No. 14-10553

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIAM LEE, JOANNE McPARTLIN and EDWARD PUNDT, Individually, and as Representatives of plan participants and plan beneficiaries of the VERIZON MANAGEMENT PENSION PLAN,

Plaintiffs – Appellants

v.

VERIZON COMMUNICATIONS, INCORPORATED; VERIZON CORPORATE SERVICES GROUP, INCORPORATED; VERIZON EMPLOYEE BENEFITS COMMITTEE; VERIZON INVESTMENT MANAGEMENT CORPORATION; VERIZON MANAGEMENT PENSION PLAN,

Defendants – Appellees

Appeal from the United States District Court
For the Northern District of Texas, Dallas Division
USDC No. 3:12-cv-4834-D

APPELLANTS' BRIEF

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Certificate of Interested Parties

Lee, et. al., v. Verizon Communications Inc., et al., No. 14-10553

I certify that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 are or may be financially interested in the outcome of this appeal. These representations are made so the judges of this Court may evaluate possible disqualification or recusal.

I. Appellants and Counsel:

A. Named-Plaintiffs/Appellants:

William Lee
Joanne McPartlin

B. A certified class (the "Transferee Class") of approximately 41,000 similarly situated retirees who were transferred out of the Verizon Management Pension Plan into a single group insurance annuity issued by The Prudential Insurance Company of America in a transaction consummated in December 2012.

C. Named-Plaintiff/Appellant:

Edward Pundt

D. A certified class (the "Non-Transferee Class") of approximately 50,000 similarly situated plan participants and their beneficiaries who remained in the ongoing Verizon Management Pension Plan after the annuity transaction.

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II. <u>Appellees and Counsel</u>:

A. Named-Defendants/Appellees:

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Verizon Corporate Services Group Inc.
Verizon Employees Benefit Committee
Verizon Investment Management Corporation
Verizon Management Pension Plan

B. Appellees' Counsel:

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III. <u>Other Interested Former Parties</u>:

A. Former Defendant Dismissed Per Stipulation:

The Prudential Insurance Company of America

/s/ Curtis L. Kennedy
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Attorney of Record for all Appellants

Statement Regarding Oral Argument

Appellants request oral argument because this is a case of first impression in this Circuit regarding numerous issues of fundamental importance to the administration of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1461 ("ERISA"). Such issues, arising out of an unprecedented expulsion of over 40,000 retirees from a long-established pension plan, consist of the necessity of disclosure of the risk of such expulsion under ERISA Section 102(b), the propriety of such an expulsion from the standpoint of the statutory fiduciary duty imposed by ERISA Section 404(a)(1), the validity of such expulsion as such and as a form of discrimination in violation of ERISA Section 510 and the appropriateness of an equitable remedy for harm done to retirees remaining in the Plan by depletion of pension assets and the payment of $1 billion from the Plan which should have been paid by the sponsoring employers' corporate revenues.

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Statement of Jurisdiction

Appellants sued Appellees in the United States District Court for the Northern District of Texas (the "District Court"). Appellants asserted violations of ERISA. Jurisdiction was proper under 29 U.S.C.A. §1132(e)(1) and 28 U.S.C.A. §1331.

On April 12, 2014, the District Court entered a final judgment dismissing Appellants' action. (ROA.1598). On May 5, 2014, Appellants filed their notice of appeal (ROA. 1599-1600). The appeal was timely. See Fed. R. App. P. 4(a). This Court has appellate jurisdiction. 28 U.S.C.A. §1291.

Statement of Issues

Appellants challenge the District Court's order dismissing all of the claims asserted in their Second Amended Complaint.

1. Did the District Court err when ruling that ERISA Section 102(b) and the Department of Labor ("DOL") regulation promulgated under it were not violated by Appellees' failure to disclose in a summary plan description ("SPD") that the purchase of a group insurance annuity is one circumstance whereby ERISA-protected pension benefits could be lost?

2. Did the District Court err by not considering Appellants' allegations that ERISA's substantive and procedural protections and the accompanying

Pension Benefit Guaranty Corporation ("PBGC") guarantee of ERISA pension plan obligations are "viable rights" impaired when Appellees expelled a group of retirees from an ongoing pension plan?

3. Did the District Court err when ruling that the purchase of an annuity by Appellee Verizon Communications Inc. ("Verizon") violated the fiduciary duties of Plan fiduciaries under ERISA Section 404(a)(1)?

4. Did the District Court err when dismissing Appellants' claim that fiduciaries of the Plan used $1 billion in Plan assets to pay settlor expenses which should have been charged to Verizon's corporate operating revenues, not the Plan?

5. Is a pension plan amendment that serves to expel one group of retirees while retaining others in an ongoing pension plan actionable under ERISA Section 510?

6. Is a decision to expel one group of retirees from an ongoing pension plan while retaining others discrimination violative of ERISA Section 510?

7. Did the District Court err when it held that retirees of an ongoing severely underfunded pension plan have no standing to challenge a depletion of pension assets and use of pension assets for a purpose prohibited by ERISA?

8. Is the use of pension assets to pay settlor expenses actionable under ERISA?

Statement of the Case

A. Statement of Proceedings Below.

This case arises out of actions by Appellees Verizon and Verizon Corporate Services Group, Inc. (collectively "Verizon"), as plan sponsors, and Verizon Employee Benefits Committee ("Verizon EBC") and Verizon Investment Management Corporation ("VIMCO"), as Plan fiduciaries, to expel a group of retirees from the Plan and transfer them into a group insurance annuity issued by Prudential.

On November 27, 2012, Appellants filed their Complaint against Verizon, Plan fiduciaries, the Plan and Prudential. (ROA 17-56). On January 4, 2013, Prudential was dismissed as a defendant without prejudice, pursuant to an agreed stipulation by all parties. (ROA 1127-1131).[1] On January 25, 2013, Appellants filed their Amended Complaint. (ROA 1139-1391).

On March 28, 2013, the District Court certified this civil action as a class action for former Verizon retirees and their beneficiaries transferred to Prudential ("Transferee Class") (ROA 1296 ¶4). Also, the District Court certified this civil

[1] Prudential, the sponsor of the group insurance annuity, agreed that "Appellants may renew their claim as they relate to Prudential only to the extent necessary for the effectuation of any equitable relief that may be ordered by the [District] Court." (ROA 1128 ¶3).

action as a class action for participants and beneficiaries remaining in the ongoing Plan ("Non-Transferee Class"). (ROA 1297 ¶8).

In an order dated June 24, 2013, the District Court dismissed, pursuant to Fed.R.Civ.P. Rule 12(b)(6), the claims asserted in the Amended Complaint and granted Appellants leave to amend. (ROA. 1348-1371; *Lee v. Verizon Communications Inc.*, 954 F.Supp.2d 486 (N.D. Tex. June 24, 2013) (Fitzwater, C.J.).

On July 12, 2013, Appellants filed their Second Amended Complaint. (ROA 1372-1422).

In an order dated April 11, 2014, the District Court dismissed, pursuant to Fed.R.Civ.P. Rule 12(b)(6), Counts One through Three asserted in the Second Amended Complaint. (ROA 1579-1597; *Lee v. Verizon Communications Inc.*, 2014 WL 1407416 (N.D. Tex. April 11, 2014) (Fitzwater, C.J.). Also, pursuant to Rule 12(b)(1) and Rule 12(b)(6), the District Court dismissed Count Four. (*Id.*).

B. Statement of Facts.

Because this is an appeal from a dismissal under Rule 12(b)(6), Fed.R.Civ.P., this Court must accept as true the allegations of the Second Amended Complaint. The following facts, unless indicated otherwise, were set

forth in the District Court's first order of dismissal, published as *Lee v. Verizon Communications Inc.*, 954 F.Supp.2d 486 (N.D. Tex. 2013) (Fitzwater, C.J.).

1. In October 2012 Verizon entered into a Definitive Purchase Agreement with Prudential under which the Plan would purchase a single group annuity from Prudential to replace approximately $7.4 billion of the Plan's pension liabilities to a group of approximately 41,000 management retirees, the Transferee Class.

2. In order to accomplish the annuity transaction, Verizon amended the Plan to direct the purchase of one or more annuity contracts. Under the Plan amendment, one or more annuity contracts were to encompass a group of management Plan participants who had begun receiving monthly payments from the Plan before January 1, 2010.

3. The Plan amendment, in Article 8.3(b)(iii), directed VIMCO, acting as a named fiduciary of the Plan, to "select the annuity provider (or providers) and determine the terms of the annuity contract (or contracts), or, in its discretion, shall retain an independent fiduciary to discharge all or any portion of these duties." (ROA 1388 ¶51; ROA 1392 ¶61).

4. Upon learning about the planned annuity transaction, the Transferee Class filed an action in the District Court seeking temporary and preliminary

injunctive relief, objecting to the annuity transaction in part on the basis that their removal from the ongoing Plan precluded their continued entitlement to rights under ERISA and their continuing entitlement to a guarantee of such benefits by the PBGC.

5. The annuity transaction was not pursued in connection with the termination of the Plan. Verizon did not follow standard termination procedures established under ERISA and by the PBGC for a plan termination. (ROA 1373-1374 ¶3).

6. The annuity transaction is not what the Transferee Class expected when they served Verizon and predecessor entities, including entities comprising the former old Bell System. Retirees within the Transferee Class were to receive their monthly retirement benefits in the form of a federally-protected pension, not a state-regulated insurance annuity. Many Transferee Class members, upon commencement of retirement, had a choice of electing to receive either a lump sum distribution or federally-protected retirement benefits from the Plan, and chose to receive the latter. (ROA 1394-1395 ¶68). The Transferee Class members did not consent to being removed from the Plan and placed in a state-regulated insurance annuity. (ROA 1395 ¶69).

7. Verizon did not include in the annuity transaction either non-management retirees, management retirees formerly represented by unions or management retirees first receiving benefits after January 1, 2010. (ROA 1374 ¶4).

