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' REPLY BRIEF

Curtis L. Kennedy, Esq.
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Tele: 303-770-0440
CurtisLKennedy@aol.com

Counsel for Plaintiffs-Appellants

Robert E. Goodman, Jr., Esq.
KILGORE & KILGORE LAWYERS
3109 Carlisle Street
Dallas, Texas 75204
Tele: 214-969-9099
Fax: 214-953-0133
reg@kilgorelaw.com
Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

PAGE

Index of Authorities ii

Summary of Argument 1

Argument 3

I. 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 3

II. 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 6

III. 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 13

IV. The District Court Erred In Ruling The Non-Transferee Class Has No Standing, Pursuant to ERISA Section 502(a)(2), 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 16

Conclusion and Prayer 21

Certificate of Service 22

Certificate of Compliance 23

TABLE OF AUTHORITIES

Page(s)

CASES

Arana v. Ochsner Health Plan,
338 F.3d 433 (5th Cir. 2003) 15

Bell Atlantic Corp. v. Twombly,
550 U.S. 544, 570,574,127 S.Ct. 1955, 1974 (2007) 12, 13

Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C.,
433 F.3d 181 (2nd Cir. 2005).. 19

Greenberg v. H & H Music Co.,
506 U.S. 981, 113 S.Ct. 482 (1992).. 15

Hines v. Massachusetts Mut. Life Ins. Co.,
43 F.3d 207 (5th Cir. 1995) 15

Horvath v. Keystone Health Plan East, Inc.,
333 F.3d 450 (3rd Cir. 2003) 19

Koehler v. Aetna Health Inc.,
683 F.3d 182 (5th Cir. 2012) 4

Lockheed Corp. v. Spink,
517 U.S. 882, 116 S.Ct. 1783 (1996).. 8

McGann v. H & H Music Co.,
946 F.2d 401 (5th Cir. 1991) 15

Mertens v. Hewitt Associates,
508 U.S. 248, 262, 113 S.Ct. 2063, 2071 (1993) 9

Shaver v. Operating Eng'rs Local 428 Pension Trust Fund,
332 F.3d 1198 (9th Cir. 2003) 19, 20

Tolbert v. RBC Capital Markets Corp.,
758 F.3d 619 (5th Cir. 2014) 17

STATUTES

29 U.S.C. §1002(21)(A) 9

29 U.S.C. §1022(b) 3

29 U.S.C. §1104 17

29 U.S.C. §1109 16

29 U.S.C. §1132(a)(2) 17, 18, 19

29 U.S.C. §1132(a)(3) 18, 19

ERISA Section 3(21)(A) 9

ERISA Section 102(b) 2, 3, 4

ERISA Section 404 16

ERISA Section 404(a)(1) 6, 12, 18, 19

ERISA Section 409 17

ERISA Section 502(a)(2) 16, 18, 19

ERISA Section 502(a)(3) 18, 19

ERISA Section 510 .... 2, 13, 14, 15

OTHER AUTHORITIES

29 C.F.R. §2510.3-3(d)(2)(ii) 5

29 C.F.R. §2520.102-3-*(l)* 2, 4

29 C.F.R. §2520.102-3-(*l*)(2) 4

DOL Advisory Opinion No. 97-03A 12

SUMMARY OF ARGUMENT

Appellants' opening Brief anticipated almost all of the arguments and factual and legal inaccuracies proffered in the Appellees' brief. This Reply focuses upon the new arguments and the most egregious inaccuracies contained with the Brief of Appellees (hereinafter collectively referred to as "Verizon").

Appellees' Brief completely ignores the heart of Appellants' claims against Verizon. Verizon's principle argument -- that ERISA does not apply to its settlor-based decision to alter the Verizon Management Pension Plan ("Plan") and enter into an annuity transaction -- misses the mark. Here, Verizon created a Plan amendment that specifically assigned to Plan fiduciaries full discretionary responsibility for formulating the terms of the annuity transaction. When implementing that decision, the Plan fiduciaries were therefore exercising fiduciary authority over the terms of the group annuity. They abjectedly failed to exercise such fiduciary authority by insuring inclusion of terms that would best serve the interests of the affected Plan participants and beneficiaries. Specifically, Plan fiduciaries breached their duty of loyalty to participants and beneficiaries when they failed to include in the group annuity contract the same or substantially similar disclosure protections and uniform financial guarantees for monthly retirement

payments the participants and beneficiaries would have enjoyed under the ongoing Plan pursuant to ERISA.

