandum brief in support of their application for temporary restraining order and supplemental brief in support of the same application and their motion for preliminary injunction, is contrary to ERISA on the grounds stated in each of Plaintiffs' first three claims for relief. For the same reason, the standing to make a claim against Prudential supposedly preserved for retirees in connection with the transaction under the regulation and the Pension Annuitants Protection Act does not exist.

2. There is a Substantial Likelihood that Plaintiffs Will Prevail on Count One — Violation of ERISA Section 102(b), Failure to Provide Required Disclosure in SPDs.

For their Count One in the Complaint, Plaintiffs contend the Verizon EBC, the designated plan administrator, violated ERISA Section 102(b). This claim is based upon the

Verizon Defendants' failure to provide disclosure of the possibility of a transaction such as the Verizon/Prudential annuity transaction in the summary plan descriptions ("SPDs") for the Plan.

Verizon Defendants do not dispute that there has been absolutely no disclosure of the fact that Verizon retained the right to sever relations with retirees and remove their federally protected pensions from the Plan and transfer the obligations to an insurance company, not federally regulated and not provided uniform protection by the PBGC. Verizon Defendants' response, pp. 21-25.

Verizon Defendants argue, however, that it need not have provided notice of the possibility because that simply amounts to notice of possible amendment of the plan. Id., pp. 22-23. Verizon Defendants' reliance in that regard on *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993), however, is misplaced. That case was completely concerned with unprotected welfare benefits, not pensions, as in this case. Likewise, the Verizon Defendants' reliance on *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 428 (5th Cir. 2003) is to no avail. In *Martinez*, the question was whether and when a plan sponsor had to disclose an intended plan amendment to provide an enhanced retirement incentive, not an impairment to existing rights. Also distinguishable is *Fischer v. Philadelphia Electric Company*, 994 F. 2d 130, 135 (3d Cir, 1993), again involving an early retirement enhancement.

The issue in this case is the complete failure of the Verizon Defendants to comply with a clearly stated ERISA statutory mandate and DOL regulation to disclose the possibility of a loss of rights in connection with a pension plan. ERISA Section 102(b) requires 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. § 1022(b). The Department of Labor ("DOL") regulation promulgated under ERISA Section 102(b) further requires, in part, that any SPD contain a statement

> clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction 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. . .

29 C.F.R. Section 2520.102-3-(*l*). It is undisputable that prior to the October 17, 2012 public announcement of the contemplated Verizon/Prudential annuity transaction, the Verizon EBC never met ERISA's requirement to disclose in the Plan's SPDs all circumstances that Verizon, as plan sponsor, contemplated may result in Plaintiffs' and the putative class members' ineligibility for or loss of Verizon sponsored pension plan benefits.

Verizon Defendants claim that notice coincident with the Verizon/Prudential annuity transaction itself is adequate. Verizon Defendants response, p. 23. However, while they try (id., p. 24-25), such Defendants cannot properly belittle the undisputed fact that the retirees, by being uninformed, were harmed in that they lost opportunity to take a different course of action and even use his or her influence to cause a legal challenge so as to prevent such action against himself or herself and other retirees. **(App. 242-43, Lee Aff. ¶ 5; App. 247-48, McPartlin Aff. ¶ 5; App. 262, Jones Aff. ¶ 7)**. By being uninformed, each was harmed, above and beyond the loss of rights under ERISA by complete removal of pension benefits from the Planc, by being denied information as to the possible consequences of such removal and thereby losing an opportunity to take appropriate preventive action other than on emergency basis, including by lobbying and petitioning for a decision by Verizon Defendants not to enter into the

Verizon/Prudential annuity transaction or for an alternative of an actuarial cashing out of pension benefits in connection with such a transaction.

Likewise inadequate is Verizon Defendants' response is the suggestion that a simple reservation of rights was sufficient. Id., p. 23. If that was the case, ERISA Section 102(b) would be meaningless.

