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

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

VERIZON DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF UNDER ERISA OR FOR JUDGMENT ON THE PLEADINGS

Defendants Verizon Communications Inc., Verizon Corporate Services Group Inc., Verizon Employee Benefits Committee, Verizon Investment Management Corp., and Verizon Management Pension Plan (collectively, the "Verizon Defendants") hereby move to dismiss Plaintiffs' Verified 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), or, in the alternative, for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The grounds for the motion are set forth in the Verizon Defendants' Memorandum of Law, which accompanies this motion.

Respectfully submitted,

<u>/s/ Thomas L. Cubbage III</u>
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: January 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 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

Gayla C. Crain
Spencer Crain Cubbage Healy & McNamara, pllc
1201 Elm Street, Suite 4100
Dallas, TX 75270
GCrain@spencercrain.com

Gregory F. Jacob
Jeffrey I. Kohn
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, DC 20006
gjacob@omm.com
jkohn@omm.com

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

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

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

VERIZON DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS OR FOR JUDGMENT ON THE PLEADINGS

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 Verizon Defendants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

Defendants Verizon Communications Inc. (“Verizon”), Verizon Investment Management Corp. (“VIMCO”), Verizon Corporate Services Group Inc., Verizon Employee Benefits Committee (the “VEBC”), and the Verizon Management Pension Plan (the “Plan” and, collectively, the “Verizon Defendants”) hereby submit this motion to dismiss pursuant to Federal Rule of Procedure 12(b)(6) or, in the alternative, for judgment on the pleadings pursuant to Federal Rule of Procedure 12(c).

INTRODUCTION

On December 10, 2012, the Plan purchased a group annuity contract from Prudential Insurance Company of America (“Prudential”). As part of the transaction, the Plan transferred assets worth more than $8 billion to Prudential, which irrevocably assumed the obligation to pay annuity benefits to plaintiffs and approximately 41,000 other Verizon management retirees who were participants in the Plan (the “Prudential annuity transaction”). Pursuant to the terms of the annuity contract and an October 17, 2012 Plan amendment, the amount of each affected retiree’s annuity benefit is the same as the amount of the retiree’s pension benefit before the transaction.

Plaintiffs filed their Complaint on November 27, 2012, alleging that the Prudential annuity transaction violated various provisions of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), 29 U.S.C. § 1002, *et seq*. The next day, plaintiffs filed an application for a temporary restraining order, seeking to prevent the planned December 10, 2012 closing of the Prudential annuity transaction. At plaintiffs’ request, their application was subsequently 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.” Dec. 7 Order (Dkt 44), at 14. Plaintiffs did not appeal this Court's order to the Fifth Circuit, and the Prudential annuity transaction closed as scheduled on December 10, 2012.

For substantially the same reasons that the Court denied plaintiffs' request for a preliminary injunction, their Complaint fails to state a claim for which relief may be granted and should be dismissed as a matter of law.

BACKGROUND

On October 17, 2012, Prudential and two of the Verizon Defendants entered into a Definitive Purchase Agreement (the "DPA" or "Agreement") committing the Plan to purchase a single premium group annuity contract (the "Annuity Contract") from Prudential to settle approximately $7.5 billion of pension liabilities of the Plan. *See* Compl. ¶ 1 & Pls. Appx. 212.[1] Upon the December 10, 2012 closing of the Prudential annuity transaction and the issuance of the Annuity Contract, Prudential irrevocably assumed the obligation to make future annuity payments to approximately 41,000 Verizon management retirees who began receiving pension payments from the Plan prior to January 1, 2010. *See id.* Plaintiffs "do not contend that the annuity contract will decrease the amount of [their] benefit payments or the[ir] right to payments." Dec. 7 Order (Dkt. 44), at 3 n.5.

Under the terms of the DPA and the Annuity Contract, the assets transferred to Prudential were placed in a "dedicated, non-comingled separate account" used to pay the annuities due under the Annuity Contract. Pls. Appx. 80, 92. This "separate account" structure specially negotiated with Prudential provides substantial, additional protections for plaintiffs' benefits, over and above the protections generally provided under state insurance law and by state guaranty associations. Under the DPA, the separate account (i) may hold only assets supporting

[1] Pages 1 through 281 of Plaintiffs' "Appendix to Verified Complaint" (hereinafter "Pls. Appx.") were attached to and incorporated by reference into Plaintiffs' Complaint.

the payment of Prudential's obligations under the Annuity Contract, and (ii) must be invested primarily in investment grade fixed-income securities. Pls. Appx. 141, 145. "[N]one of the assets allocated to the" separate account "will be chargeable with liabilities arising out of any other business of Prudential." Pls. Appx. 145. In other words, the assets in the separate account may not be used to satisfy any other obligations of Prudential, even in the event of Prudential's bankruptcy or dissolution. Moreover, in the unlikely event that the assets in the separate account prove to be insufficient, the Agreement requires Prudential to satisfy its payment obligations under the Annuity Contract out of its general account. Pls. Appx. 144.

