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

WILLIAM LEE, JOANNE McPARTLIN,	§	
and EDWARD PUNDT, Individually,	§	
and as Representatives of plan participants	§	
and plan beneficiaries of the	§	
VERIZON MANAGEMENT PENSION PLAN,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION NO. **3:12-cv-04834-D**
	§	
VERIZON COMMUNICATIONS INC.,	§	
VERIZON CORPORATE SERVICES GROUP	§	
INC.,VERIZON EMPLOYEE BENEFITS	§	
COMMITTEE, VERIZON INVESTMENT	§	
MANAGEMENT CORP., and VERIZON	§	
MANAGEMENT PENSION PLAN,	§	
	§	
Defendants.	§	

PLAINTIFFS' RESPONSE OPPOSING (Docket 64) MOTION TO DISMISS

Plaintiffs William Lee, Joanne McPartlin, and Edward Pundt, by and through their counsel, file this response in opposition to Docket No. 64, the Verizon Defendants' motion to dismiss the Amended Complaint**.**

DATED this 18TH day of March, 2013. Respectfully submitted,

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PLAINTIFFS' RESPONSE OPPOSING (Docket 64) MOTION TO DISMISS

Plaintiffs William Lee, Joanne McPartlin, and Edward Pundt, by and through their counsel, file this response in opposition to Docket No. 64, the Verizon Defendants' motion to dismiss the Amended Complaint, and state as follows:[1]

PRELIMINARY STATEMENT

On October 17, 2012, Verizon Communications Inc. ("Verizon") filed with the United States Securities and Exchange Commission ("SEC") a Form 8-K announcing it had entered into a contract with The Prudential Insurance Company of America ("Prudential") under which the Verizon Management Pension Plan ("Plan") would no longer provide monthly pension payments pensions to approximately 41,000 management retirees, but, instead, Prudential would begin providing monthly annuity payments to such retirees**.** (App. 212). On December 10, 2012, Verizon's annuity transaction with Prudential was finalized and executed. Through the annuity transaction with Prudential, Verizon evaded the dictates of the Employee Retirement Income Security Act of 1974, as amended , 29 U.S.C. §§ 1001- 1461 ("ERISA"), and denied participants and their beneficiaries the protection accorded by the Pension Benefit Guaranty Corporation ("PBGC"), as Congress contemplated with respect to defined benefit pension plans. The "Press release" attached to Verizon's October 17, 2012 SEC filing emphasizes the abdication of Verizon's responsibility under ERISA and the loss of PBGC protection, in stating "Prudential, rather than Verizon, will be responsible for making these monthly payments. The group annuity includes an irrevocable commitment by Prudential to make annuity payments to affected retirees

[1] The material facts set forth in this Response are supported by the sworn affidavits assembled in the previously submitted Appendix ("App") efiled as an attachment to the original Complaint, Docket 1.

covered under the annuity contract." (App. 216).

A letter from Verizon to affected retirees was executed by Marc C. Reed, who serves both as Verizon's Chief Administrative Officer and as Chairman of the Verizon Employee Benefits Committee, the named fiduciary and plan administrator of the Verizon Management Pension Plan**.** (App. 221). The standardized letter stated, in part: "Let me assure you that this decision was made after careful consideration and a thorough review of both our funding obligations and what is legally permissible under the terns of the Plan." (emphasis added). (*Id.*). To the contrary, Verizon's transaction violated the controlling terms of documents establishing and governing the Verizon Management Pension Plan, constituted a breach of ERISA's fiduciary duty requirements, violated ERISA and Internal Revenue Code restrictions and limitations on making accelerated benefit distributions when a defined benefit plan is less than 80% funded, violated ERISA's prohibition on discriminatory and intentional interference with retirees' rights under a pension plan and ERISA, and undermined Congressional intent to provide American pensioners with a uniform safety net under the auspices of the PBGC.

By its annuity transaction, Verizon simply "de-risked", or abandoned, its long-term responsibility for financing and paying the pension obligations of 41,000 retirees. Verizon's motive is revealed in a standardized letter sent to affected retirees indicating that "Prudential will assume the responsibility for your pension benefit," so as to allow "Verizon to better focus on the core mission of providing the best communications network around the world." (App. 220-221, 251-252). The annuity transaction did not follow ERISA's procedures for a standard termination.