8. The District Court denied Appellants' application for a temporary restraining order and preliminary injunction to enjoin Verizon from consummating the annuity transaction with Prudential. *See Lee v. Verizon Communications Inc.*, 2012 WL 6089041, at *1 (N.D. Tex. Dec. 7, 2012).

9. A few days later, on December 12, 2012, the annuity transaction was fully consummated.

10. Under the terms of the annuity transaction, Verizon transferred to Prudential Verizon's responsibility to provide retirement payments to approximately 41,000 retirees, the Transferee Class.

11. The annuity transaction eliminated all of the Transferee Class members' ERISA protections for their retirement benefits, including the guarantee provided by the PBGC. (ROA 1381 ¶ 25).

12. The participants and beneficiaries not covered by the December 2012 annuity transaction, the Non-Transferee Class members—who number approximately 50,000—remain part of the ongoing Plan.

13. When the annuity transaction was carried out, almost $1 billion more than necessary to cover the transferred liabilities was paid to Prudential by the Plan for expenses other than benefit payments and reasonable expenses of administering the Plan. The extra $1 billion payment was applied towards expenses, not for administering the ongoing Plan, but to enable avoidance of payment of such expenses by the Plan sponsor, Verizon, contrary to Article 8.5 of the Plan and the terms of Section 2 of the Master Trust holding its assets. (ROA 1407 ¶114; ROA 477).

14. In late April 2013, the Verizon disclosed in an annual funding notice to Plan participants that, immediately after the annuity transaction, the fair market value of the Plan's remaining assets was approximately $3.77 billion and the Plan's liabilities were approximately $5.69 billion. Thus, in the immediate aftermath of the annuity transaction, the Plan was not fully funded, but left in an unstable financial condition and underfunded by almost $2 billion, or only about 66% actuarially funded. (ROA 1386 ¶45).

15. On the parties' joint motion, the District Court certified the Transferee Class and the Non-Transferee Class. (ROA 1295-1299).

16. In their Second Amended Complaint, The Transferee Class asserted three claims: (Count One) Verizon failed to disclose, in violation of ERISA

Section 102(b), that an annuity transaction carried out while the Plan remained ongoing was a circumstance under which benefits would no longer be provided under the plan; (Count Two) Plan fiduciaries breached their fiduciary duties under ERISA §404(a), 29 U.S.C. §1104(a); and (Count Three) Verizon expelled, and discriminated against the Transferee Class, in violation of ERISA §510, 29 U.S.C. §1140. In the Second Amended Complaint, the Non-Transferee Class asserted one claim: (Count Four) a claim for relief under ERISA §502(a)(2), 29 U.S.C. §1132(a)(2), based upon financial harm done to the Plan by the annuity transaction, including depletion of the Plan's assets to pay expenses of the annuity transaction which should have been charged to Verizon's corporate revenues.

SUMMARY OF ARGUMENT

"Sitting in equity, the district court is a 'court of conscience.'" *United States v. Durham*, 86 F.3d 70, 73 (5th Cir. 1996) (quoting *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 90, 18 L.Ed. 727 (1867). However, when ruling upon Appellants' ERISA claims, the District Court rejected any notion of equity, subordinating Appellants' interests to those of Appellees, even basing some key rulings on contentions that were never made by Appellees in their motions to dismiss.

Contrary to ERISA Section 102(b), the District Court excused Appellees from the nondisclosure in an SPD of a possible destruction of their pension rights.

The transfer of the Transferee Class members was not in the best interests of the retirees and, when Plan fiduciaries facilitated the transfer of the retirees out of the Plan, they violated ERISA statutory duties imposed by ERISA Section 404(a)(1). The Plan fiduciaries should have obtained the consent of the Transferee Class, or at least consulted them and assured them rights under the annuity consistent with their rights under ERISA as plan participants, or purchased the annuity as an asset of the Plan. The Plan fiduciaries also violated their fiduciary duty under ERISA when they used approximately $1 billon of the Plan's assets to fund expenses of the annuity transaction removing the Transferee Class from the Plan in violation of ERISA and the Plan.

The Transferee Class members were expelled from the ongoing Plan without their consent, and expelling them was a clear violation of ERISA Section 510. The choice to remove only Transferee Class members as retirees under the Plan was also, in violation of ERISA Section 510, and an act of discrimination interfering with their rights under the Plan.

The Non-Transferee Class members suffered harm as a result of the annuity transaction by gross depletion of assets and payment of $1 billion in Plan assets for purposes prohibited by ERISA and the Plan, and had standing on behalf of the Plan to remedy such harm under ERISA Section 502(a)(2).

ARGUMENT

I. Standard of Review

This Court reviews a district court's decision to grant a motion to dismiss *de novo*. *Fontana v. Barham*, 707 F.2d 221, 227 (5th Cir.1983), *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711 (1984). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id*.

The District Court's rulings concerning Appellees' compliance with ERISA and DOL regulations implementing ERISA are legal questions which this Court likewise reviews *de novo*. *Rhorer v. Raytheon Eng's & Contractors Inc.*, 181 F.3d 634, 639 (5th Cir. 1999). The ultimate question posed by a Rule 12(b)(6) motion is whether the complaint states a valid claim when it is viewed in the light most favorable to the plaintiff. *Great Plains Trust Co. v. Morgan Stanley Dean Witter*, 313 F.3d 305, 312 (5th Cir. 2002).

II. The District Court Erred In Ruling Verizon Did Not Violate ERISA Section 102(b), Thus Improperly Dismissing the First Claim for Relief in the Second Amended Complaint.

The Transferee Class members were blindsided by being expelled from the ongoing Plan and transferred into a single group insurance annuity without their consent, thereby losing pension benefits protected by ERISA and the PBGC. Count One of the Second Amended Complaint alleges that the Verizon Employee

Benefits Committee breached a duty to make disclosure of the risk of such expulsion, pursuant to ERISA Section 102(b), requiring an SPD relating to an ERISA pension plan to describe the "circumstances which may result in disqualification, ineligibility, or denial, or loss of benefits." 29 U.S.C. §1022(b). No SPD as to the Plan ever informed any retiree that, prior to termination of the Plan, he or she might lose eligibility for benefits provided by the Plan as a result of an annuity transaction during the operation of the Plan and, thereby lose all associated federal ERISA and PBGC rights. (ROA 1397 ¶ 79). The proof of the pudding is that the SPDs relating to the Plan only disclosed that participants might receive benefits in the form of an annuity contract issued by an insurance company in the event of a plan *termination*. (ROA 76).

The pertinent DOL regulation promulgated under ERISA Section 102(b) requires 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. . . (emphasis added).

29 C.F.R. Section 2520.102-3(*l*). An SPD, and especially the portion describing the circumstances under which a person's participation rights may be threatened, is necessarily essential in informing employees and retirees of their rights,

reasonable expectations and obligations under a pension plan. "SPDs are central to ERISA. Section 104(b) of ERISA requires plan administrators to regularly furnish SPDs to plan beneficiaries." *Frommert v. Conkright*, 738 F.3d 522, 531 (2nd Cir. 2013) (citing 29 U.S.C. §1024).

There is no suggestion in the SPDs that, absent a full termination of the Plan, Verizon's obligation to retirees could be transferred to an insurance company. None of Verizon's SPDs explained that Verizon could unilaterally choose to expel certain retirees from the Plan while keeping it ongoing for the benefit of other retirees and Plan participants. The Transferee Class accurately contend, and the District Court had to accept as true, their allegations that "[i]n none of the SPDs issued to Plaintiffs and Transferee Class members by the Plan administrators is there any discussion, disclosure or notice that either a single retiree or large group of retirees with vested rights could be involuntarily removed from enrollment in the Plan and transferred to either Prudential or any other insurance company and, thereby, made ineligible for continued receipt of pension benefits under the Plan with the attendant ERISA protections and uniform PBGC guarantee." (ROA 1397 ¶79). The same is true of the separate related allegation in the Second Amended Complaint that "[n]o average Plan participant would understand from reading any SPDs that he or she could be abandoned by Verizon,

removed from the ongoing Plan which is protected by ERISA and the PBGC, and involuntarily transferred to either Prudential or another insurance company and, thereby, forever lose all protections provided by ERISA and the PBGC." (ROA 1398 ¶82).

The only instance in which the SPDs identified whereby participants would be expelled was upon either termination of the Plan or a spinoff into another ERISA-regulated pension plan. (ROA 78-80). Accordingly, there was no compliance with ERISA Section 102(b) because no SPD given to the retirees explained in its "full import" the possibility of expulsion of retirees out of the ongoing Plan into a state-regulated group insurance annuity. *Koehler v. Aetna Health Inc.*, 683 F.3d 182, 189 (5th Cir. 2012) (holding 29 C.F.R. Section 2520.102-3-(*l*) requires considerably greater "clarity."); *Layaou v. Xerox Corp.*, 238 F.3d 205, 211 (2nd Cir. 2001) (finding that the SPD did not apprise participants of a risk of benefit reduction with adequate clarity and completeness).

Since there was no adequate disclosure, the SPDs given to the retirees [h]ad the effect of failing to inform" them of a key limitation on their right to recover benefits under their pension plans in violation of 29 C.F.R. §2520.102-3(b). Appellants thereby violated Section 102(b).

When dismissing Count One, as asserted in the Second Amended Complaint, the District Court simply reiterated its initial determination to dismiss the claim, as stated in the Amended Complaint. (ROA 1583, order dismissing claim for the reasons explained in the District Court's first Order of Dismissal, ROA 1362-1363). Thus, the first order of dismissal was incorporated by reference into the District Court's second order of dismissal.