Appellees make no attempt to refute Appellants' further contention that the October 2012 Plan amendment which served to expel the Transferee Class from the ongoing Plan was highly discriminatory. Appellants' claim that the Plan amendment violated Section 510 of ERISA thereby squarely presents the legal issue of whether a plan amendment can be actionable under ERISA Section 510.

Appellees' Brief does not adequately address either Appellants' argument that the retirees were not properly informed about the possibility of an insurance annuity transaction affecting the retirees' pensions or their argument that Verizon's insertion of a generic reservation of rights clause into a summary plan description does not satisfy the requirement under ERISA Section 102(b) and 29 C.F.R. §2520.102-3-*(l)* that Verizon disclose a possible insurance annuity transaction as being a circumstance that could result in ineligibility, offset or loss of pension plan benefits.

Appellees' Brief also does not address the statutory and Article III standing of Appellant Pundt and the Non-Transferee Class to pursue appropriate equitable relief, including declaratory and injunctive relief requested for Count Four of the Second Amended Complaint.

The Court should reverse the judgment of the District Court and remand this appeal for further proceedings.

ARGUMENT

I. 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.

Count One of the Second Amended Complaint alleges that the Verizon Employee Benefits Committee ("Verizon EBC") breached a duty, pursuant to ERISA Section 102(b), to make disclosure of the risk of a retiree being expelled from participation in Verizon's federally-regulated ongoing Plan and placed into a state-regulated group insurance annuity after he or she had commenced retirement and began collecting his or her monthly pension under the Plan. ERISA Section 102(b) requires a summary plan description ("SPD") for 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 insurance annuity transaction during the operation of the Plan and, thereby lose all associated federal ERISA and Pension Benefit Guaranty Corporation ("PBGC") rights. (ROA 1397 & 79). The SPDs given to the Transferee Class members 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 Transferee Class's ERISA-governed and PBGC-guaranteed pension benefits under the federally-regulated Plan have been completely replaced and offset by a state-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)*.

Verizon has no viable retort to Appellants' contention that, even if Verizon disclosed there might be changes made to the pension plans, more specific disclosure of a potential annuity transfer was required since 29 C.F.R. Section 2520.102-3-(*l*)(2) and other "regulations require considerably greater clarity." *Koehler v. Aetna Health Inc.*, 683 F.3d 182, 189-190, and fn14 (5th Cir. 2012). Appellees contend Plan "fiduciaries could not have been obligated to disclose the possibility of an annuity transaction until *after* the Plan was amended to provide for such a transaction." (Verizon's Brief at pp. 38-39). Yet Appellees have posited both in the District Court proceedings and in this appeal that Verizon undisputably always had the right to place retirees into a group insurance annuity, pursuant to the "Annuitization Regulation." (Verizon's Brief at p. 21) ("federal regulations specifically authorize the transfer of pension benefit obligations to an insurance

company as part of an annuity transaction. *See* 29 C.F.R. §2510.3-3(d)(2)(ii)"). Appellees also contend that "[t]he DOL, moreover, has made clear that a transfer of liabilities may occur either upon plan termination or where -- as here -- the annuity contract is purchased by 'an ongoing plan.'" (Verizon Brief at pp. 21-22). Even if that were the case, then the possibility at any time after retirement had commenced of there being an insurance annuity transaction occurring with the Plan still ongoing was a circumstance that should have been disclosed within the SPDs issued to Transferee Class members, and it was not.

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 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.

II. 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. Verizon's principal argument against Count Two is that the settlor's decision to conduct an annuity transaction is not one cabined by ERISA's fiduciary duty standards. (Verizon's Brief at pp. 23-25). But that argument has always been irrelevant to this case. Count Two does not challenge the corporation's decision, acting as settlor, to amend the Plan and conduct an annuity transaction. Rather, Count II challenges the Plan fiduciaries' subsequent conduct when implementing the Plan amendment.

Here, the Plan amendment vested VIMCO and the VEBC, the Plan fiduciaries, with the responsibility and discretion to determine the terms of the group annuity contract. 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; ROA. 119-20). <u>Verizon concedes that the Plan</u>

fiduciaries' "*implementation* of the amendment directing the annuity purchase is subject to ERISA's fiduciaries standards." (Verizon's Brief at p. 32). Likewise, the District Court so ruled. (ROA 1356).