In shedding the pension obligations in question, moreover, Verizon took advantage of the group of retirees least able to defend themselves. Verizon did not engage in the same or similar

action with respect to non-management retirees or those management retirees formerly represented by unions. Retirees formerly represented by unions during employment were not included in the annuity transaction. (App. 3-4, Lee Aff. ¶ 9). Also not included were certain retiree participants of the Plan formerly employed by MCI Corporation, whom Verizon is obviously concerned have rights inconsistent with Verizon's intentions. Verizon, that is to say, moved swiftly against management retirees who lack a formalized bargaining representative or other such protection. (*Id.*).

Plaintiffs, for themselves and on behalf of a putative class of 41,000 pension plan participants and their beneficiaries and on behalf and for the benefit of the Plan, seek temporary, preliminary and permanent injunctive relief, as well as declaratory plan-wide relief. Each of the claims asserted in this Amended Complaint, all under ERISA, support such relief against one or more of the Verizon Defendants on the grounds identified below:

Count One	Verizon Employee Benefits Committee - Violation of ERISA Section 102(b), Failure to Provide Required Disclosure in Summary Plan Descriptions;
Count Two	Verizon Employee Benefits Committee, Verizon Investment Management Corporation - Violation of ERISA Section 404(a)(1), Breach of ERISA Fiduciary Duties;
Count Three	Verizon, Verizon Employee Benefits Committee, Verizon Investment Management Corporation - Violation of ERISA Section 510, Interference with Protected Rights; and
Count Four	Verizon, Verizon Employee Benefits Committee, Verizon Investment Management Corporation - Appropriate Equitable Relief under ERISA Section 502(a)(2) for the Benefit of the Plan.

STANDARD OF REVIEW

The Verizon Defendants move to dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In deciding the Rule 12(b)(6) motion, the Court must construe the Amended Complaint petition in the light most favorable to plaintiffs, accept as true all well-pleaded factual allegations, and draw all reasonable inferences in their favor. See, e.g., *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004). The Court may also consider those documents referenced in the Amended Complaint that are central to the Plaintiffs' claims. See, e.g., *Hoffman v. L & M Arts*, 774 F.Supp.2d 826, 829 n.2 (N.D. Tex. 2011) (Fitzwater, C.J.) (citing *Kane Enters. v. MacGregor (USA) Inc*., 322 F.3d 371, 374 (5th Cir. 2003)).

"To survive a Rule 12(b)(6) motion, the plaintiff[s] must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974 (2007)), *cert. denied*, 552 U.S. 1182, 128 S.Ct. 1230 (2008). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Katrina Canal*, 495 F.3d at 205 (quoting *Twombly*, 127 S.Ct. at 1965). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id*. (internal quotation marks omitted) (quoting *Martin K. Eby Construction Company v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). The ultimate question in 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).

The United States Supreme Court has prescribed a "two-pronged approach" to determine whether a complaint fails to state a claim under Rule 12(b)(6). See *Ashcroft v. Iqbal*, 556 U.S.

652, 678, 129 S.Ct. 1937, 1949-50 (2009). The trial court must "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950. The trial court should then assume the veracity of any well-pleaded allegations and "determine whether they plausibly give rise to an entitlement of relief." *Id.* The plausibility principle does not convert Fed.R.Civ.Proc. Rule 8(a)(2) notice pleading into a "probability requirement," but "a sheer possibility that a defendant has acted unlawfully" will not defeat a motion to dismiss. *Id.* at 1949. A plaintiff need only "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The trial court, drawing on its judicial experience and common sense, must undertake the "context-specific task" of determining whether the plaintiff's allegations "nudge" its claims against the defendant "across the line from conceivable to plausible." See *id.* at 1950, 1952. The trial court does not evaluate the plaintiff's likelihood of success; instead, it only determines whether the plaintiff has pleaded a legally cognizable claim. *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 376 (5th Cir. 2004).

ARGUMENT

I. The Transferee Class Has Stated A Breach Of Fiduciary Duty Claim.

Count Two of the Amended Complaint alleges that the Verizon Defendants breached ERISA fiduciary duties owed to the transferee class.

While ERISA allows a corporate employer to play multiple roles, such as both the plan sponsor and the plan fiduciary, ERISA does require the entity with two hats wear only one at a time, and wear 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). In Count Two, Plaintiffs contend that the Verizon Defendants did not carry-out a standard plan termination so as to assume the plan sponsor settlor role. The annuity transaction which disposed of more than half of the Plan's assets, together with 41,000 Plan participants fell squarely within the definition of ERISA fiduciary functions. Plaintiffs further contend that the Verizon Defendants breached their fiduciary duties.