In the first order of dismissal, the District Court erroneously opined that, because the monthly amount of the retirees' benefits did not change as a result of the annuity transaction, the situation was not a possible circumstance that needed to be disclosed in the SPD, pursuant to ERISA Section 102(b); the District Court characterized the Transferee Class' claim as a complaint about a change in the payor of pension benefits. (ROA 1353-1354). But Count One of the Second Amended Complaint was not merely a challenge to a change in the payor or sponsor of the Plan's benefits. In any case, within the Second Amended Complaint, the Transferee Class members stated explicitly that they lost, as a result of the annuity transaction, all uniform federal protection for their pension benefits under ERISA and through the PBGC and, instead, became relegated to fifty separate sets of patchwork protections under state law regulating insurance annuities. That change was not in harmony with the Transferee Class members'

understanding of "benefits to be provided under the plan," within the meaning of 29 C.F.R. §2520.102-3*(l)*. Quite simply, the Transferee Class's ERISA-governed and PBGC-guaranteed pension benefits that were expected to be provided under the Plan have been completely replaced, offset by a non-federally-regulated group insurance annuity maintained fully outside of the Plan. The failure to disclose the risk of that drastic change to the retirees enrolled in the Plan was wrongful under ERISA Section 102(b) and 29 C.F.R. §2520.102-3-*(l)*.

There are no cases supporting the District Court's conclusion that the loss of federally-regulated and guaranteed pension benefits and substitution by state-regulated insurance benefits was not a circumstance that had to have been disclosed in a pension plan SPD. The District Court's ruling conflicts with Congress' ultimate desire to protect the interests of plan participants and beneficiaries. *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105, 114, 128 S.Ct. 2343, 2349 (2008) (Congress's desire to protect beneficiaries "outweighed" other subsidiary purposes, including employers' freedom to set up benefit plans) (citing *Varity Corp. v. Howe*, 516 U.S. at 497, 116 S.Ct. at 1070 (1996)).

Appellees contended in the District Court that Verizon always had the right to amend the Plan at any time so as to authorize and require an annuity transaction. (ROA 572). That is irrelevant to the disclosure issue. An annuity transaction

carried out at the sole discretion of the Plan sponsor, during the operation of the Plan was justifiably perceived by Appellees as a circumstance that could result in the loss, offset or replacement of pension benefits payable under the Plan. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993), cert. denied, 510 U.S. 870, 114 S.Ct. 196 (1993) ("Section 1022(b) relates to an individual employee's eligibility under then existing, current terms of the Plan. . .).[2]

Congress enacted ERISA to ensure that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." (emphasis added). *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 375, 100 S.Ct. 1723, 1733 (1980). When each Transferee Class member chose to begin receiving monthly payment of his or her federally-protected pension benefit, there was no alternate promise by the retiree that he or she would accept monthly payments under a state-regulated insurance annuity, much less at the sole choice of the Plan sponsor, after retirement commenced and the Plan began to pay benefits. The annuity transaction, therefore, unfairly defeated the Transferee Class members' legitimate expectation that all retirees would continue to receive

[2] *Wise* did not concern defined pension benefits, but concerned welfare benefits and the right of a plan sponsor to change unvested benefits. 986 F.2d at 934-35.

benefits under the Plan so long as there was not a full termination equally affecting every Plan participant's rights.

Appellees conceded in the District Court that "SPDs generally must disclose existing plan provisions under which benefits may be offset. . ." (ROA 1531). Appellees completely ignore the fact that the Transferee Class members' entire defined pension benefits were fully offset, replaced with an unanticipated group insurance annuity. The SPDs given to the Transferee Class members only disclosed that either a complete termination of the Plan or spinoff placement into another pension plan could result in an offset of pension benefits. (ROA 1396 ¶76; ROA 78-80).[3] The Transferee Class, accordingly, received no notice in any SPD that their federally-protected pension benefits could be offset with a state-regulated insurance annuity while the Plan remained ongoing.

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[3] The SPD for the Plan that was last given to Transferee Class members states, in pertinent part:

> **How benefits could be reduced, lost, suspended or delayed**
> Your pension benefits under the plan will be reduced, lost, suspended or delayed if one of the following conditions applies:
> . . .
> • You transfer to another company as a result of a sale, spinoff or outsourcing arrangement, and your benefit is transferred to and paid from another pension plan maintained by such other company.

(emphasis in original). (ROA 1385 ¶ 38; ROA 78-80). The SPD does not inform the participants that responsibility for payment of pension benefits could be transferred out of the ongoing Plan over to an insurer as a result of a corporate decision to enter into a group annuity arrangement.

There is, moreover, no legal support for Appellees' argument in the District Court that a generally worded reservation of rights provision, permitting changes and amendments, constitutes an escape hatch from the disclosure requirements of ERISA Section 102(b) and the companion federal regulation.[4] By decreeing that a plan sponsor meets the requirements simply by tucking into a SPD a statement that the plan sponsor reserves the right to make future plan changes eviscerates Section 102(b) and the regulation, making both entirely irrelevant. To simply state within a pension plan document that there may be future changes is not the same as disclosing specific circumstances whereby a participant could be expelled, from a pension plan or have his or her benefits payable under the pension plan completely offset. *See*, *Koehler*, 683 F.3d at 189 (holding 29 C.F.R. Section 2520.102-3-(*l*) requires considerably greater "clarity.").

In the District Court, Appellees emphasized that "pre-existing [Plan] provisions expressly authorized terminations and spin-offs." (ROA 1447).[5]

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[4] Appellees contended that the SPD complied with ERISA and the regulation because "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' that resulted in the purported loss or denial of benefits at issue here.'" (ROA 580).

[5] ERISA "permits plan sponsors to *terminate* plans, replace plan benefits with annuities, and recapture the remaining plan assets to the extent contemplated by the plan's governing documents. ERISA §§ 4041(b)(3)(A) and 4044(d)(1), 29 U.S.C. 1341(b)(3)(A)

Appellees also contended they had the right to conduct an annuity transaction during ongoing Plan operations under the DOL regulation relating to purchase of annuities out of pension plan assets, generally referred to as the "Annuitization Regulation", 29 C.F.R. §2510.3-3(d)(2)(ii). (ROA 1211-1212; ROA 669, citing provisions of the regulation that "[insurance] annuities may be purchased for participants and beneficiaries in connection with the termination of a plan, or in the case of an ongoing plan, annuities might be purchased for participants who are retiring or separating from service with accrued vested benefits.").

The District Court correctly noted that the Annuitization Regulation neither expressly authorizes nor prohibits a plan sponsor from transferring a group of retirees out of an ongoing pension plan. (ROA 1355). In any event, permission to enter into the specific terms of the annuity transaction pursuant to either a Plan amendment or the Annuitization Regulation could not avail Appellees in resisting the Transferee Class members' claim under ERISA Section 102(b). Since no SPD provided adequate notice to the Transferee Class members that, during ongoing operation of the Plan, they might be transferred outside ERISA's pension regime and thus lose valuable federal rights under ERISA, including a PBGC guarantee, and have their pension benefits fully replaced by an insurance group annuity, it

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and 1344(d)(1)." (emphasis added). *Maher v. Strachan Shipping Co.*, 68 F.3d 951, 956 fn 4 (5th Cir. 1995).

was error for the District Court to grant Appellees' motion to dismiss Count One of the Second Amended Complaint.

Accordingly, the Court should reverse the District Court's ruling granting Appellees' motion to dismiss the Transferee Class' First Claim for Relief in the Second Amended Complaint, and the claim should be remanded for further proceedings.

III. The District Court Erred In Ruling Verizon Plan Fiduciaries Did Not Violate ERISA Section 404(a)(1), Thus Improperly Dismissing the Second Claim for Relief in the Second Amended Complaint.

Count Two of the Second Amended Complaint alleges that Plan fiduciaries violated ERISA Section 404(a)(1). (ROA 1400-1409 ¶¶90-117). The claim was not directed towards Verizon, functioning as plan sponsor, but against the Plan fiduciaries, VIMCO and Verizon EBC. Nevertheless, the District Court's entire reason for disposing of the claim is summed up by the following conclusory remark in the final order of dismissal:

> At bottom, plaintiffs are disagreeing with the rights of a settlor under ERISA, and such disagreement must be addressed to Congress through requests for legislative changes to ERISA, not through litigation that complains of the decisions that ERISA empowers a plan sponsor as settlor to make.

(ROA 1596). However, since the claim only pertains to Plan fiduciary functions wrongfully carried out by Plan fiduciaries at the expense of the retirees and the Plan, ERISA already provides both a claim and remedy.

While ERISA allows a corporate employer to play multiple roles, such as both plan sponsor and plan fiduciary, ERISA does require the entity with two hats to wear only one at a time, and wear only the fiduciary hat when making fiduciary decisions. *Pegram v. Herdrich*, 530 U.S. 211, 225, 120 S.Ct. 2143, 2152 (2000) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-444, 119 S.Ct. 755 (1999)); *Varity Corp. v. Howe*, 516 U.S. 489, 497, 116 S.Ct. 1065 (1996).

Appellees did not carry out a standard termination of the Plan so as to assume the permitted plan sponsor role of making decisions regarding the creation or termination of the Plan. The annuity transaction which disposed of more than half of the Plan's assets, together with 41,000 Plan participants, occurred while the Plan was still operating, making the decision to enter into it one squarely within the definition of ERISA fiduciary functions. (ROA 1402 ¶102). Further, the Plan fiduciaries breached their fiduciary duties when implementing the Plan amendment directing the annuity purchase, deciding the contractual terms without giving Transferee Class members a choice in the matter and assuring them of the rights equivalent to those they had under the Plan or even consulting with them.

(ROA 1404 ¶105). In addition, the Plan fiduciaries wrongfully failed to purchase the group annuity as part of the Plan and wrongfully used approximately $1 billion of Plan assets to pay for settlor expenses. (ROA 1407-1408 ¶¶114-116).