As explained in Appellants' Opening Brief, the Transferee Class contends, *inter alia*, in Count Two that Plan fiduciaries breached fiduciary duties in implementing the Plan amendment and annuity transaction by: (1) not including terms in the annuity contract requiring Prudential to make the same or substantially similar annual disclosures to which the Transferee Class had become accustomed to receiving under the Plan; and (2) not requiring Prudential to make provisions for the same or substantially similar financial guarantee that the PBGC continues to provide all participants and beneficiaries remaining in the ongoing Plan. The District Court did not even consider these allegations. (ROA. 1359-60; ROA. 1591-95). Likewise, Verizon's Brief does not address these matters.

Appellants contend that 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). Appellants contend that 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).

Verizon's Brief relies, as its saving grace, upon the District Court's erroneous ruling that all actions by Appellees with respect to implementing the Plan amendment's directive for an annuity transaction must be viewed as involving plan design and, thus, settlor functions. That reasoning flies in the face of *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-891, 116 S.Ct. 1783, 1789-1790 (1996), in which the Court held that "when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration, a person is acting as an ERISA fiduciary." 517 U.S. at 890-91, 116 S.Ct. at 1789-90. It also flies in the face of Verizon's concession at page 32 of its Brief, noted above, and the District Court's own recognition of a fiduciary function in that regard, also noted above. The simple fact is that not all of the decisions about the annuity transaction were made by the corporate entity acting in a settlor capacity. Here, Verizon, as plan settlor amended the Plan and in that very Plan amendment specifically directed that the Plan fiduciaries determine the best terms for the group annuity contract. (ROA 113; ROA 1388 ¶51).

Indeed, when deciding the annuity contract terms and conducting the annuity transaction, the Plan fiduciaries exercised total control over allocation and

disposition of more than half of the Plan's assets, even apart from the impact of its decision upon nearly 40% of the fully qualified Plan participants, 41,000 of the total almost 100,000. When the Plan fiduciaries subsequently disposed of $8.5 billion in assets, severely depleting assets of the ongoing Plan, the Plan fiduciaries were, thereby, exercising core fiduciary functions recognized as such by ERISA. ERISA Section 3(21)(A), 29 U.S.C. §1002(21)(A), specifically defines pension plan fiduciary functions to include "exercising authority or control respecting management or disposition of plan assets." *See also Mertens v. Hewitt Associates*, 508 U.S. 248, 262, 113 S. Ct. 2063, 2071 (1993) ("ERISA … defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties – and to damages[.]") When plan assets are at issue, Section 3(21)(A) does not even require that any exercise of discretion be involved so as to trigger the fiduciary function.

Accordingly, given the operative terms of the Plan amendment and under the plain meaning of ERISA Section 3(21)(A), both the disposition of Plan assets delivered to Prudential and the choice of the specific terms for inclusion in the group annuity contract must be regarded as fiduciary functions.

Appellants alleged in their Second Amended Complaint that the Plan fiduciaries breached their duty to act in the best interests of the Transferee Class

because, among other things, they failed to make certain that the group annuity contract contained terms that would preserve the retirees' right to be kept informed as to the funded status of their annuities now managed by Prudential. As alleged in the Second Amended Complaint, "[b]asic 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).

The Plan fiduciaries, in order to serve the best interests of the Transferee Class, should have insisted on terms to be included in the group annuity contract that would have required Prudential to make regular disclosures to the retirees and their beneficiaries. Without their consent, the Transferee Class members have lost numerous disclosure rights and the uniform PBGC financial protection still enjoyed by the retirees in the ongoing Plan. In Verizon's Brief, Appellees paid no homage to the Transferee Class's loss of annual disclosures and accountability by anyone personally charged with investing and administering the group fund or group account Prudential has established for payment of the retirees' annuities. The Plan

fiduciaries' failure to insist upon such terms for the group annuity contract accentuates their disloyalty to the Transferee Class.

In their Brief, Appellees also nowhere address Appellants' contention that Plan fiduciaries should have dictated, as part of the terms of the group annuity contract, 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.

Lastly, as explained in Appellants' Brief, the Plan fiduciaries are not insulated from the allegations about their fiduciary breach resulting from using about $1 billion of Plan assets to pay settlor expenses, not expenses needed for the ongoing administration of the Plan. Verizon's Brief pays no tribute to Article 8.5 of the Plan, which places a specific limitation on what expenses can be charged to Plan assets -- only "reasonable expenses of administering the Plan." (ROA 83). Instead of using Plan assets to pay costs of administering the ongoing Plan, the Plan fiduciaries gave Prudential an extra $1 billion dollars for costs associated with consultants, accounting and legal fees for establishing and administering the group insurance contract held outside of the Plan. Those expenses should have been charged to corporate assets, not charged to Plan assets.