On October 17, 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 the annuity transaction contemplated by the Agreement. *See* Pls. Appx. 54-59. The amendment, which became effective on December 7, 2012, 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 (whether paid to the Designated Participant or his beneficiary, survivor or alternate payee), *in the same form that was in effect under the Plan immediately before the annuity purchase*, including any beneficiary designation, survivor benefit, and qualified domestic relations order.
>
> (iii) . . . . The terms of the annuity contract shall provide that the benefits are legally enforceable at the sole choice of the individual against the insurance company issuing the contract.

[2] "Designated Participant[s]" generally include all Plan participants who retired before January 1, 2010, and are currently receiving an annuity benefit from the Plan, except certain retirees of MCI, Inc. and former union-represented employees. *See* Pls. Appx. 61-62.

> (iv) After the annuity purchase described in this Section 8.3(b), *the Plan shall have no further obligation to make any payment with respect to any pension benefit of a Designated Participant*. . . .

Pls. Appx. 60-62 (emphasis added).

Shortly after the DPA was executed, in October 2012, Verizon sent plaintiffs and other affected Plan participants a notice informing them of the annuity transaction. *See, e.g.*, Pls. Appx. 251-59 (copy of the notice as received by plaintiff McPartlin).

STANDARD OF REVIEW

"A motion brought pursuant to Rule 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts. The standard for deciding a motion under Rule 12(c) is the same as the one for deciding a motion to dismiss under Rule 12(b)(6)." *Kummerle v. EMJ Corp.*, No. 3:11–CV–2839–D, 2012 WL 2995065, at *2 (N.D. Tex. July 23, 2012) (internal citations, brackets, and quotation marks omitted) (Fitzwater, C.J.).

In deciding a Rule 12(b)(6) motion, the court must "evaluate[] the sufficiency of plaintiffs' [] complaint by 'accept[ing] all well-pleaded facts as true.'" *Paragon Office Servs., LLC v. UnitedHealthcare Ins. Co., Inc.*, No. 3:11–CV–2205–D, 2012 WL 5868249, at *1 (N.D. Tex. Nov. 20, 2012) (Fitzwater, C.J.) (citations omitted) (third alteration in original). To survive a motion to dismiss, "plaintiffs must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*; *see also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level[.]").

"In deciding a motion to dismiss the court may consider documents attached to or incorporated in the complaint and matters of which judicial notice may be taken." *Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 379 (5th Cir. 2003).

ARGUMENT

Plaintiffs assert that the Prudential annuity transaction violated ERISA's fiduciary duty requirements, disclosure obligations and non-discrimination provision, and seek "equitable relief" for those purported violations. For the following reasons, each of their four claims for relief fails to state a claim upon which relief can be granted.

First, plaintiffs assert that the Prudential annuity transaction violated ERISA's fiduciary duty requirements, including the requirement to act in accordance with plan documents. This claim fails, among other reasons, because (i) the decision to enter into the transaction was a business or "settlor" decision that does not implicate ERISA's fiduciary duty provisions, and (ii) no Plan terms prohibited the Prudential annuity transaction or required that Plan participants consent to the transaction.

Second, plaintiffs claim that the transaction violated ERISA's summary plan description ("SPD") disclosure rules, which generally require SPDs to disclose plan provisions that may result in a loss or reduction of benefits. These allegations fail to state a claim, among other reasons, because (i) the Prudential annuity transaction did not result in any loss or reduction of benefits to plaintiffs, and (ii) the SPD disclosure rules require only the disclosure of *existing* Plan terms, not possible future Plan amendments, such as the October 17, 2012 Plan amendment at issue here.

Third, plaintiffs allege that the transaction violated ERISA's anti-discrimination provision. This claim fails, among other reasons, because (i) plaintiffs' rights to future benefits were not affected by the Prudential annuity transaction, (ii) plaintiffs have failed to plead sufficient facts to give rise to a plausible inference of actionable discrimination, and (iii) the settlor decision to adopt a plan amendment is not actionable under ERISA's anti-discrimination provision.

Finally, plaintiffs assert a claim for "equitable relief." ERISA's remedial provisions, however, do not authorize equitable relief "at large," but only for the purpose of remedying a violation of ERISA or plan terms. Because none of plaintiffs' substantive claims can withstand a motion to dismiss, their free-standing claim for equitable relief also fails to state a claim.