A. There is No Federal Regulation Countenancing The Transaction.

In enacting ERISA, Congress wanted to make sure "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. The [PBGC] termination insurance program is a major part of Congress' response to the problem." *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 375, 100 S.Ct. 1723, 1733 (1980). While it is true that a key feature of ERISA's voluntary retirement system is the ability of a corporate employer to engage in a plan merger, spin-off or standard termination, discrimination is not permitted.

Contrary to the Verizon Defendants' assertion, there is no federal regulation that either contemplates or countenances the very situation that occurred here. Both the federal regulation and the interpretative bulletin referred to in defendants' motion to dismiss address only the situations where there is either an annuity purchase at the beginning of a person's retirement or an annuity purchase when a standard termination occurs affecting all plan participants. 29 C.F.R. § 2510.3-3(d)(2)(ii) ("Annuitization Regulation"); 60 Fed. Reg. 12328 (March 6, 1995) ("Interpretative Bulletin"). Neither the Annuitization Regulation nor the Interpretative Bulletin provide any approval for the Verizon Defendants' actions which circumvented the stringent requirements and federal agency oversight attendant to a standard plan termination contemplated

by ERISA Section 4041(a)(1)(b), 29 U.S.C. § 1341(a)(1)(b). The Verizon Defendants provide no case law authority construing the Annuity Regulation to cover any transaction other than a purchase of an insurance annuity by a pension plan at the onset of a participant's retirement or at the point of plan termination under ERISA Section 4041(a)(1)(b), 29 U.S.C. § 1341(a)(1)(b).

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

Plaintiffs Lee and McPartlin assert that the removal of the transferee class together with over $8.5 billion in Plan asset pursuant to the annuity transaction was a fiduciary function and not a mere plan design function as posited by the Verizon Defendants. "In 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." See *Hughes*, 525 U.S. at 443, 119 S.Ct. at 763; *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-891, 116 S.Ct. 1783, 1789-1790 (1996) (holding 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"). In this instance, the decision to amend the Plan wasn't concerned with changing the benefit formula or choosing which group of present and future workers could qualify for benefits, a run of the mill amendment involving the form and benefit structure of a pension plan, as occurred in both the *Hughes* and *Spink* cases. Rather, in this instance, the plan amendment was a proxy for exercising fiduciary control over allocation and disposition of more than half of the Plan's assets and 41,000 fully qualified Plan participants.

When Verizon decided to enter into the agreement for the Prudential annuity transaction, it was not an ordinary day-to-day corporate decision. When Verizon agreed to exchange pension

plan assets in an on-going plan for a group insurance annuity, Verizon was acting in a fiduciary capacity under ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), because it was specifically exercising authority and control respecting management or disposition of plan assets." [2]

The plain meaning of ERISA Section 3(21)(A) is that the act of choosing to transfer Plan assets to Prudential and choosing the group of Plan participants to be affected and sent to Prudential during an on-going pension plan can reasonably be construed as anything other than the "management" or "disposition" of a plan assets.[3] Verizon Communications Inc. exercised control over both the Verizon Employee Benefits Committee and the Verizon Investment Management Corporation with respect to management and disposition of Plan assets and Plan participants which activity did not involve termination of the Plan.

The Verizon Defendants mistakenly contend that their conduct must be viewed as plan design in the wake of the Supreme Court's decision in *Beck v. PACE International Union*, 551 U.S. 96, 127 S.Ct. 2310 (2007). *Beck* involved an employer's decision to completely end its defined benefit pension plans by undertaking a standard termination. The Supreme Court made

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[2] ERISA § 3(21)(A), states, in part, that a fiduciary is one who "(i) [E]xercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of [plan] assets." 29 U.S.C. § 1002(21)(A)(i). 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.).

[3] "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.

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. The holding in *Beck* is not dispositive here, because the transaction under attack by the retirees was neither a termination nor merger of the Plan. While not all of Verizon's business activities involve plan management or administration, Verizon's decision to jettison 41,000 retirees while continuing with operations of the Plan goes far beyond being a settler function.