On appeal and for the first time, Appellees' attempt to defend their misuse of Plan monies by relying upon a DOL advisory opinion. (Verizon's Brief at pp. 35-36). However, DOL Advisory Opinion No. 97-03A, 1997 WL 28100 at *3 (January 3, 1997) is limited to the situation where a pension plan is completely <u>terminated</u> for all plan participants and beneficiaries:

> "[R]easonable expenses incurred in implementing a plan termination would generally be payable by the plan. This would include expenses incurred in auditing the plan, preparing and filing annual reports, preparing benefit statements and calculating accrued benefits, notifying participants and beneficiaries of their benefits under the plan, and, in certain circumstances, amending the plan to effectuate an orderly termination that benefits the participants and beneficiaries."

Appellants' contention that, because the Plan was not terminated, the monies spent on professional services for the benefit of corporate Verizon should have instead remained in the Plan in order for there to be compliance with Article 8.5, was neither addressed by the District Court's dismissal order nor addressed within Verizon's Brief.

Accordingly, Appellants have indisputably nudged their ERISA Section 404(a)(1) breach of fiduciary duty claim challenging the Plan fiduciaries' implementation of Verizon's decision to conduct an annuity transaction "across the line from conceivable to plausible", and Count Two of the Second Amended Complaint should not have been dismissed for failure to state a claim. *Bell Atlantic*

Corp. v. Twombly, 550 U.S. 544, 570, 574, 127 S.Ct. 1955, 1974 (2007). This Court should accordingly reverse the District Court's Rule 12(b)(6) ruling to dismiss the Transferee Class's Second Claim for Relief in the Second Amended Complaint, and the claim should be remanded for further proceedings.

III. 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 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.

In Appellants' Brief, the Transferee Class accurately predicted and thoroughly addressed all of Appellees' arguments now asserted in Appellees' Brief. Appellees

place reliance on inapplicable case law concerning changes to nonvested welfare benefit plans. Furthermore, Appellees fail to address the Transferee Class's contention that retirees had a right to continued participation in the Plan until such time as they were either properly transferred to another ERISA-governed pension plan or there was a complete termination of the Plan affecting all participants and beneficiaries.

Appellees lamely argue that Appellants' ERISA Section 510 claim fails because "Plaintiffs conclusorily allege that Defendants had a 'specific intent to. . . discriminate and expel' members of the Transferee Class from the Plan.'" (Verizon's Brief at p. 43, citing to a single allegation within the Second Amended Complaint). That argument is totally inaccurate. Appellants unambiguously alleged the necessary elements for a viable ERISA Section 510 claim. See Second Amended Complaint ¶¶119-129. (ROA 1409-1412).

Appellees also wrongly assume that the Section 510 claim "ultimately turns on the permissibility of the October 2012 Plan amendment adopted by Verizon as settlor" (Verizon's Brief at p. 44) without addressing Appellants' major contention that the Plan amendment was discriminatory and so violative of Section 510. Appellants' claim that the discriminatory Plan amendment which served to expel the Transferee Class from the ongoing Plan presents squarely before this Court the

previously reserved legal 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), cert. denied sub nom*, Greenberg v. H & H Music Co.*, 506 U.S. 981, 113 S.Ct. 482 (1992) (expressly reserving the question of the scope of Section 510); *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).

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 view of the obviously discriminatory Plan amendment, this Court should rule that Appellants have stated a viable claim under ERISA 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.

IV. 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.

In order to protect the retirement income of workers, ERISA imposes duties of prudence and loyalty on the fiduciaries who administer pension plans and authorizes any plan participant to bring an action on behalf of the plan to enforce those statutory duties. 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). Plan fiduciaries allowed the annuity transaction to severely deplete the Plan's actuarial funding and applied approximately $1 billion of Plan assets 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. Thus, the financial harm suffered by the Plan due to the annuity transaction was concrete, actual and imminent, not conjectural or hypothetical, and the harmful situation is being addressed by a Plan participant taking legal action under ERISA on behalf of the Plan.

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 in accordance with the terms of plan documents and without 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 of Labor. 29 U.S.C. §1132(a)(2) "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.*, 758 F.3d 619, 621 (5th Cir. 2014).

The fact that the Plan is not directly bringing this lawsuit is no obstacle. The Plan has no means to bring suit for the benefit of the Plan other than via a litigant representative. Unquestionably, courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit: trustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth.