A. There is No Federal Regulation or Case Law Countenancing Verizon's Annuity Transaction.

There is no federal regulation or case law that either contemplates or sanctions the very situation that occurred here. Likewise, Appellees cannot provide any case law authority concerning the purchase of an insurance annuity in a situation other than at the onset of a participant's retirement or at the point of a complete pension plan termination under ERISA Section 4041(a)(1)(b), 29 U.S.C. §1341(a)(1)(b). The expulsion of a group of retirees out of an ERISA-protected and PBGC-guaranteed defined benefit plan, while keeping the Plan ongoing for everyone else, is unprecedented. The Transferee Class' claim of breach of fiduciary duty in that regard is one of first impression. ERISA compels that the claim be sustained.

B. Verizon' Disposition of 41,000 Plan Participants and Almost Half of the Plan's Assets Were Fiduciary Functions.

The Transferee Class contends that the removal of them, together with the disposition of over $8.5 billion in Plan assets, pursuant to the annuity transaction,

was a fiduciary function and not a mere plan design function, as posited by Appellees during the District Court proceedings.

The District Court mistakenly accepted Appellees' contention that all actions by Appellees with respect to the annuity transaction must be viewed as involving plan design, relying on *Hughes Aircraft v. Jacobson*, 525 U.S. 432, 443, 119 S.Ct. 755, 763 (1999) and *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-891, 116 S.Ct. 1783, 1789-1790 (1996) . The Court in *Hughes* held that "[i]n general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets." 525 U.S. at 433, 119 S.Ct. at 763. In *Spink*, the Court held that "[o]nly when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration, does a person become an [ERISA] fiduciary". 517 U.S. at 890-91, 116 S.Ct. at 1789-90.

When conducting the annuity transaction, the Plan fiduciaries exercised control over allocation and disposition of more than half of the Plan's assets and nearly 40% of the fully qualified Plan participants, 41,000 of the total almost 100,000. Further, Verizon, as plan sponsor, directed the Plan fiduciaries to make all decisions with respect to whether to select one or more insurance group

annuities and what terms should be included in the insurance contracts (ROA 113; ROA 1388 ¶51). When the Plan fiduciaries decided to enter into a confidential agreement with Prudential and exchange $8.5 billion in pension assets from the ongoing Plan for the purchase of a group insurance annuity to be maintained outside of the Plan, the Plan fiduciaries were, accordingly, exercising core fiduciary functions recognized as such by ERISA. ERISA Section 3(21)(A), 29 U.S.C. §1002(21)(A), specifically defines such functions to include "exercising authority or control respecting management or disposition of plan assets." [6] When plan assets are at issue, Section 3(21)(A) does not even require that any exercise of discretion be involved, as it does in connection with management of a plan. *See* discussion, *infra*.

Under the plain meaning of ERISA Section 3(21)(A), both the act of choosing the amount of Plan assets to be delivered to Prudential and agreeing to contractual terms with Prudential for the group of Plan participants removed from the Plan and assigned to the Prudential group annuity must be regarded as

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[6] Individuals may acquire fiduciary status if they exercise the fiduciary functions set forth in ERISA § 3(21)(A). *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262, 113 S.Ct. 2063 (1993) ("ERISA ... defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan ...."); *see* 29 C.F.R. §§2509.75-8, 2510.3-21 (describing various functions that do create fiduciary status, such as exercising discretion with respect to purchasing, selling, disposing securities or property on behalf of the employee benefit plan.).

"management" or "disposition" of plan assets.[7] Plan fiduciaries failed when carrying out those tasks.

In the District Court, Appellees did not address the Plan fiduciaries' authority or control over management or disposition of Plan assets when implementing Verizon's decision to conduct an annuity transaction. Appellees, instead, pointed only to the Supreme Court's decision in *Beck v. PACE International Union*, 551 U.S. 96, 127 S.Ct. 2310 (2007). *Beck* is, however, absolutely distinguishable. It involved an employer's decision to completely end its defined benefit pension plans by undertaking a standard termination. The Supreme Court made clear that "an employer's *decision* whether to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations.") (emphasis original). *Id.*, 551 U.S. at 101, 127 S.Ct. at 2315. Here, the annuity transaction did not involve a termination of the Plan.

The selection of an annuity provider in particular is indisputably a fiduciary function. *See*, 29 CFR §§2509.95–1, 4041.28(c)(3). The additional decisions whether to purchase a group insurance annuity either within or outside an ongoing

[7] "Management" is defined as "the act or art of managing, as ... the conducting or supervising of something ... especially the executive function of planning, organizing, coordinating, directing, controlling, and supervising any ... activity with responsibility for results." *Webster's Third New International Dictionary* 1372 (2002). "Disposition" is defined as "the act or power of disposing ... [as in] placing elsewhere, a giving over to the care or possession of another, or a relinquishing." *Id*. at 654.

pension plan and which already retired persons to assign to the annuity are also fiduciary in nature under ERISA Section 3(21)(A). Section 3(21)(A) not only characterizes as a fiduciary a person who exercises authority or control over management or disposition of plan assets (without regard to any issue of discretion), but a person who "exercises any discretionary authority or discretionary control respecting management of such plan." ERISA Section 3(21)(A).

C. Verizon Plan Fiduciaries Violated Their Fiduciary Duty of Loyalty to Act in the Best Interests of the Transferee Class Members.

ERISA defines the duty of an ERISA fiduciary as follows:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> . . .
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . .

ERISA Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). The fiduciary duty rules were borrowed from the common law of trusts. *Bogert* expresses the fiduciary duty in language nearly identical to that of ERISA, stating: "In his management of the trust, the trustee is required to manifest the care, skill, prudence, and diligence

of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question." G. Bogert and G. Bogert, *The Law of Trusts and Trustees* §541, p. 167 (2d rev. ed. 1993).[8]

At all times when implementing Verizon's decision to conduct an annuity transaction, the Plan fiduciaries had a duty of loyalty and prudence owed to all Transferee Class members. As stated in *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2nd Cir. 1982), cert. denied, 459 U.S. 1069, 103 S.Ct. 488 (1982):

> Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries. Restatement of Trusts 2d s 170 (1959); II Scott on Trusts s 170, at 1297-99 (1967) (citing cases and authorities); Bogert, The Law of Trusts and Trustees s 543 (2d ed. 1978).

See also, Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 294 (5th Cir. 2000). A plan fiduciary must discharge plan responsibilities solely in the interest of participants and beneficiaries (not the sponsoring employer) and for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying the

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[8] The U. S. Supreme Court has long favored *Bogert* as an aid in interpreting the fiduciary provisions of ERISA by reference to the common law of trusts. *See, e.g., Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989), *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), *Varity Corp. v. Howe*, 516 U.S. 489 (1996), *Conkright v. Frommert*, 559 U.S. 506 (2010).

reasonable expenses of the plan in accordance with the lawful terms of the plan's controlling documents. ERISA §404(a), 29 U.S.C. §1104(a). The duty is analogous to the common trust law duty of "undivided loyalty". *E.g.*, *McDonald v. Provident Indem. Life Ins. Co.,* 60 F.3d 234, 237 (5th Cir. 1995), *cert. denied*, 516 U.S. 1174, 116 S.Ct. 1267 (1996). Other courts have ruled that this statutory provision imposes an unwavering duty on an ERISA plan fiduciary "to make decisions with single-minded devotion to a plan's participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation." *Adams v. Avondale Indus, Inc.*, 905 F.2d 943, 946 (6th Cir. 1990) (quoting *Morse v. Stanley,* 732 F.2d 1139, 1145 (2nd Cir. 1984). However characterized, the Plan fiduciaries labored under the duty when carrying out the annuity transaction.

D. Verizon Plan Fiduciaries Breached Their Fiduciary Duty In Failing to Obtain Consent of the Transferee Class Members.

It cannot be disputed that while each Transferee Class member was in the Plan, he or she received not only a monthly payment but was also the beneficiary of an annual premium paid by the Plan to the PBGC so as to provide each retiree a uniform guaranty of benefits. That very PBGC guaranty has substantial value and it has been taken away without the consent of the Transferee Class members. Furthermore, while in the Plan, each pension payment was, without question,

protected from all creditors' claims and fully exempt from any bankruptcy estate. Now that protection has been lost. Without their consent, the Transferee Class members have lost numerous other federal legal rights still enjoyed by the retirees in the ongoing Plan.

29 U.S.C. §1001(b) declares that it is the policy of ERISA to protect the interests of participants and their beneficiaries "by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. §1132(a)(1)(B) grants participants and beneficiaries the right to commence a "civil action" and provides that "the district courts shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties." In short, ERISA provides retirees with a guarantee that their benefit plans will be governed by a single, federal set of rules that guarantees "efficiency, predictability, and uniformity." *Conkright v. Frommert*, 559 U.S. 506, 517, 130 S. Ct. 1640, 1649 (2010).

As alleged in the Second Amended Complaint, "Prudential will not be subject to ERISA's fiduciary duties standards, minimum funding standards and disclosure requirements. Basic data regarding the funded status of a pension annuity, changes in assets and liabilities, and the amount that annuitants would stand to lose if an underfunded annuity was terminated are vitally important to retirees. Prudential will not be required to disclose to any transferred retiree how

his or her annuity funding is invested and who is in charge of the underlying investments, as Verizon is required to do with respect to the Plan." (ROA. 1392 ¶65).

In their motion to dismiss, Appellees paid no homage to the Transferee Class's loss of ready access to the federal courts and their other lost ERISA rights such as annual disclosures and fiduciary accountability.

As a consequence of the annuity transaction, the Transferee Class members "must rely primarily (if not exclusively) on state-contract remedies if they do not receive proper payments or are otherwise denied access to their funds." *Beck*, 551 U.S. at 106, 127 S.Ct. at 2318. To leave the Transferee Class in that predicament was a complete abandonment of fiduciary duty.