Finally, the most desperate argument of Verizon Defendants, that a reference to an annuity upon termination of the plan should have been understood as a reference to an annuity at any other time (id., pp. 23-24), much less one outside the Plan, is completely contrary to the requirement of Section 102(b) for disclosure of risks to retirees while a pension plan remains in effect.

The violation of ERISA Section 102(b) by the Verizon Defendants is undisputable. The appropriate relief under ERISA Section 502(a)(3)[8] is an injunction against the Verizon/Prudential annuity transaction due to the violation of ERISA Section 102(b), 29 U.S.C. § 1022(b), and the DOL regulation 29 C.F.R. § 2520.102-3-(*l*). This Court should estop Verizon Defendants from exercising undisclosed rights by enjoining the Verizon/Prudential annuity transaction.

Verizon Defendants, indeed, acknowledge, in specifically addressing the issue of harm to Plaintiffs necessary to justify such an estoppel against the enforcement of undisclosed rights, that once the retirees' pensions are removed from the Plan, the monthly payments to be made by

---

[8] ERISA Section 502(a)(3) allows a participant to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3).

Prudential are no longer payments under an ERISA pension plan subject to all ERISA protections and PBGC guaranty, but a legally lesser protected form of payment. Verizon Defendants' response, p. 25 ("outside ERISA's regulatory regime.") The issue is, thus, as Verizon Defendants themselves recognize, not that the monthly payments will or will not remain the same, the issue is that all federal protections accorded to payments under pensions are ended, and for reasons discussed in Section II(B), that Plaintiffs and other affected retirees will be less secure than they are in the Plan. Thus, there is an unquestionable denial or loss of benefits resulting from the Verizon/Prudential annuity transaction, a circumstance not previously disclosed as required by ERISA Section 102(b) and DOL regulation 29 C.F.R. § 2520.102-3(*l*), and Plaintiffs accordingly have a substantial likelihood of success on their first claim for relief.

3. <u>There is a Substantial Likelihood that Plaintiffs Will Prevail on Count Two — Violation of ERISA Section 404(a)(1), Breach of ERISA Fiduciary Duties.</u>

The Verizon Defendants' primary defense to Plaintiffs' claim that ERISA Section 401(a)(1) fiduciary duties have been and will be violated by the Verizon/Prudential annuity transaction is that the ERISA regulation referred to in Section II(C)(1), contemplates a transfer of pension benefit obligations to an insurance company as part of an annuity transaction. Verizon's response, pp. 11-13. However, as noted, in Section II(c)(1), the regulation explicitly recognizes the issuance of insurance annuities only at the beginning of a person's retirement or when the plan is terminated. 60 Fed. Reg. 12328. It is plainly not the intent of either the regulation or the interpretive bulletin explicating it to authorize allow plan sponsors to freely remove a pensioner from an ongoing pension plan at any time years after retirement, solely at the whim of the plan

sponsor. That is the essence of Plaintiffs' Second Claim for Relief, not addressed as such by Verizon Defendants.

Furthermore, contrary to Verizon Defendants' arguments, their agreement to the Verizon/Prudential annuity transaction is one made in a fiduciary capacity, as specifically recognized by the DOL regulation and interpretive bulletin. "The selection of an annuity provider under these circumstances is a fiduciary decision governed by part 4 of title 1 of ERISA." 60 Fed. Reg. 12328, discussing 29 C.F.R. § 2510.3-3(d)(2)(ii).

While it is true that the decision by a plan sponsor to fully terminate a pension plan is not a fiduciary duty, *Beck v. PACE International Union*, 551 U.S 96, 127 S.Ct. 2310 (2007), there is no case law similarly declaring that a decision by a plan sponsor to expel retirees from an ongoing pension plan does not implicate fiduciary duties. *Beck*'s holding is not dispostive here because it is limited to declaring that an "employer's decision whether to *terminate an ERISA plan* is a settlor function immune from ERISA's fiduciary obligations." *Id.*, 551 U.S. at 101, 127 S.Ct. at 2316. (Emphasis added). (citations omitted).