I. <u>The Complaint (Count II) Fails To State A Breach Of Fiduciary Duty Claim.</u>

Count II alleges that the Verizon Defendants breached ERISA fiduciary duties. This claim fails as a matter of law. *See generally* Dec. 7 Order (Dkt. 44), at 7-11.

Plaintiffs acknowledge that both ERISA and the Plan permit Verizon to terminate its obligation to pay the pension benefits of putative class members and to transfer those obligations to an insurance company. *E.g.*, Compl. ¶¶ 33 n.5, 52. Having recognized that Verizon had the right to transfer retirees' benefits to an insurance company, plaintiffs are left to complain about the *manner* in which Verizon did so. Whether the transfer to an insurance company occurs by termination or (as here) by an annuity transaction, the result for retirees is the same. In both cases, their benefits and the post-transfer procedural protections available to them are identical. Because the Verizon Defendants undisputedly could have transferred the obligation to pay plaintiffs' benefits to Prudential as part of a plan termination, there is no merit to plaintiffs' argument that Verizon breached its fiduciary duties by instead doing so through an annuity purchase.

A. The Prudential Annuity Transaction Fully Complied With ERISA And All Applicable Regulations.

In enacting ERISA, Congress was careful not to "mandate what kind of benefits employers must provide if they choose to have" a retirement plan. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Congress recognized that providing employers with the freedom to design their own pension plans was "vital" to the willingness of employers to provide such plans, and therefore sought to preserve "flexibility in the design and operation of . . . pension programs." H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647.

A key feature of ERISA's voluntary retirement system is the employer's ability to leave it. ERISA sets forth several means by which an employer may choose to remove liabilities from a pension plan and specifies protections for participants in each instance. For example, an employer may terminate a pension plan entirely. 29 U.S.C. § 1341 (plan terminations). Or an employer may merge a plan with another plan or spin off a portion of a plan into a separate plan. 29 U.S.C. § 1058; *see* 26 C.F.R. § 1.414(*l*)-1 (plan mergers and spin-offs). Finally, and most relevant here, Department of Labor regulations specifically authorize the transfer of pension benefit obligations to an insurance company as part of an annuity transaction. *See* 29 C.F.R. § 2510.3-3(d)(2)(ii) ("Annuitization Regulation").

Under the Annuitization Regulation, an individual's benefit ceases to be covered by an ERISA-governed plan if:

> (1) the entire pension benefit is "fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State";
>
> (2) the individual's rights to the benefit "are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization"; and

> (3) 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). The Department of Labor has observed that this regulation "explicitly recognize[s] a transfer of liability from the plan when such an annuity is purchased from an insurance company licensed to do business in a State." 60 Fed. Reg. 12328, 12328 (Mar. 6, 1995). Furthermore, the transfer of liabilities may occur either upon termination or when the annuity contract is purchased by "an ongoing plan." *Id.* And, contrary to plaintiffs' suggestion, nothing in the regulation limits such transfers to the context of a plan termination or the moment in time when an employee separates from service and commences receiving a benefit. *See* 29 C.F.R. § 2510.3-3(d)(2)(ii).

Verizon complied with the three-step procedure set out in the Annuitization Regulation, and plaintiffs do not contend otherwise. The October 17 Plan amendment authorizing the transaction required (i) the Plan to purchase an annuity contract from an insurance company under which the insurance company would "fully guaranty" the payment of the pension benefits of designated participants, (ii) the contract to specify that "the benefits are legally enforceable by the sole choice of the individual against the insurance company issuing the contract," and (iii) the insurance company to issue annuity certificates describing participants' rights. Pls. Appx. 61-62. The Annuity Contract issued by Prudential follows these requirements, *id.* at 143, 147, 155-56, and the transfer of pension liabilities to Prudential thus fully complied with governing regulations pertaining to the annuitization of pension benefit obligations.