In *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir.1994), aff'd on other grounds, 516 U.S. 489, 116 S.Ct. 1065 (1996), the trial court summarily concluded that an employer violated its fiduciary duties under ERISA when it transferred its obligation to pay retirees' benefits to another company without obtaining the retirees' consent. The Eighth Circuit affirmed that determination, ruling:

> As we have indicated, these employees were simply "transferred" to MCC without their knowledge or consent. They were given no explanation, they were not asked for permission, and they were not even informed of the "transfer" until MCC went into receivership. Such a complete disregard of the rights and interests of beneficiaries is a clear breach of fiduciary duty in violation of Section 1104(a)(1),

> and the named individual plaintiffs have a right of action for redress under Section 1132(a)(3). An obligor (here, M-F and Varity) cannot free itself of contractually created duties without the consent of the persons to whom it is obligated. Restatement (2d) of Contracts, Section 318(3), comment d. M-F and Varity cannot unilaterally relieve themselves of obligations to the individual retirees. Their attempt to do so is of no legal effect, and we uphold the District Court's ruling in favor of the ten named individual plaintiffs.

Id., at 756.[9] The Eighth Circuit found a breach of fiduciary duty in the fact that retirees' benefit obligations were transferred to the new company without their consent. Likewise, in this case, the decision to transfer the retirees was a cram down, not an arm's length transaction. Verizon imposed its will on the unsuspecting Transferee Class members. When carrying out Verizon's decision to conduct the annuity transaction and transfer retirees without consent, Plan fiduciaries breached their duty of loyalty to the Transferee Class members.

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[9] The *Howe* case proceeded to the Supreme Court, but the Court declined to review this portion of the Eighth Circuit's opinion because the petition for certiorari did "not sufficiently call into question the Court's holding that Varity breached a fiduciary duty with respect to the Massey-Ferguson retirees whose benefit obligations had been involuntarily assigned to Massey Combines." *Howe*, 516 U.S. at 496, 116 S.Ct. at 1070. Although in a later case the Supreme Court ruled that employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate *welfare* plans, *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 78, 115 S.Ct. 1223, 1228 (1995) (emphasis added), the Supreme Court has neither suggested nor ruled that an employer is free to do what the Appellees did with respect to an ongoing *pension* plan.

E. Plan Fiduciaries Breached Their Fiduciary Duty in Failing to Consult with the Transferee Class Members

Whether or not requiring their consent, Plan fiduciaries also breached their fiduciary duty in failing to consult with Transferee Class members. In the Second Amended Complaint, the Transferee Class contends that, if an amendment to an ongoing pension plan requires the purchase of one or more group insurance annuities, at the very least, plan fiduciaries must have first notified and consulted with the affected retirees who had long relied upon their federally-protected rights. When Plan fiduciaries executed the Plan amendment's directive, their deliberative process of choosing one or more annuity providers must have involved dialogue with the affected retirees. The Plan fiduciaries breached their fiduciary duty by secretly selecting a single group annuity provider, placing the affected retirees in jeopardy of losing retirement benefits based upon the fortunes of a single insurer. They should have consulted with the retirees before choosing to put all of the Transferee Class members' nest eggs in one basket instead of contracting with several or more insurance providers. Since the retirees were going to lose all of their ERISA rights and PBGC guarantee, a prudent fiduciary would not act without consulting the beneficiaries.

The fiduciary duty to communicate with potentially affected retirees and their beneficiaries is well established.[10] ERISA and its accompanying regulations call for a "meaningful dialogue between the plan administrators and their beneficiaries." *Booton v. Lockheed Medical Benefit Plan*, 110 F. 3d 1461, 1463 (9th Cir. 1997). "There is nothing extraordinary about this; it's how civilized people communicate with each other regarding important matters." *Id.* This principle is, necessarily, not limited to situations only involving claims for payment of benefits under an employee benefit plan. The importance of the duty to communicate is even greater where pension disclosure and guaranty rights are going to be defeated long after the retirees had been slated to receive ERISA-governed and PBGC-protected monthly pensions during their retirement years.

Verizon stands out as the lone business entity within this country that neither consulted with its retirees nor allowed them a choice when making a decision to transfer retirees from a defined benefit pension plan into an insurance annuity. The Transferee Class requested the District Court to take judicial notice of federal securities filings made by both Ford Motor Company and General Motors Corporation, both revealing that when they decided to "de-risk" their

[10] Although VIMCO appointed an "Independent Fiduciary" to carry out selection of Prudential as the sole annuity provider, the Independent Fiduciary did not consider the wishes of the affected retirees.

respective defined pension plans, they prudently consulted with and allowed all affected retirees a choice. (ROA 1484).[11] Both Ford Motor Company and General Motors Corporation allowed their respective retirees to elect either a lump sum distribution of the balance of their accrued benefits or to go with the selected group annuity.[12] In view of the extraordinary change made to their federally-protected pensions, the entire Transferee Class, all with vested benefits, should have first been consulted, given a choice and their consent obtained before moving them into the state-regulated group annuity.

F. Verizon Plan Fiduciaries Breached Their Fiduciary Duty In Not Assuring Appropriate Protection of the Transferee Class Members.

VIMCO and the Verizon EBC served as the designated plan fiduciaries in control of Plan assets. (ROA. 1378 ¶19). While such Plan fiduciaries must have acted in compliance with duly constituted Plan amendments, they were not beholden to act in accordance with wishes of Verizon expressed in a board

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[11] *See*: http://www.sec.gov/Archives/edgar/data/37996/000115752312002199/0001157523-12-002199-index.htm (Ford's Form 8-K filed April 27, 2012); http://www.sec.gov/Archives/edgar/data/1467858/000146785812000036/0001467858-12-000036-index.htm (GM's Form 8-K filed June 1, 2012).

[12] Verizon Plan fiduciaries could have sought a "Private Letter Ruling" from the Internal Revenue Service allowing lump-sum distribution to the retirees who were receiving Plan annuities. *See*, *e.g.*, http://www.irs.gov/pub/irs-wd/1228045.pdf; http://www.irs.gov/pub/irs-wd/1228051.pdf; http://www.irs.gov/pub/irs-wd/1422028.pdf; http://www.irs.gov/pub/irs-wd/1422029.pdf

resolution which was not a Plan amendment. (ROA. 112-117). VIMCO was only required to act in accordance with the operative Plan amendment. (ROA 115-117).

The applicable Plan amendment did not dictate either that Prudential would be the only annuity provider or that the group annuity selected be purchased and maintained outside of the Plan. (*Id.*). Since the Plan amendment permitted leeway in how the annuity transaction would be structured,[13] the discretionary decision how to carry out the annuity transaction was, rather, an exercise of a fiduciary function cabined by ERISA. In carrying out that duty, the Plan fiduciaries should have required Prudential to provide the Transferee Class the same or substantially similar annual financial disclosures as are required by ERISA. Likewise, they should have dictated that Prudential insure that every retiree, regardless of state residency, have the same level of insurance guaranty equivalent to that provided by the PBGC for participants of a defined pension benefit plan.

Any other terms were disloyal and imprudent. The Plan fiduciaries failed to act in the best interest of the Transferee Class in not obtaining such protection, and

[13] The Plan amendment, Article 8.3(b)(iii), empowered VIMCO to "determine the terms of the annuity contract (or contracts)." (ROA 117).

thereby violated their fiduciary duty. It would have been most appropriate for them to insist that any group annuity purchased with Plan assets be maintained within the ongoing Plan, instead of purchased outside the Plan, so as to maintain the affected retirees' uniform level of PBGC protection and the same panoply of ERISA rights and protections as afforded to all other retirees who remained in the ongoing Plan.

G. When Carrying Out the Annuity Transaction, Verizon Plan Fiduciaries Wrongfully Used $1 Billion in Plan Assets to Pay For Settlor Expenses.

The District Court elided the Transferee Class' allegations that Plan fiduciaries breached ERISA fiduciary duties by using about $1 billion in plan assets to pay for settlor expenses. Transferee Class members contended that "[t]he extra $1 billion payment to Prudential violated Article 8.5 of the Plan which required that Plan assets be used for the "exclusive benefit" of participants to "provide benefits under the terms of the Plan" and pay "reasonable expenses of administering the Plan.[14] Those expenses and fees should have been charged to

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[14] Article 8.5 of the 2009 restated Plan states, in pertinent part, "all property of the Pension Fund, including income from investments and other sources, shall be used for the exclusive benefit of Employees, Retired Employees, former Employees, and Beneficiaries and shall be used to provide benefits under the Plan and to pay reasonable <u>expenses of administering the Plan</u> and the Pension Fund, except to the extent such expenses are paid by the Company." (emphasis added) (ROA 83).

Verizon's corporate operating revenues, not charged to the Plan and Master Trust." (ROA 1407 ¶115).

The District Court erroneously dismissed the claim on the basis that the Transferee Class "did not specify which aspects of the extra $1 billion of expenditures were unreasonable, or how they were unreasonable." (ROA 1591). Reasonableness was not the issue; that argument was not even raised in Appellees' motion to dismiss. (ROA. 1442).[15] Regardless of reasonableness of the expenses charged in connection with the annuity transaction, the real issue is whether the extra $1 billion payment was used to pay settlor obligations for third-party costs related to the annuity transaction, including fees paid to outside lawyers, accountants, actuaries, financial consultants and brokers, expenses that should <u>not</u> have been paid by Plan fiduciaries using Plan assets.

The DOL takes the position that "[e]xpenses incurred in connection with the performance of settlor functions would not be reasonable expenses of a plan as they would be incurred for the benefit of the employer and would involve services for which an employer could reasonably be expected to bear the cost in the normal

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[15] The only argument Appellees raised was that the "Plan no longer has any obligation to pay benefits to members of the Transferee Class as a result of the Prudential annuity transaction" and, "[t]hus, the Transferee Class lacks standing to assert this claim on behalf of the Plan." (ROA. 1442). Appellees' argument and contention is patently false, and even so, it was not addressed by the District Court. <u>The Plan still has an obligation to</u>

course of its business operations. DOL Advisory Opinion 2001-01A: http://www.dol.gov/ebsa/programs/ori/advisory2001/2001-01A.htmhttp://www.dol.gov/ebsa/regs/aos/ao2001-01a.html. Since there are numerous unresolved fact issues about whether the expenses paid by the Plan should have been borne by Verizon, as the employer, none determinable on a Rule 12(b)(6) motion to dismiss, the District Court erred in dismissing the claim that Plan fiduciaries wrongfully paid settlor expenses with Plan assets.