The appellate court ruling in *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *aff'd on other grounds*, 515 U.S. 489, 116 S.Ct. 1065 (1996), remains particularly instructive. Contrary to Verizon Defendants' portrayal of *Howe*, the case involved the transfer of retirees' welfare benefits and *pension* benefits, and is, thus, not overruled by subsequent case law declaring employer are generally free to do as they please with welfare benefits.[9]

---

[9] *Sengpiel v. B.F. Goodrich Company*, 156 F.3d 660 (6th Cir. 1998) declared that "BFG's decision to spin off its tire division and to transfer a share of its welfare benefit liabilities approximately equivalent to the portion of its business devoted to tires does not constitute discretionary plan administration according to the plan's terms or management of its assets." *Id.*, at 666. The case was not concerned about changes to pension benefits.

a. The Governing Plan Documents Allowed Only Transfers of Assets and Liabilities to an IRS Qualified pension plan, Not a Transfer From the Federally Protected Pension Plan Into an Insurance Company.

No federal court has ever interpreted ERISA as allowing a plan sponsor to selectively remove pensioners from an *ongoing* pension plan and take them completely out of ERISA's protective grid. The Verizon Defendants are jettisoning 41,000 retirees' federally protected accrued pension benefits in exchange for state law governed insurance annuities, a situation that is unprecedented when there is not a full plan *termination*.

The Verizon/Prudential annuity transaction disregards the pensioners' reasonable expectations that they would enjoy all federal protections for so long as the Plan was ongoing or until all their accrued benefits were distributed directly into the control of the pensioners. A pension plan to pension plan transfer would have preserved all such protections, but that is not the situation here. Therefore, there has been and will be a violation of the terms of Section 8.5 of the Plan and its counterpart found in Section 2 of the governing master trust agreement referred to in Plaintiffs' supplemental brief in support of their application for temporary restraining order and motion for preliminary injunction (Docket 19). **(App. 25, 294)**.

Finally, the contemplated transaction is being carried out without the consent of Plaintiffs and putative class members. The hastily-concocted Plan amendment to facilitate the Verizon/Prudential annuity transaction violates the requirement that Plaintiffs' consent be obtained, because of their grandfathered rights under Article 15.1(c) of the predecessor NYNEX Management Pension Plan, also referred to in Plaintiff's prior supplemental brief. Defendants' consummation of the Verizon/Prudential annuity transaction, occurring long after Plaintiffs' respective retirements, violates Plaintiffs' grandfathered contractual rights that their consent must

be obtained in order for there to be a *post hoc* retirement change from receiving federally protected pensions to receiving state law-governed insurance annuities. Verizon Defendants, it should be noted, do not take issue with Plaintiffs' contention that their grandfathered rights cannot be unilaterally overridden at the whim of Defendants. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (citing *Bryant v. International Fruit Products Co., Inc.*, 793 F.2d 118, 123 (6th Cir.) ("An agreement that provides that an act can occur in no event and under no circumstances cannot be converted into one that permits the act by a series of amendments that first deletes the reference to the prohibition and then adds a provision permitting the forbidden act."), *cert. denied*, 479 U.S. 986, 107 S.Ct. 576, 93)).

The Court must rule the contemplated transaction will violate ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), and the appropriateness of that ruling satisfies the requirement as to Plaintiffs' Second Claim for Relief of a substantial likelihood of success.

b. Verizon Defendants Violated the ERISA Fiduciary Duty of Loyalty and Duty to Act in the Best Interests of the Retirees.

Under ERISA, the Verizon EBC, VIMCO and Plan administrators have a duty of loyalty to Plaintiffs and Class members, a duty that has been completely flouted. Here, the issue is not only the utter failure of the fiduciaries and administrators to take into account the actual wishes of the very retirees they are charged with protecting. Not only does the transfer of the retirees' pensions out of the Plan without their consent violate ERISA Section 404(a)(1)(A) duties, it also violates ERISA Section 404(a)(1)(C) duties to diversify the investments of an ongoing pension plan. Verizon Defendants do not dispute this or even address the issue.