Verizon's undisputed compliance with the specific requirements governing the annuitization of benefit obligations precludes plaintiffs' claim that the decision to transfer their benefits to an insurance company violated ERISA's fiduciary standards. This conclusion is consistent with the decisions of courts that have considered the similar question of whether pension benefits can be transferred from one plan to another. ERISA permits a pension plan to transfer or "spin off" some of its benefit obligations to another plan (including a plan with a different sponsor), and regulations specify the requirements for doing so. 29 U.S.C. § 1058; *see* 26 C.F.R. § 1.414(*l*)-1; *see also Koch Indus., Inc. v. Sun Co.*, 918 F.2d 1203, 1206-07 (5th Cir. 1990). When those rules are followed, courts have consistently rejected claims that the transfer of benefit obligations violates other ERISA duties. *See Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1190 (3d Cir. 1993) ("compliance with ERISA's provisions for the funding of merged, transferred or acquired pension plans as set forth in 29 U.S.C. § 1058 precludes a finding that a fiduciary breach had occurred"); *see also Bigger v. Am. Commercial Lines*, 862 F.2d 1341, 1344 (8th Cir. 1988) ("general standard of fiduciary duty [does not] supersede[] and impose[] a higher standard than" ERISA's specific requirements for a plan merger or spin-off). For the same reason, plaintiffs' fiduciary breach claims here are without merit: the Verizon Defendants complied with the Department of Labor regulations governing annuity transactions, and ERISA requires nothing more.

B. Verizon's Decision To Enter Into The Annuity Transaction Was Not Made In A Fiduciary Capacity.

Plaintiffs assert that their "inclusion . . . in the Verizon/Prudential annuity transaction is not a Plan design function" but "an exercise of a fiduciary function." Compl. ¶ 82. This is incorrect. As this Court has recognized, "the decision to amend a plan to purchase an annuity does not implicate a plan fiduciary's duties." Dec. 17 Order (Dkt. 44), at 10. Accordingly, plaintiffs' fiduciary breach claims fail as a matter of law.

Under ERISA's "two-hats" doctrine, a person or entity may at times wear a fiduciary hat and at other times wear an employer or "settlor" hat with respect to an ERISA-governed plan. *See Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). Thus, the "threshold question" in an action charging breach of fiduciary duty under ERISA is "not whether the actions of some person . . . adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Id.* at 226. The Supreme Court, moreover, has made clear that the "*decision to amend a pension plan* concerns the composition or design of the plan itself and *does not implicate the employer's fiduciary duties*." *Hughes Aircraft v. Jacobson*, 525 U.S. 432, 444 (1999) (emphasis added); *see also Lockheed*, 517 U.S. at 890 ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.").

The Supreme Court's decision in *Beck v. PACE International Union*, 551 U.S. 96 (2007), is especially 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 its 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 design decision that belongs to the employer as settlor, *not* as a fiduciary under ERISA. *See id.* at 101 ("an employer's decision *whether* to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations" (emphasis in original)).

The holding in *Beck* is dispositive here. As in *Beck*, plaintiffs seek to challenge as a breach of fiduciary duty Verizon's decision to "sever[] the applicability of ERISA to plan assets and employer obligations." *Id.* Because *Beck* makes clear that Verizon's decision to undertake the annuity transfer was a settlor decision and not a fiduciary decision, plaintiffs' breach of fiduciary duty claim fails as a matter of law.

C. The Annuity Transaction Was Authorized By Plan Terms.

Plaintiffs also assert that the Verizon Defendants breached fiduciary duties because the Prudential annuity transaction "violates the controlling terms of documents establishing and governing the [Plan]." Compl. ¶ 5. The Plan documents attached to and relied on by plaintiffs in the Complaint, however, unambiguously disprove their assertion. *See, e.g.*, *Willard*, 336 F.3d at 379 (court may consider documents attached to or incorporated by reference in complaint on a motion to dismiss).

As this Court has recognized, Section 8.3 of the Plan was amended on October 17, 2012, to "expressly authorize[]" the "purchase of the annuity contract." *E.g.*, Dec. 7 Order (Dkt. 44), at 7. Indeed, the October 17 Plan amendment states that the Plan "*shall purchase* one or more annuity contracts" for designated participants. Pls. Appx. 61 (emphasis added). Thus, the Plan terms not only authorized the Prudential annuity transaction, they unambiguously *required* the Plan to enter into an annuity transaction.

Plaintiffs allege that, before October 17, 2012, no Plan terms expressly authorized the Prudential transaction. *E.g.*, Compl. ¶ 31. But nothing here turns on the pre-October 17 terms of the Plan. Verizon had the right to "modify or amend the Plan . . . at any time," Pls. Appx. 29, and the Plan was amended, effective December 7, 2012, to authorize and require the annuity transaction, *see* Pls. Appx. 60-62. Thus, the Plan terms in effect when the transaction closed on December 10, 2012 unambiguously authorized the Prudential annuity transaction.