For all the foregoing reasons, this Court should reverse the District Court's rulings determining Plan fiduciaries did not violate their fiduciary duties imposed by ERISA Section 404(a)(1). Accordingly, the Court should reverse the District Court's ruling granting Appellees' motion to dismiss the Transferee Class's Second Claim for Relief in the Second Amended Complaint, and the claim should be remanded for further proceedings.

IV. The District Court Erred In Ruling Appellees Did Not Violate ERISA Section 510, Thus Improperly Dismissing the Third Claim for Relief in the Second Amended Complaint.

Count Three of the Second Amended Complaint alleges that the Appellees violated ERISA Section 510. (ROA 1409-1412 ¶¶118-129). Specifically, the Transferee Class alleges that the annuity transaction violated Section 510 in that

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Transferee Class members, because they remain participants in the Plan for purposes of payment of their Pensioner Death Benefit out of Plan assets. (ROA 1411-1412 ¶128).

Verizon expelled them from the Plan and intentionally interfered with the Transferee Class members' rights and protections under ERISA and the Congressionally-mandated PBGC guaranty of their benefits. The Transferee Class members contend they were deprived of their right to continued participation in the ongoing Plan until such time as the Plan was terminated, and that Verizon had no legitimate justification for removing them from the Plan or giving preferential treatment to other groups of retirees who were allowed to remain in the ongoing Plan. As a result of the annuity transaction, 41,000 management retirees were expelled from the Plan while over 6,000 other similarly-situated management retirees and at least 50,000 non-management retirees and other Plan participants were unaffected.

ERISA Section 510, "Interference with Protected Rights," make illegal both such expulsion of plan participants and beneficiaries and discrimination against them. It reads in pertinent part: "It shall be unlawful for any *person* to discharge, fine, suspend, *expel*, discipline, or discriminate against a participant or beneficiary. . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or] for exercising any right to which he is entitled to under the provisions of an employee benefit plan, this title

or Welfare and Pension Plans Disclosure Act." (emphasis added). 29 U.S.C. §1140.

In the District Court, Appellees acknowledged that this Court "has rejected the proposition that the reach of Section 510 is limited to decisions that affect the 'employment relationship.'" (ROA 1446, n.11).[16] However, Appellees contended a plan amendment that serves to expel a select group of participants and beneficiaries from an ongoing pension plan is not actionable under ERISA Section 510. (ROA 1446). The District Court noted that this Court has never addressed whether plan amendments are actionable under Section 510. (ROA 1363 fn. 12).

In several prior cases before this Court, panels did not find it necessary to address the issue of whether a plan amendment can be actionable under ERISA Section 510. *McGann v. H & H Music Co.,* 946 F.2d 401, 406, fn 8 (5th Cir. 1991) (expressly reserving the question of the scope of Section 510's), cert. denied sub

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[16] Recently, the Seventh Circuit clarified some of its prior opinions misread as suggesting that ERISA Section 510 prohibitions apply only to an employment relationship:

> We are not saying that only employers can be liable for violating §510—although some of our opinions can be read to suggest as much. *See*, *Andersen v. Chrysler Corp.*, 99 F.3d 846, 856 (7th Cir.1996); *McGath v. Auto–Body N. Shore, Inc.*, 7 F.3d 665, 668-69 (7th Cir.1993); *Deeming v. Am. Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir.1990). As we have recently explained, this language was dicta, and any assumption that only employers can be liable under §510 was ill founded. *See*, *Feinberg*, 629 F.3d at 675.

Teamsters Local Union No. 705 v. Burlington Northern Santa Fe, LLC, 741 F.3d 819, 826-27. (7th Cir. 2014).

nom*, Greenberg v. H & H Music Co.*, 506 U.S. 981, 113 S.Ct. 482 (1992); *Hines v. Massachusetts Mut. Life Ins. Co.*, 43 F.3d 207, 210, fn. 5 (5th Cir. 1995) (same), overruled on other grounds, *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003). This case brings the issue squarely before this Court.

Here, the Plan amendment served to expel a select group of retirees from the ongoing plan, affecting only the Transferee Class. The Plan amendment has no potential to affect other present or future retirees. The Plan amendment at issue in this case did not affect all retirees equally, unlike those plan amendments previously considered by either this Court or other appellate courts.

In *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir.1991), this Court considered a welfare plan amendment that reduced the lifetime maximum benefit available for Acquired Immune Deficiency Syndrome ("AIDS") claims from $1,000,000.00 to $5,000.00. While the plan amendment affected only those plan participants who wished to make AIDS related claims, and thus, in a sense, "discriminated" against those plan participants afflicted with AIDS, this Court held that the plan amendment did not violate Section 510 because the change applied to all plan participants. *McGann*, 946 F.2d at 404.

Appellees did not attempt to apply a uniform change to all Plan participants. Rather, Appellees expelled the Transferee Class while maintaining within the

ongoing Plan similarly situated management retirees and all nonmanagement retirees. *McGann* does not sanction such activity.

A judge of the district court from which this appeal was taken has held that an employer should provide uniform treatment to participants in a retirement plan. *Carrabba v. Randalls Food Markets, Inc.*, 145 F.Supp.2d 763, 772 (N.D. Tex. 2000) (McBryde, J) ("principle underlying ERISA [is] that, as a general proposition, an employer should provide uniform treatment to participants in a retirement plan", citing *Frontier Airlines, Inc. v. Frontier Airlines, Inc., Pilot's Pension Board (In re Frontier Airlines, Inc.)*), 84 B.R. 724, 729 (Bkrtcy. D. Colo.1988) ("ERISA contemplates equality of treatment among the covered employees of equal employment status"). This reasoning is in conformity with the Supreme Court's expressed opinion. *Varity Corp. v. Howe*, 516 U.S. at 506, 116 S.Ct. 1065, 1075 (1996) (citing Bogert & Bogert, Law of Trusts and Trustees §543, at 218-219 (duty of loyalty requires trustee to deal fairly and honestly with beneficiaries); 2A Scott & Fratcher, Law of Trusts §170, pp. 311-312 (same); Restatement (Second) of Trusts §170 (same). In this instance, Appellees have not applied a uniform change to either all Plan participants or all retirees.

In their motion to dismiss, the focus of Appellees' argument in this respect was that the Transferee Class failed to sufficiently allege facts so as to prove

Verizon had a discriminatory intent. (ROA 1445). That argument completely misses the mark. The Transferee Class's ERISA Section 510 claim focuses both on the prohibited expulsion of Plan participants and beneficiaries, as well as separately actionable discrimination against them for the purpose of interfering with their rights. (ROA 1410 ¶124). By its plain terms, ERISA Section 510 first prohibits expelling Plan participants and beneficiaries without regard to discriminatory intent, and then also condemns discrimination.

In the District Court, moreover, Appellees could not advance any nondiscriminatory reason for dividing the management retirees into two parts and maintaining full ERISA protection for a group of 6,000 such retirees while not doing so for the other such 41,000 retirees. Such a purely partial transfer of retirees out of an ongoing pension plan in the middle of their retirement years demonstrates a discriminatory intent and, as such, constitutes a ground for Appellant's separate theory of their claim under Section 510 that the annuity transaction represented discrimination intended to interfere with their rights. It is indisputable that the annuity transaction thwarted Congress's aim to safeguard equally the rights of all Plan participants. *See Heimann v. National Elevator Industry Pension Fund*, 187 F.3d 493, 508 (5th Cir. 1999).

When dismissing the Section 510 claim of the Second Amended Complaint, the District Court did not address the distinction between expulsion and discrimination or even rule that the Transferee Class failed to sufficiently allege discriminatory intent, but, steadfastly maintained its initial determination that the "Transferee Class failed to allege a viable *right* with which Verizon interfered." (emphasis added). (ROA 1583, order at p. 5 dismissing claim for the reasons explained in the District Court's first Order of Dismissal, ROA 1361-1363). Specifically, in the first order of dismissal of the ERISA Section 510 claim, the District Court concluded that the Transferee Class had no viable right to continued participation in the Plan. (ROA 1362).[17]

Subsequently, the Transferee Class asserted within their Second Amended Complaint that they had suffered a loss of viable rights to ERISA's protections and the uniform PBGC guarantee. Nevertheless, when dismissing the reasserted ERISA Section 510 claim, the District Court did not address the Transferee Class's allegations that ERISA's panoply of rights and the PBGC uniform

[17] The District Court concluded that, within the Amended Complaint's Section 510 claim, "[t]he only right the Transferee Class asserts, however, is a right to continued participation in the Plan." (ROA 1361-1362).

guarantee are, indeed, viable rights, and that those rights were lost when Transferee Class members were expelled from the Plan.[18]

In all events, the Plan amendment at issue served to strip the Transferee Class of all rights, information, disclosures, remedies and access to the federal courts afforded by ERISA to all other participants in the ongoing Plan. By expelling the Transferee Class from the ongoing Plan and discriminating against them, Appellees thereby defeated a paramount purpose for ERISA's creation, "Congress' desire to offer employees enhanced protection for their benefits." (emphasis added). *Varity Corp. v. Howe*, 516 U.S. 489, 497, 116 S.Ct. 1065, 1070 (1996); *Leigh v. Engle*, 727 F.2d 113, 126 (7th Cir. 1984) ("The entire statutory scheme of ERISA demonstrates Congress' overriding concern with the protection of plan beneficiaries"). The retirees' statutory rights under ERISA and their PBGC guarantee could have been preserved had Appellees either transferred the retirees into another ERISA-regulated defined pension benefit plan or, as discussed in Section II, purchased the group annuity as an asset in the ongoing

[18] When opposing Appellants' effort to obtain a temporary restraining order and preliminary injunction, Appellees conceded that "the loss of pension benefit protections afforded by ERISA and the PBGC, . . .are ultimately financial in nature." (ROA 587). However, in their renewed motion to dismiss, the Appellees did not address the Transferee Class's contention that they lost viable rights by being totally removed from the ERISA grid.