Verizon plans to remove over $7.5 billion of Plan assets and give it to Prudential. The Verizon Defendants do not dispute Plaintiffs' contention that Prudential is not too big to fail.[10] If the current economic situation has taught retirees anything, it is that the funded status of a behemoth insurer can change in an instant and cause devastating economic harm for the whole country. One cannot overlook the sudden downfall of not only AIG, but Lehman Brothers and Bear Stearns, other large financial entities in existence for decades.

Verizon Defendants' also fail to explain why they are taking advantage of the group of 41,000 retirees least able to defend themselves, unrepresented management retirees, and not also nonmanagement retirees or management retirees formerly represented by unions. Clearly, Verizon Defendants are not uniformly protecting the interests of all retirees who are participants in the Plan. There is no just reason for Plan fiduciaries to allow abandonment of all federal rights and protections afforded to 41,000 retirees, while maintaining the same federal rights for more than 60,000 retirees and active workers allowed to stay within the Plan. Verizon Defendants are not relinquishing their ERISA statutory duties and assigning them to another equally bound set of ERISA fiduciaries. They are placing the retirees under the control of an entity that will not have to answer to ERISA's fiduciary duties standards, minimum funding standards or disclosure requirements.

For all the reasons stated, Verizon Defendants' conduct towards Plaintiffs and the putative class members, all carried out without the retirees' consent and contrary to the specific

---

[10] Neither Prudential nor the Verizon Defendants dispute any of the salient facts about Prudential's portfolio discussed in Plaintiffs' supplemental brief, p. 22, n. 19 (Docket 19). Prudential's ability to withstand a liquidity crisis or another economic downturn is not at all certain. A Prudential insolvency could create major disruptions in payments flowing to the retirees.

requirements of the Plan, has and will violate ERISA's fiduciary duty of loyalty and requirement to act in the best interests of the retirees, in accordance with ERISA Section 404(a)(1)(A) and ERISA Section 404(a)(1)(C). Because that is the case, Plaintiffs have established a likelihood of success on the merits of their Second Claim for Relief for violation of ERISA fiduciary duties.

4. There is a Substantial Likelihood that Plaintiffs Will Prevail on Count Three — Violation of ERISA Section 510, Interference With Protected Rights.

For their Count Three in the Complaint, Plaintiffs claim that the Verizon/Prudential annuity transaction discriminates against 41,000 retirees and interferes with their rights under the Plan and under ERISA in violation of ERISA Section 510, 29 U.S.C. § 1140. The gravamen of Plaintiff's claim is that the Verizon Defendants have the specific intent to violate ERISA by discriminating against and expelling 41,000 retirees from and ongoing pension plan, removing all of their federal law protections and exposing them to the uncertainties of nonuniform state law, a blow-back to before 1974 when ERISA was enacted. Under section 510, the asserted discrimination is illegal if it is motivated by a desire to deprive an employee or retiree of an existing right to which he may become entitled. *McGann v. H & H Music*, 946 F.2d 401, 408 (5th Cir.1991), *cert. denied sub nom., Greenberg v. H & H Music Co.*, 506 U.S. 981, 113 S.Ct. 482 (1992) (finding no ERISA Section 510 violation where the employer terminated AIDS coverage for *all* employees, rather than for just one employee).

Verizon Defendants claim that Section 510 cannot apply to a plan amendment. Verizon Defendants' response, pp. 25-26. However, Plaintiffs are not claiming injury from a plan amendment, but the Verizon/Prudential annuity transaction, which the amendment here -- retroactively authorizing the transaction -- simply purports to permit but does not mandate it. Moreover, as indicated in Section III(B)(2), a choice of an annuity provider is a fiduciary

decision, such that, again, the amendment -- even if itself a settler function, as Verizon Defendants argue (Id., p. 26) -- cannot protect against a Section 510 claim on the basis that the related decision as to selection of the participants in the annuity is a settlor function.

Accordingly, Verizon Defendants cannot use their October 17, 2012 Plan amendment as a shield to insulate their clearly expressed intent to deprive Plaintiffs and putative class members of a panoply of existing federal rights to which they have been entitled. Unlike *McGann*, which concerned a welfare benefit "to which an employee may have conceivably become entitled," the situation here involves the cancelling of existing, enforceable obligations assumed by Verizon Communications, Inc., the employer and Plan sponsor.