To the extent plaintiffs mean to suggest that pre-October 17, 2012 Plan terms somehow *precluded* Verizon from adopting the October 17 Plan amendment, they are again mistaken:

First, plaintiffs point to Section 11.2 of the Plan, which states that no plan "amendment shall [] reduce . . . any benefit[] that is accrued." Compl. ¶ 78; Pls. Appx. 29. This provision represents the Plan's codification of ERISA's anti-cutback rule, which states that the "accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." 29 U.S.C. § 1054(g). Because the Annuity Contract guarantees plaintiffs "the same amount of benefits and the same rights to future benefits" after the annuity transaction as before, *see* Dec. 7 Order (Dkt. 44), at 9, the October 17 Plan amendment did not reduce any accrued benefits in violation of Section 11.2 or the anti-cutback rule.

ERISA provides no support for plaintiffs' assertion that their "accrued benefit" includes a right to receive "benefits *paid directly from the Plan*." Compl. ¶ 79 (emphasis added). That is because ERISA protects the form and amount of benefits paid to participants; it does not guarantee that benefits will be paid by any specific entity or source. As plaintiffs concede, *see* Compl. ¶¶ 33, 52, 68, Verizon has the right under both ERISA and the Plan (i) to terminate the plan, resulting in the transfer of benefit obligations to an insurance company, (ii) to "transfer[] to another plan" the "assets or liabilities" of the Plan, or (iii) to merge the Plan into another plan. Pls. Appx. 29-30; *see* 29 U.S.C. § 1058 (providing that a pension plan may "merge or consolidate with, or transfer its assets or liabilities to" another plan); 29 U.S.C. § 1341 (authorizing the termination of a pension plan and the transfer of plan liabilities to an insurer). If plaintiffs' "accrued benefit from the Plan" theory were correct, *all* pension plan spinoffs and terminations would necessarily violate ERISA's anti-cutback rule, which is not a sensible reading of ERISA and is belied by the extensive line of cases finding that such transactions are permissible under ERISA.[3]

Second, plaintiffs point to Section 8.5 of the Plan, which requires that Plan assets be used for the "exclusive benefit" of participants, to "provide benefits under the terms of the Plan" and pay "reasonable expenses." Compl. ¶¶ 32, 37; Pls. Appx. 25. This Plan provision, again, simply incorporates an ERISA provision – in this case, the exclusive benefit rule of Section 404(a). *See* 29 U.S.C. § 1104(a)(1)(A)(i). The annuity purchase here does not violate this rule because Plan assets were used in connection with the Prudential annuity transaction solely to fund annuity benefits for designated participants and to pay associated expenses. Interpreting ERISA's exclusive benefit rule (and thus Plan Section 8.5) to prohibit using plan assets for this purpose cannot be reconciled with ERISA provisions expressly authorizing analogous asset transfers in the context of plan mergers, spin-offs and terminations. Indeed, "if Section 8.5 were interpreted as plaintiffs posit, Verizon would effectively be precluded from exercising its right to amend the Plan, a result that the Plan's text does not support." Dec. 7 Order (Dkt. 44), at 8. Thus, as this Court has held, plaintiffs "have not shown that any part of the . . . [Prudential annuity] transaction violates the requirements of Section 8.5." *Id.*

Third, plaintiffs reference Sections 12.3 and 12.7 of the Plan. Compl. ¶¶ 33 n.5, 37. These provisions, however, merely set forth certain requirements in the event of a plan termination. Pls. Appx. 33. As this Court has recognized, they "have no bearing on whether Verizon can amend the Plan to authorize an annuities purchase." Dec. 7 Order (Dkt. 44), at 9.

Fourth, plaintiffs point to Section 11.3 of the Plan. Compl. ¶¶ 33, 37; *see* Pls. Appx. 30. As this Court has determined, "Section 11.3 only addresses mergers and transfers to another

---

[3] *See, e.g.*, *Beck*, 551 U.S. 101 (plan terminations); *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1382 (D.C. Cir. 1998) (plan spinoffs).

plan; it does not implicate any other types of plan transactions like the annuity transaction here." Dec. 7 Order (Dkt. 44), at 8-9.

In sum, no Plan provision precluded Verizon from adopting the October 17, 2012 Plan amendment or entering into the Prudential annuity transaction, and Section 8.3(b) of the Plan (as amended effective December 7, 2012) expressly required the Plan to purchase an annuity. Plaintiffs' claim that the Verizon Defendants breached their fiduciary duty to follow Plan terms by entering into the Prudential annuity transaction thus fails as a matter of law.

D. Nothing In ERISA Or The Plan Required Participant Consent For The Prudential Annuity Transaction.

Plaintiffs complain that the transfer of the obligation to pay their benefits to Prudential was done without their consent. *E.g.*, Compl. ¶ 21. Neither ERISA nor the Plan requires participant consent for the Prudential annuity transaction. Plaintiffs' arguments to the contrary have no merit.