Plan. In the District Court, no reason was even suggested by Appellees to explain why neither satisfactory alternative was pursued.

Besides interfering with the Transferee Class members' panoply of ERISA rights and the PBGC's protection, the annuity transaction interfered with the Transferee Class member's right under the Plan itself to continued participation in the Plan until such time as their respective vested pension benefits were directly paid to them in full. The current SPD for the Plan states, in pertinent part:

> **When participation ends**
> You are a plan participant as long as you have a vested benefit [i.e. accrued] in the plan that has not been paid to you in full.

(emphasis in original). (ROA 77). Clearly, the SPD reflects that, until all pension benefits from the Plan are paid to a retiree – i.e., received by the retiree – he or she will continue participating in the ongoing Plan. The Transferee Class's reading of the SPD language does not conflict with that portion of the Annutitazation Regulation stating, without regard to a particular SPD, that a person will no longer be a plan participant if, for example, he or she receives the balance of his or her benefit in an either a lump sum distribution from the Plan or he or she is receiving his entire benefit from an insurance company. 29 C.F.R. §2510.3-3(d)(2).[19] The

[19] The annuity transaction could not, moreover, affect the Transferee Class members' status as continued participants in the Plan to the extent they have prospective rights to payment of a Pensioner Death Benefit. (ROA 1411-1412 ¶128).

regulation cannot trump the plain language of an SPD, such as those received by Transferee Class members, which told a reasonable Plan participant that he or she will continue participating in the Plan until such time as the full vested benefit has been paid to him or her.

The expulsion of the Transferee Class from the Plan and discrimination against the Transferee Class was a violation of Section 510.

Accordingly, the Court should reverse the District Court's ruling granting Appellees' motion to dismiss the Transferee Class's Third Claim for Relief in the Second Amended Complaint, and the claim should be remanded for further proceedings.

V. The District Court Erred In Ruling The Non-Transferee Class Has No Standing to Vindicate Harm to the Plan Caused by the Verizon Plan Fiduciaries Breaches of Fiduciary Duty, Thus Improperly Dismissing the Fourth Claim for Relief in the Second Amended Complaint.

Count Four of the Second Amended Complaint is brought pursuant to ERISA Section 502(a)(2) by Appellant Pundt and the Non-Transferee Class for the sole benefit of the Plan. (ROA 1412-1414 ¶¶130-136).[20] The annuity transaction

[20] ERISA §502(a)(2), 29 U.S.C. §1132(a)(2), provides that a plan participant may bring a civil action against fiduciaries for breaches of their duties of loyalty and prudence as articulated in ERISA §409(a). *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 105 S.Ct. 3085 (1985). Notably, ERISA Section 502(a)(2) does not give direct standing to a pension plan; there must be someone to bring suit on behalf of the plan. "That provision authorizes either the Secretary of Labor or a 'participant,' 'beneficiary' or

depleted the Plan's actuarial funding (assets by comparison with predictable obligations) to a dangerously low approximately 66% level (*id.*, ¶45) while, at the same time, to facilitate the transaction, approximately $1 billion of Plan assets was applied towards expenses, not for administering the ongoing Plan, but merely for settlor expenses associated with the transaction, including commissions and legal fees generated by many third parties to the transaction.

The group annuity purchased by the Plan should never have been purchased or should have been purchased by the Plan as part of the Plan's portfolio of assets to avoid the resulting depletion of the Plan assets. (*Id.*, ¶¶133-35). The Non-Transferee Class requests relief for the benefit of the Plan against Verizon to remedy the harm to the Pan occasioned by such depletion.

When dismissing the refined Count Four reasserted in the Second Amended Complaint, the District Court relied upon its order dismissing the Appellants' Amended Complaint. (ROA 1583, Order at p. 5, dismissing claim for the reasons explained in the District Court's first Order of Dismissal, ROA 1363-1366).

'fiduciary' to bring a civil action for breach of fiduciary duty as proscribed by §1109(a).'" *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 347 (5th Cir. 1989).

In the first order of dismissal, the District Court erroneously opined that the Non-Transferee Class could not pursue the claim because no one had suffered any personal harm. This is false.

Pursuant to ERISA Section 502(a)(2), the Non-Transferee Class seeks to right a wrong for the benefit of the ongoing Plan.[21] The claim is one for disgorgement of Verizon's illicitly obtained benefit, its use of Plan assets to pay Verizon corporate expenses. Generally, disgorgement claims for breach of fiduciary duty do not require that a plaintiff personally suffer a financial loss, as relief in a disgorgement claim "is measured by the defendant's profits." Restatement (Third) on Restitution and Unjust Enrichment §51 cmt. a (2011); *see also id*. §43 cmt. d (stating a claim based on a breach of the duty of loyalty may be brought "without regard to economic injury"); *id*. (providing examples where fiduciary is liable for gains even though plaintiff suffered no loss). This is because disgorgement claims seek not to compensate for a loss, but to "deprive[ ] wrongdoers of ill-gotten gains." *Commodity Futures Trading Comm'n v. Am. Metals Exchange Corp.*, 991 F.2d 71, 76 (3rd Cir.1993) (quotation omitted). *See*,

[21] ERISA Section 502(a)(2) states a civil action may be brought "by the Secretary or by a participant, beneficiary or fiduciary for appropriate relief under section 409." 29 U.S.C. Section 1132(a)(2). ERISA Section 409, in turn, provides that a plan fiduciary "who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. §1109.

S.E.C. v. Huffman, 996 F.2d 800, 802 (5th Cir.1993) ("[D]isgorgement is ... an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs"" rather than "aim to compensate the victims of the wrongful acts ...." (citations omitted)).

A requirement that there be any showing of personal loss of a plan beneficiary who is defending the financial integrity of a pension plan and seeking disgorgement would allow fiduciaries to retain ill-gotten profit—exactly what disgorgement claims are designed to prevent—so long as the breaches of fiduciary duty do not immediately, as opposed to prospectively, harm the plan or beneficiary. This is not appropriate. *See*, *e.g.*, Restatement (Third) of Restitution and Unjust Enrichment §3 reporter's note (2011) ("[T]here can be restitution of wrongful gain in cases where the plaintiff has suffered an interference with protected interests but no measurable loss whatsoever.").

Courts have traditionally avoided undue benefit to a fiduciary by asserting jurisdiction over cases against a trustee "even though the trust itself ha[d] suffered no loss." George G. Bogert et al., Law of Trusts and Trustees §861 (2013) (citing *Mosser v. Darrow*, 341 U.S. 267, 272-73 (1951); *Magruder v. Drury*, 235 U.S. 106, 120 (1914)). Thus, a holding here that the Non-Transferee Class has standing is not novel and completely appropriate under established authority.

Despite the fact that the Non-Transferee Class' claim is in the nature of a disgorgement claim, the District Court erroneously ruled that the class representative, Appellant Pundt, must, as a matter of constitutional standing, show personal harm before he can carry forward with Count Four.

A. Appellant Pundt and Other Non-Transferee Class Members Have Article III Standing Based On The Invasion Of Their Statutory Right To Proper Management Of Trust Assets Held On Their Behalf.

There can be no dispute that Appellant Pundt, as a participant in the Plan, has constitutional standing to bring Count Four on behalf of the Plan. Appellant Pundt has alleged losses to Plan assets held on his behalf as a direct result of the fiduciary mismanagement of Plan assets in violation of ERISA. The invasion of his statutory right to proper management of Plan assets gives him a concrete, personal stake in the case and, hence, the "injury in fact" required for Article III standing.

Article III requires a party seeking to invoke federal court jurisdiction to demonstrate an "injury in fact," a causal relationship between the injury and the challenged conduct, and likelihood of redressibility. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 (1992). "Injury in fact" exists when: (1) there is "an invasion of a legally protected interest;" (2) the "invasion"

is "concrete and particularized"; and (3) the "invasion" is "actual or imminent, not conjectural or hypothetical." *Id.*

Congress has the power to define "the status of legally cognizable injuries." *Katz v. Pershing, LLC*, 672 F.3d 64, 71, 75 (1st Cir. 2012). This principle is dispositive here. Congress has mandated ERISA fiduciaries to abide by certain strictures and has granted ERISA beneficiaries corresponding rights to sue for the benefit of the Plan for violations of those strictures. *See* 29 U.S.C. §1132(a)(3) (authorizing beneficiaries to sue "to obtain . . . appropriate equitable relief" in order "to redress . . . violations" of ERISA). An ERISA beneficiary thus has a legally cognizable right to have his plan fiduciaries perform those duties that ERISA mandates. Here, the Non-Transferee Class makes a colorable claim that the Plan has been harmed by Appellees' breach of fiduciary duty, especially by the removal of $1 billion from the Plan's assets for expenses that should have been paid out of Verizon's corporate assets.

The District Court's holding that Appellant Pundt and the Non-Transferee Class cannot vindicate the Plan fiduciaries' misapplication of Plan assets and the resulting financial harm done to the Plan because no Plan participant has been personally harmed simply eviscerates ERISA Section 502(a)(2). Indeed, given the terms of Section 502(a)(2), this would mean that neither a co-fiduciary nor the

Secretary of Labor could assume the role of the plaintiff and vindicate harm done by a plan fiduciary to a defined pension benefit plan, unless those plaintiffs could likewise demonstrate personal harm. That is clearly inconsistent with the Congressional intent manifested by the statute that standing be broadly accorded.