Moreover, with respect to Verizon Defendants' argument that there is no possibility of demonstrating a specific intent to interfere with retirees' rights (Id., pp. 26-27), Verizon Defendants do not advance any legitimate, nondiscriminatory reason for dividing the retirees into more and less protected groups and maintaining full protection for the group of retirees formerly protected by unions or employed by MCI Corporation. The population of retirees being shifted into the Prudential annuity excludes both formerly union represented retirees and those persons who formerly worked for MCI Corporation. There is no readily apparent business justification to expel one group of retirees while protecting another group of retirees. Verizons' offered reasons (Id., pp. 27-28) amount to no more than its choice to manage risk as to the least defended group of retirees. No explanation whatsoever is given for the choice of the least defended group. The only stated reason the discrimination is occurring is for "administrative reasons." (Verizon Defendants' App. at p. 30, ¶ 7). The decision to transfer Plaintiffs and the particular other putative class members out of an ongoing pension plan accordingly reflects some invidious intent and certainly thwarts Congress's aim to safeguard equally the rights of all Plan

participants. *Heimann v. National Elevator Industry Pension Fund*, 187 F.3d 493, 508 (5th Cir. 1999). That consideration alone supports a determination of specific intent to treat the retirees affected by the Verizon/Prudential annuity transaction less favorably. Accordingly, the Verizon/Prudential annuity transaction is allowed to go forward, Verizon, the Verizon EBC and VIMCO will have, violated ERISA Section 510, 29 U.S.C. § 1140, and Plaintiffs have satisfied the substantial likelihood of success requirement as to their Third Claim for Relief.

5. <u>There is a Substantial Likelihood that Plaintiffs Will Prevail on Count Four — Claim for Appropriate Equitable Relief</u>.

For their Count Four in the Complaint, Plaintiffs request, pursuant to ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3), appropriate equitable relief, including temporary, preliminary and permanent injunctive relief, ordering Defendants to maintain the status quo and not remove Plaintiffs and putative class members from continued participation in the Plan. In the alternative, Plaintiffs request an order requiring Defendants to give Plaintiffs and each putative class member an elective choice of either: (1) keeping his pension benefit in the Plan; (2) receiving a lump sum distribution of Plan pension benefits; or (3) selecting Prudential or some other issuer of an annuity equivalent to his or her existing pension benefits under the Plan.

In a single paragraph, the Verizon Defendants defend against Count Four by merely arguing a claim under Section 502(a)(2) and (a)(3) cannot exist as a freestanding claim. Verizon Defendants' response, p. 28. The Fifth Circuit, however, has observed that "[u]nlike four of § 502's six subsections, § 502(a)(3) is not focused on specific areas or types of defendants."

Heimann, 187 F.3d at 504-05 (citations omitted). Plaintiffs have asserted Count Four seeking "appropriate equitable relief" for the purpose of redressing the violations and enforcing the provisions of ERISA and the Plan terms alleged violated in Counts One, Two and Three.

Curiously, Prudential extols the virtues of its accomplishment last month of General Motors Corporation's transfer of retirees into Prudential issued insurance annuities. Prudential response, p. 8; Prudential App. at p. 251, ¶ 12. However, as noted, Prudential is unwilling to reveal the fact that the transaction not only involved a full termination of GM's pension plan, but that there was choice extended to and accepted by 30% of retirees to receive an immediate full distribution of their accrued pension benefits. See footnote 2, above.

In all fairness to the Verizon management retirees, since the Verizon/Prudential annuity transaction involves such an unexpected loss of federal protections, the transaction, if allowed to proceed, should be modified to include an option for the Plaintiffs and putative class of retirees to make the same lump sum distribution election as Prudential extended to General Motors retirees. But, that will not happen unless the Court grants Plaintiffs and other Verizon management retirees appropriate equitable relief.