First, plaintiffs have argued that undertaking the Prudential annuity transaction without their consent would violate fiduciary duties under ERISA. Their sole support for this argument is *Howe v. Varity Corp.*, 36 F.3d 746, 749, 756 (8th Cir. 1994), *aff'd on other grounds*, 516 U.S. 489 (1996). Although *Howe* held that it was a breach of fiduciary duty under ERISA to transfer the welfare benefit obligations for retired employees to a new employer without their consent, that holding was effectively overruled by the subsequent succession of Supreme Court cases holding that employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *E.g.*, *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *see* Part I.B, *supra*. As the Sixth Circuit has noted, "[t]o the extent that the Eighth Circuit's holding [in *Howe*] is grounded in the retirees' lack of consent," the holding is "an anomaly within the case law governing the scope of employer action subject to ERISA's fiduciary standards." *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 668 n.8 (6th Cir. 1998).

Second, plaintiffs have asserted that Section 1.2 of the Plan, in conjunction with Article 15.1 of a predecessor plan ("NYNEX Plan"), required participant consent from the subset of participants who retired from NYNEX before 2002. Plaintiffs are mistaken. Section 15.1 of the NYNEX Plan "stated that no change or termination could 'adversely affect the rights . . . to any benefit or pension' without consent." Dec. 7 Order (Dkt. 44), at 9. This provision, however, merely restates ERISA's anti-cutback rule and does not require participant consent to Plan amendments that change the payor of benefits due under the Plan. As this Court has held, because "the [Prudential] annuity contract guarantees the same amount of benefits and the same rights to future benefits" as plaintiffs had prior to the transfer, the Prudential annuity transaction did not run afoul of this Plan provision. *See id.*[4]

Because neither ERISA nor the terms of the Plan required Verizon to obtain participants' consent to the October 17 Plan amendment or the Prudential annuity transaction, plaintiffs' "involuntary transfer" allegations fail as a matter of law.

E. Plaintiffs' Diversification Argument Is Meritless.

Plaintiffs assert that the Prudential annuity contract constitutes a plan investment that runs afoul of ERISA's requirement that a fiduciary "diversify the investments of the plan," 29 U.S.C. § 1104(a)(1)(C). *See, e.g.*, Dec. 7 Order (Dkt. 44), at 10. When a plan purchases a contract that transfers liabilities from the plan to an insurance company, however, the purchase is

[4] Moreover, Section 16.4 of the NYNEX Plan expressly states that the Plan may "purchase . . . annuities from an insurance company" in order to satisfy its obligations, without requiring consent. Thus, the transfer of benefit obligations to an insurance company for a subset of former NYNEX employees is not a change for which consent is required under Section 15.1(c) of the NYNEX Plan.

a plan distribution, *not* a plan investment. *See, e.g.*, 60 Fed. Reg. 12328, 12329 & n.5 (Mar. 6, 1995) (comparing fiduciary duties when purchasing an annuity contract as a distribution with fiduciary duties when purchasing an annuity contract as a plan investment). Because no authority "supports treating an annuity purchase as an investment subject to the fiduciary duty to diversify," plaintiffs' diversification claim fails as a matter of law. Dec. 7 Order (Dkt. 44), at 11.

II. Plaintiffs' Disclosure Claim (Count I) Fails As A Matter Of Law.

Count I alleges that the VEBC breached its fiduciary duties by impermissibly 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." Compl. ¶ 62. According to plaintiffs, this "non-disclosure" runs afoul of Section 102(b) of ERISA, 29 U.S.C. § 1022(b), and applicable regulations requiring SPDs to describe the "circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery" of benefits, 29 C.F.R. § 2520.102-3(*l*). *See* Compl. ¶ 58. This claim fails as a matter of law.[5]

A. Plaintiffs' Disclosure Claims Are Baseless.

First, plaintiffs are wrong that the transfer of their benefit obligations to Prudential constitutes a circumstance that resulted in the denial or loss of benefits. Under the terms of the October 17 Plan amendment and the Annuity Contract, Prudential is required to pay plaintiffs benefits in precisely the same form and amount that they would otherwise have received from the Plan. *See* Dec. 7 Order (Dkt. 44), at 5. Because plaintiffs "have failed to show that the . . .