The Supreme Court has, in fact, long recognized that the "injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Lujan*, 504 U.S. at 578, 112 S.Ct. at 2145 (quoting *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206 (1975) and *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n.3, 93 S.Ct. 1146, 1148, n.3 (1973)); *see also Massachusetts v. EPA*, 549 U.S. 497, 516, 127 S.Ct. 1438, 1453 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," so long as it "identifie[s] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit").

ERISA gives Appellant Pundt and the Non-Transferee Class a legally protected interests in the Plan and requires fiduciaries to hold Plan assets in trust for the exclusive benefit of the plan's participants. ERISA Sections 403, 404, 29 U.S.C. §§1103, 1104. Appellant Pundt and the Non-Transferee Class have the right to have the Plan assets managed solely in the interests of Plan participants

and beneficiaries with prudence, loyalty and no self-dealing. ERISA Section 404, 29 U.S.C. §1104.

Under ERISA Section 502(a)(2), Congress has identified the injury it seeks to vindicate, i.e., losses to a pension plan resulting from a fiduciary breach, ERISA Section 409, 29 U.S.C. §1109, and identified the persons entitled to bring suit, i.e., participants and beneficiaries, such as Appellant Pundt, fiduciaries, and the Secretary. 29 U.S.C. §1132(a)(2); *Massachusetts*, 549 U.S. at 516, 127 S.Ct. at 1452-53. “Section 1132(a) creates, among other things, a private cause of action against a fiduciary who breaches his fiduciary duties vis-a-vis an employee benefit plan." *Tolbert v. RBC Capital Markets Corp.*, --- F.3d ----, 2014 WL 3408230 at *1 (5th Cir. July 14, 2014).

Congress, indeed, purposefully required plan fiduciaries to hold plan assets in trust for the exclusive benefit of participants, thereby creating a beneficial interest in the trust that is correlative to the plan trustee's fiduciary duties. ERISA Sections 403, 404, 29 U.S.C. §§1103, 1104. Indeed, fully consistent with historical authorities and the structure of ERISA, courts applying ERISA have held that, under 29 U.S.C. §1109(a), ERISA provides that a plan can recover against fiduciaries regardless of whether or not the plan suffered an economic financial loss. *See*, *Leigh v. Engle*, 727 F.2d 113, 122 (7th Cir.1984) (“ERISA

clearly contemplates actions against fiduciaries who profit by using trust assets, even where the plan beneficiaries do not suffer direct financial loss.”). “The purpose behind this rule is to deter the fiduciary from engaging in disloyal conduct by denying him the profits of his breach.” *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1411 (9th Cir.1988) (citing G. Bogert and G. Bogert, The Law of Trusts and Trustees §543, at 218 (2d ed.1978). ERISA does not require either a plan participant or beneficiary to suffer a personal financial loss in order to bring a suit against a fiduciary for breach of the duty to act in the best interest of plan participants and beneficiaries. ERISA provides that a fiduciary “shall ... discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries” and that the fiduciary “shall not ... deal with the assets of the plan in his own interest or for his own account.” 29 U.S.C. §§1104(a)(1), 1106(b) (emphases added).

This Court and other appellate courts have, moreover, held that ERISA statutory violations are *per se* violations, for which lack of harm is not relevant because Congress sought to categorically bar certain actions and to remedy fiduciary violations. *Donovan v. Cunningham*, 716 F.2d 1455, 1464-65 (5th Cir. 1983); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1213 (2nd Cir.

1987); *National Securities Systems, Inc. v. Iola*, 700 F.3d 65, 94 & n.24 (3rd Cir. 2012); *Chao v. Hall Holding Co.*, 285 F.3d 415, 439 (6th Cir. 2002); *Patelco Credit Union v. Sahni*, 262 F.3d 897, 911 (9th Cir. 2001); *Etter v. J. Pease Const. Co., Inc.*, 963 F.2d 1005, 1010 (7th Cir. 1992). By the nature of the holdings of all of the cited decisions, the decisions assumed constitutional standing and correctly recognized that Congress expected participants would have such standing to allege prohibited transactions regardless of whether they individually experienced pecuniary harm.

The District Court's first order of dismissal cited several appellate decisions finding plaintiffs to be without constitutional standing. However, this was because the alleged breaches of fiduciary duty occurred when the pension plan had a surplus and resulted in no economic harm to the Plan. *See*, *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906–07 (8th Cir.2002) (holding that an ERISA plaintiff lacked standing because the plan portfolio had a surplus and, thus, the Plan did not experience actual injury); *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013) (upholding dismissal of plaintiffs' claim regarding purportedly improper and excessive fees paid by the overfunded pension plan since any recovery by the plaintiffs' would have absolutely no effect on the plaintiffs' entitlement to benefits).

In contrast, Count Four centers around conduct that put the Plan at severe risk, as Plan assets were used to pay expenses that should have been borne by Verizon corporate revenues, and the Plan was left significantly underfunded. About $1 billion from Plan assets was used by Verizon not for administration of the ongoing Plan but for establishment of an insurance annuity, including payment of legal fees, consultant fees, actuarial and accounting fees, none serving to benefit the ongoing Plan and the Non-Transferee Class.

Although there was no direct harm to Appellant Pundt when the Appellees engaged in the annuity transaction and used Plan funds to pay expenses that should have been charged to Verizon, Pundt, as a member of the Non-Transferee Class, met the test of Article III standing precisely because all Plan assets continued to be held in trust for the benefit of all Plan participants and beneficiaries, including him, and the fiduciary duties violated by Plan fiduciaries were owed to the Non-Transferee Class of participants and beneficiaries, including him. To put it another way, since Congress gave equal statutory standing to Appellant Pundt, the Secretary of Labor and any co-fiduciary of the Plan, to recover Plan losses, enforce the terms of the Plan, enforce the provisions of ERISA and to seek other "appropriate relief," 29 U.S.C. §1132(a)(2), the only

"injury-in-fact" necessary is that to the Plan. No more is needed to establish the "injury-in-fact" required for Appellant Pundt to have Article III standing.

B. Count Four States A Claim That the Plan Funds Were Improperly Used To Pay Verizon Corporate Expenses.

In Count Four of the Second Amended Complaint, Appellant Pundt alleges the Plan was charged with expenses that should have been charged to Verizon corporate revenues. In connection with the annuity transaction, Verizon transferred to Prudential and Prudential agreed to assume responsibilities for Plan liabilities of $7.4 billion. However, Verizon gave Prudential Plan assets of almost $8.5 billion. Appellant Pundt contends "the extra $1 billion payment was applied towards expenses, <u>not for administering the ongoing Plan</u>, but for settlor expenses, including commissions and legal fees generated by many third parties, including consultants to the annuity transaction, thus, violating Article 8.5 and the terms of Section 2 of the governing Master Trust. There was a breach of the general ERISA duty to use Plan monies to pay only reasonable expenses of Plan administration. Those expenses and fees should have been charged to Verizon's operating revenues, not charged to the Plan and Master Trust." (emphasis original) (ROA 1413 ¶132). A plan sponsor does not have license to treat plan assets as an interest-free loan to pay corporate plan sponsor expenses. The annuity

transaction was carried out at the convenience of the settlor and did not involve the ongoing administration of the Plan. Appellee Pundt's claim relating to the $1 billon was therefore viable and should have not been dismissed.

C. Count Four States A Claim That the Group Annuity Should Have Remained in the Ongoing Plan.

In Count Four of the Second Amended Complaint, Appellant Pundt alleges "[it] would have been in the best interests of all remaining Plan participants not transferred to Prudential (the "Non-Transferee Class") for the group annuity contract purchased by the Plan to have remained in the Plan as part of the Plan's portfolio of assets. Plan fiduciaries breached fiduciary duties to the Non-Transferee Class when implementing the settlor's decision to purchase a single group annuity and remove that purchase from the ongoing Plan's financial portfolio." (ROA 1413 ¶133). Appellees cannot dispute the fact that the annuity transaction left the Plan in a far less stable financial condition, a situation not in the best interests of the Non-Transferee Class, one that could have been avoided by the annuity being purchased by the Plan. Appellee Pundt's claim in this regard should not have been dismissed.

Accordingly, the Court should reverse the District Court's ruling granting Appellees' motion to dismiss the Non Transferee Class's Fourth Claim for Relief

in the Second Amended Complaint, and the claim should be remanded for further proceedings.

CONCLUSION AND PRAYER

For the foregoing reasons, the Court should reverse the judgment of the District Court; award Appellants their costs and attorney's fees;[22] and remand this case for further proceedings.

Dated: August 4, 2014 Respectfully submitted,

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[22] "A long and consistent line of Fifth Circuit precedent allows awards of attorneys' fees for both trial and appellate work." *Norris v. Hartmarx Specialty Stores, Inc.*, 913 F.2d 253, 257 (5th Cir.1990). The "usual practice" of this Court is to transfer consideration of attorneys' fees incurred on appeal and fees to be incurred on remand to the district court. *See*, *Schneider v. PerleyRobertson*, 114 F.3d 1182, at *2 (5th Cir.1997); *Powell v. Rockwell Int'Corp.*, 795 F.2d 522, 523 (5th Cir.1986) (citing *Morrow v. Dillard*, 580 F.2d 1284, 1300 (5th Cir.1978)).

CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2014, I electronically transmitted the attached document to the Clerk of the Court of the 5th Circuit Court of Appeals using the ECF System of the Court. Counsel for the Appellees are registered in this case and will be served with the brief via the ECF system. The electronic case filing system will send a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Curtis L. Kennedy
Curtis L. Kennedy

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because:

1. This brief contains 13,739 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the text of this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font, and the footnotes of this brief are in Microsoft Word in Times New Roman 12 point font.

I hereby certify that: A) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; B) the electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; C) the document has been scanned for viruses suing Symantec Internet Protection active scan and is free of viruses; and D) the paper document will be maintained for three years after the mandate or order closing the case issues, pursuant to 5th Cir. R. 25.2.9.

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