The invasion of the Non-Transferee Class's statutory right to proper management of the Plan's assets gives each class member a personal stake in the

case and, hence, the "injury in fact" required for Article III standing. However, the District Court erroneously ruled that, because Appellant Pundt had not yet been personally harmed, he could not seek recourse for the benefit of the Plan. The decision below severely undermines ERISA's strict statutory duties and the rigor with which Congress intended the federal courts to monitor the conduct of fiduciaries trusted with safeguarding the retirement assets of tens of millions of American workers.

Appellant Pundt has a stake in remedying the financial wrongs done to the Plan which owns the claims asserted in Count Four. A requirement that there first be a showing of personal loss by the representative suing on behalf of a pension plan simply eviscerates the power, pursuant to ERISA Section 502(a)(2), that Congress gave to plan participants, beneficiaries, fiduciaries and the Secretary of Labor to bring a federal court action and defend the financial integrity of a pension plan and to remedy plan mismanagement.

With respect to Count Four of the Second Amended Complaint, the Non-Transferee Class seeks appropriate equitable relief, including declaratory and injunctive relief. See Second Amended Complaint, Prayer at ¶ B.2., B.3., B.7. and

B.10. (ROA 1418-20).[1] With regard to injunctive relief, it is well-established that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing." *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 456 (3rd Cir. 2003); *Central States Southeast and Southwest Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199-200 (2nd Cir. 2005); *see also Shaver v. Operating*

---

[1] Within the Second Amended Complaint, Appellant Pundt and the Non-Transferee Class seek the following equitable relief:

B.2. Pursuant to ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§1132(a)(2) and (a)(3), grant Plaintiffs and Class members a declaration that the Verizon EBC and VIMCO each breached its ERISA duty of loyalty and impartiality and, thus, failed to discharge duties to act in the best interests of Plaintiffs and the members of the two classes, as required by ERISA Section 404(a)(1), 29 U.S.C. §1104(a)(1);

B.3. Pursuant to ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3), grant Plaintiffs and members of the two classes a declaration that the Verizon EBC and VIMCO failed to act in compliance with the Plan's rules, the restrictions and requirements of ERISA and, thus, violated ERISA Section 404(a)(1), 29 U.S.C. §1104(a)(1);

B.7. Pursuant to ERISA Section 502(a)(2), 29 U.S.C. §1132(a)(2), grant equitable and remedial relief for the benefit of the Plan, including an order requiring reversal of any transfer of Plan assets by VIMCO from Verizon's master trust to Prudential and restoration of all losses to the Plan and Master Trust, including those attributable to the use of Plan monies to pay unreasonable and excessive expenses; and

B.10. Grant Plaintiffs and all members of the two classes such other and further class-wide and plan-wide relief requested within Counts One, Two, Three and Four, including appropriate equitable relief allowable under ERISA Section 502(a)(3), 29 U.S.C. §1132(a)(3), as the Court deems just and proper;

(ROA. 1418-20).

Eng'rs Local 428 Pension Trust Fund, 332 F.3d 1198, 1203 (9th Cir. 2003) (reversing district court's dismissal for failure to state a claim, finding that actual injury to individual participants is unnecessary where relief sought is "purely equitable").

Consistent with these holdings, 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). Accordingly, Appellant Pundt clearly satisfies any standing requirement.

While Verizon, as settlor, wanted the purchase of the group annuity to relieve the Plan of any further obligation for payment of certain retirees' annuities, Appellees' Brief does not explain why the Prudential group annuity contract could not have remained within the Plan as a segregated asset solely designated for funding the group of retirees' annuities. Indeed, Appellees cannot explain why the Prudential group annuity contract cannot be placed within the ongoing Plan, while,

at the same time, the Plan's remaining other assets remain as the source of payment of both the Non-Tranferee Class and, to a limited extent, the Transferee Class as well.[2] Certainly, those factual issues cannot be determined in a Rule 12(b)(6) disposition.

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; and remand this case for further proceedings.

Dated: October 6, 2014

Respectfully submitted,

/s/ Curtis L. Kennedy
Curtis L. Kennedy, Esq.
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Tele: 303-770-0440
CurtisLKennedy@aol.com

/s/ Robert E. Goodman, Jr.
Robert E. Goodman, Jr., Esq.
KILGORE & KILGORE, PLLC
3109 Carlisle Street
Dallas, Texas 75204
Tele: 214-969-9099
Fax: 214-953-0133
reg@kilgorelaw.com

[2] Transferee Class members remain participants in the Plan for purposes of payment of their Pensioner Death Benefit payable out of other remaining Plan assets. (ROA 1411-1412 128).

CERTIFICATE OF SERVICE

I hereby certify that on October 6, 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 4,587 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.

/s/ Curtis L. Kennedy
Curtis L. Kennedy