[5] Plaintiffs also assert that Verizon attempted to "avoid[]" satisfying the "notice requirements" that apply to a plan termination. Compl. ¶ 75 (citing 29 C.F.R. §§ 4041.23, 4041.27). These regulations do not apply because the Prudential transaction does not constitute a plan termination. Moreover, Verizon provided retirees with notices substantially similar to those that would be required in the event of a plan termination. *See, e.g.*, Pls. Appx. 251-59.

annuity transaction" might "result in 'loss of benefits,'" their SPD disclosure argument fails as a matter of law. *Id.*

Second, as this Court has held, Section "102(b) requires a description of a plan's current terms, not a disclosure of changes that may occur." Dec. 7 Order (Dkt. 44), at 5; *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."). Plan administrators do not have a "duty of clairvoyance," and ERISA does not require them to anticipate and disclose in an SPD every plan amendment that the plan's sponsor might conceivably make to the plan in the future. *See Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993). While SPDs generally must disclose existing plan provisions under which benefits may be offset – for example, provisions stating that pension benefits will be offset by Social Security payments – they need not disclose possible future plan terms unless and until they are adopted. *See, e.g., Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 428 (5th Cir. 2003) (holding that there is no affirmative duty under ERISA to disclose contemplated plan amendments to participants).

Here, shortly after the Plan amendment relating to the Prudential annuity transaction was adopted, plaintiffs and putative class members were sent a notice explaining the amendment and its impact on them. *See, e.g.,* Pls. Appx. 251-59. This notice amply satisfied any disclosure obligations that the Verizon Defendants had under ERISA relating to the Prudential annuity transaction. *See generally* 29 C.F.R. § 2520.104b-3 (plan amendments must be disclosed no later than 210 days after the close of the plan year in which the modification or change was adopted).

Third, even if participants needed to be informed prior to October 17, 2012 that a plan amendment affecting their benefits could be adopted, the SPD did so. The SPD made clear that Verizon reserved the "unlimited right to amend, modify, suspend, terminate or partially terminate the plan at any time, at their discretion, with or without any advance notice to participants," Pls. Appx. 17, thus fully disclosing the "circumstance" – *i.e.*, a plan amendment – that resulted in the purported loss or denial of benefits at issue here.

Fourth, plaintiffs are wrong that the SPD failed to inform them that the obligation to pay their benefits could be transferred to an insurance company. The SPD clearly stated that participants might "receive benefits . . . *in the form of an annuity contract issued by an insurance company*." Pls. Appx. 18 (emphasis added). While this provision relates specifically to the payment of benefits in the event of a plan termination, it plainly put participants on notice that the obligation to pay their benefits might be transferred to an insurance company. From the standpoint of participants, there is no material difference between a termination and the Prudential annuity transaction: in either case, the obligation to pay their benefits transfers from an ERISA-covered pension plan to an insurance company. The SPD thus provided adequate notice to participants that the obligation to pay their benefits might be transferred outside ERISA's regulatory regime.

B. Plaintiffs Cannot Satisfy The "Actual Harm" Requirement For SPD Disclosure Claims.

Plaintiffs' disclosure claim fails for a second, independent reason. The Supreme Court has held that a plan participant may "obtain relief" for an SPD disclosure violation only upon an individualized showing of "actual harm" and "causation." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1881 (2011).[6] And the participant's

remedy is limited to the "harm stemming from [the plaintiff's] reliance on the SPD." *See id.* at 1885 (Scalia, J., concurring in the judgment). Here, there is no record evidence that plaintiffs have suffered any harm *caused by* the alleged deficiencies in the pension plan SPD.

The only potentially cognizable harm that plaintiffs claim to have suffered is the "lost . . . opportunity to . . . take . . . legal steps" to prevent the transaction from closing. Compl. ¶ 69; *see* Pls. Appx. 247 (McPartlin Aff., ¶ 5); *id*. 242 (Lee Aff., ¶ 5); *see also id*. 262 (Jones Aff., ¶ 7). Even if this were a cognizable legal injury, plaintiffs' allegation is belied by the facts that they brought this lawsuit and had their request for an injunction considered and decided by this Court prior to the December 10, 2012 closing. Accordingly, plaintiffs cannot establish the element of "actual harm" required to state a claim for relief under *Amara*.[7]

III. <u>Plaintiffs' "Discrimination" Allegations (Count III) Should Be Dismissed.</u>

Plaintiffs allege that Verizon's decision to enter into the Prudential annuity transaction violated Section 510 of ERISA, which makes it "unlawful for any person to . . . expel . . . or discriminate against a participant . . . for the purposes of interfering with the attainment of any rights to which such participant may become entitled under the plan." 29 U.S.C. § 1140. Plaintiffs argue that Verizon discriminated against the affected retirees because the obligation to

---

[6] Plaintiffs have also failed to allege that they relied to their detriment on the purportedly defective SPD, as they must do where, as here, the remedy they seek is estoppel. *See* Compl. ¶ 70; *Amara*, 131 S. Ct. at 1881 ("[W]hen a court exercises its authority under §502(a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made.").