D. Injunctive Relief Will Not Disserve Public Policy or the Public Interest

Prudential argues that the public policy and public interest element of the test for injunctive relief will be satisfied because its pension annuities represents a better alternative than pension plans for all retirees, not only Verizon retirees, relying upon underfunding of some pension plans and alleged uncertainties about the PBGC. Prudential response, pp. 23-24. For reasons indicated above, the factual premise as to the funding status of the Plan and risk of failure of the PBGC are inaccurate, and the conclusion that the public interest would be served by the transaction in question and similar transactions is thus inaccurate. Indeed, Prudential

highlights the purely selfish motives of employers in contemplating transactions such as that challenged in this action by describing the motive as one of risk management. Id., pp. 23-24. This Court should not invite wholesale stripping of ERISA and PBGC rights by the Verizon/Prudential transaction or other similar transactions for the sake of employer risk management, much less insurance company profits.

Verizon Defendants acknowledge the last element required for injunctive relief, but, as if ERISA never been enacted, claims that its contract rights with Prudential supersede any rights of Plaintiffs and other affected retirees under ERISA as a matter of public interest. Verizon Defendants' response, p. 40. That is turning reality on its head. Indeed, Verizon Defendants actually contradict Prudential's argument that annuity transactions of the type at issue serve the public interest, by speculating that more transactions will occur when Prudential has expressed the certainty that such transactions will occur. Id. If Defendants themselves cannot agree on the consistency of their own transaction with the public interest, this Court can hardly find that the public interest is being disserved when Plaintiffs have established a wholesale violation of ERISA if the transaction proceeds.

WHEREFORE, Plaintiffs William Lee and Joanne McPartlin, individually and on behalf of a putative class of approximately 41,000 similarly situated retirees, request the Court to enter an order as follows:

Defendants are hereby restrained and enjoined as follows:

> Defendants are restrained from consummating the terms of the ADefinitive Purchase Agreement@ dated October 17, 2012 and restrained from removing the pensions of Plaintiffs and other retirees from the Verizon Management Pension Plan from the date of this order until further order of this Court.

Plaintiffs request such other and further relief as the Court deems just and appropriate.

DATED this 6th day of December, 2012.

Respectfully submitted,

s/ Curtis L. Kennedy
Texas State Bar No. 11284320
Colorado State Bar No. 12351
Curtis L. Kennedy, Esq.
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Tele: 303-770-0440
CurtisLKennedy@aol.com

s/ Robert E. Goodman, Jr.
Texas State Bar No. 08158100
Robert E. Goodman, Jr., Esq.
KILGORE & KILGORE LAWYERS
3109 Carlisle Street
Dallas, Texas 75204
Tele: 214-969-9099
Fax: 214-953-0133
reg@kilgorelaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of December, 2012, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and causing a copy to be emailed to Defendants' counsel as follows:

Thomas L. Cubbage III, Esq. Jeffrey G. Huvelle, Esq. Christian J. Pistilli, Esq. COVINGTON & BURLING LLP 1201 Pennsylvania Avenue, NW Washington, DC 20004-2401 Tele: 202-662-5526 tcubbage@cov.com jhuvelle@cov.com cpistilli@cov.com *Counsel for Verizon Defendants* Joanne R. Bush, Esq. Matthew D. Orwig, Esq. JONES DAY 2727 North Harwood Street Dallas, TX 75201.1515 Tele: 214-220-3939 jrbush@jonesday.com morwig@jonesday.com	Gayla C. Crain, Esq. SPENCER CRAIN CUBBAGE HEALY & McNAMARA, pllc 1201 Elm Street, Suite 4100 Dallas, Texas 75270 Tele: 214- 290-0000 GCrain@spencercrain.com *Counsel for Prudential* Gregory F. Jacob, Esq. Jeffrey Kohn, Esq. Robert N. Eccles, Esq. O'MELVENY & MYERS LLP 1625 Eye Street, N.W. Washington, DC 20006 Tele : 202- 383-5300 gjacob@omm.com jkohn@omm.com beccles@omm.com *Counsel for Prudential*

s/ Curtis L. Kennedy