[7] Plaintiffs' other allegations of actual harm make no sense. For instance, plaintiffs assert that the "lost opportunity to be informed" of the transaction on an earlier date itself constitutes a cognizable legal harm. But this would eviscerate the Supreme Court's holding in *Amara*, since such a lost opportunity will always be present where a disclosure violation has been found.

pay *other* Plan participants' benefits was *not* transferred to Prudential. *See* Compl. ¶¶ 80, 83. This argument fails to state a claim for four separate reasons.

First, pursuant to the October 17 Plan amendment, plaintiffs did not have any "right" to continued participation in the Plan. Absent such a right, plaintiffs' interference claim fails as a matter of law. *See generally* Dec. 7 Order (Dkt. 44), at 14 n.13.

Second, the Prudential annuity transaction did not interfere with the attainment of any right to benefits. Rather, as this Court has recognized, the Annuity Contract "provide[s] the same rights to future payments . . . as each retiree" had under the Plan prior to the transfer. *Id.* at 1-2.

Third, as this Court has recognized, Section 510 does not broadly prohibit "any change to a plan that [allegedly] disadvantages an identifiable group of plan beneficiaries." Dec. 7 Order (Dkt. 44), at 13 (citing *McGann v. H & H Music Co.*, 946 F.2d 401, 408 (5th Cir. 1991)). Thus, a claim under Section 510 must allege "more than that a plan amendment resulted in an identifiable group's being treated differently from another." *See id.* at 12 (citing *McGann*, 946 F.2d at 406-07). Here, however, plaintiffs allege only that they were treated differently than the Plan participants whose benefit obligations were not transferred to Prudential. Because they have failed to allege facts that – if true – would state a plausible claim of unlawful discrimination or interference under Section 510, Count III should be dismissed. *See generally Twombly*, 550 U.S. at 555-56.

Fourth, several circuits 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.[8] Because plaintiffs' Section 510 claims ultimately turns on the permissibility of the October 17 Plan amendment adopted by Verizon in its settlor capacity, it fails to state a claim.

IV. <u>Plaintiffs' Equitable Relief Claim (Count IV) Does Not State A Claim Upon Which Relief Can Be Granted.</u>

Count IV purports to state a claim for equitable relief pursuant to Sections 502(a)(2) and (a)(3) of ERISA. But "Section 502(a)(3) 'does not . . . authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions' of ERISA.'" *Peacock v. Thomas*, 516 U.S. 349, 353 (1996) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253 (1993) (alterations and emphasis in original)). Thus, free-standing equitable relief is not authorized by Section 502(a)(3).

Similarly, Section 502(a)(2) authorizes suit only "for appropriate relief under [29 U.S.C. §] 1109." That section, in turn, provides that a plan fiduciary "who breaches any of the

---

8 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). Notably, *Heimann* relies heavily on the Sixth Circuit's *Mattei* decision, which makes clear that Section 510 "offers no protection against an employer's actions affecting the status or scope of an ERISA plan itself." 126 F.3d at 800; *see id.* at 801 ("From a review of the[] cases involving employers' alterations of ERISA plans, we think that, rather than viewing attacks on the 'employment relationship' as a sine qua non of § 510 coverage, it is more appropriate to view 'employment relationship' as an illustrative but non-exclusive description of a set of rights that are protected by § 510, *as compared to* . . . '*merely the pension plan,' which is not*." (emphasis added)).

responsibilities, obligations, or duties imposed upon fiduciaries by [ERISA] . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109. Thus, equitable relief is available under Section 502(a)(2) only to the extent that someone acting in a fiduciary capacity violates the fiduciary standards imposed by ERISA.

To the extent that Count IV rests upon the purported violations of ERISA or the Plan set forth in the other counts, it fails for the same reasons that those other counts are defective. To the extent Count IV purports to go further than the other counts, it fails to state a claim upon which relief can be granted. *See* Dec. 7 Order (Dkt. 44), at 3 n.7.

CONCLUSION

For the foregoing reasons, the Court should dismiss each of Plaintiffs' claims with prejudice for failure to state a claim upon which relief can be granted.

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: January 4, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 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

Gayla C. Crain
Spencer Crain Cubbage Healy & McNamara, pllc
1201 Elm Street, Suite 4100
Dallas, TX 75270
GCrain@spencercrain.com

Gregory F. Jacob
Jeffrey I. Kohn
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, DC 20006
gjacob@omm.com
jkohn@omm.com

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