The selection of an annuity provider is also indisputably a fiduciary function. See 29 CFR §§ 2509.95–1, 4041.28(c)(3). The decisions whether to maintain a purchased group insurance annuity within an ongoing plan and which already retired persons are also properly viewed as fiduciary in nature. Here, the Prudential annuity transaction had everything to do with managing Plan participants and disposing of Plan assets. Hence, the transaction raises the question whether the Plan fiduciaries were freed from fiduciary responsibilities by simply implementing the mandates of a Plan amendment. Plaintiffs contend that, even if the amendment to the pension plan required the purchase of a group insurance annuity, at the very least, the Plan fiduciaries must have first notified, consulted with
and obtained the consent of, the affected retirees.

Since implementation of the decision to purchase a group insurance annuity and the transfer of retirees was a fiduciary function, it would have been most prudent for the Plan fiduciaries to insist that any group annuity purchased with Plan assets be maintained within the ongoing 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. By allowing thousands of retirees to be treated differently from others in the

annuity transaction, Plan fiduciaries breached their duty of impartiality, a "duty to administer the trust in a manner that is impartial with respect to the various beneficiaries of the trust." Restatement, Trusts, Third § 79.

C. **The Annuity Transaction Diminished The Overall Value Of The Retirees' Pension Benefit And Was Done Without the Retirees' Consent**.

The Verizon Defendants contend that since the annuity transaction resulted in the transferred retirees receiving the same dollars and cents per monthly payment, the retirees' suffered no loss in benefits. That is not true. It cannot be disputed that while each retiree 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 guarantee. That very PBGC guarantee has some value and it has been taken away without the retirees' consent. Furthermore, while in the Plan, each retiree's pension payment was, without question, protected from all creditors claims' and fully exempt from any bankruptcy estate. Now, all of that protection has been lost. Lastly, the transferred class of retirees have lost numerous federal legal rights still enjoyed by the retirees in the ongoing Plan.[4] The transferred retirees "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.

The Verizon Defendants did not obtain consent from any retiree to transfer him or her to Prudential. 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:

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[4] In their motion to dismiss, the Verizon Defendants pay no attention to the transferee class's loss of rights to annual disclosures, fiduciary accountability and ready access to the federal courts.

> 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. 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. The *Howe* case decision proceeded to the Supreme Court and was affirmed, but the Justices declined to review this portion of the Eighth Circuit's opinion only because it construed the petition for certiorari as not having raised the issue. 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 taken the position nor ruled that an employer is free to do what the Verizon Defendants did with respect to an ongoing *pension* plan.

Article 1.2 of the Plan dictates that the terms of the pension plan in effect whenever each Plaintiff retired to govern his or her respective rights. When Plaintiff Lee and Plaintiff McPartlin retired, each was protected by the following provision set forth within subpart (c) of Article 15.1 of the NYNEX Management Pension Plan:

> (c) ***General Benefit Protection***.
> A change or termination shall not adversely affect the rights of any Employee, without his or her consent, to any benefit or pension to which he may have previously become entitled hereunder. (emphasis added).

(App. 286). Lacking both Plaintiff Lee's and Plaintiff McPartlin's consent, the Verizon Defendants' consummation of the Prudential annuity transaction, resulting in the loss of all federal protections, accordingly, violated their grandfathered contractual rights under the

NYNEX Management Pension Plan. Herein, the transferred retirees, all with vested benefits, should have first been consulted and then their consent obtained before the Verizon Defendants reached agreement to the annuity transaction.

For all the reasons stated, Verizon Defendants' motion to dismiss Count Two of the Amended Complaint must be denied.

II. **The Transferee Class Has Stated An ERISA Section 102(b) Claim**.

Count One of the Amended Complaint alleges that the Verizon Employee Benefits Committee breached a duty to make disclosure pursuant to ERISA Section 102(b) requiring SPDs to describe the "circumstances which may result in disqualification, ineligibility, or denial, or loss of benefits." 29 U.S.C. § 1022(b). The Department of Labor ("DOL") regulation promulgated under ERISA Section 102(b) further requires, in part, that any SPD contain a statement

> clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction or recovery. . . of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits. . . (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 considered essential in informing employees and retirees of their rights, reasonable expectations and obligations under a pension plan.

The Verizon Defendants take the position that they always had the right to conduct an annuity transaction during ongoing Plan operations, citing the Annuitization Regulation, 29 C.F.R. § 2510.3-3(d)(2)(ii). (Dkt entry 64-1, pp. 6-7; Dkt. entry 29, p. 12 "the transfer of liabilities may occur when a plan terminates or when the annuity contract is purchased by an ongoing plan."). Accordingly, an annuity transaction was perceived by the Verizon Defendants as a then exiting circumstance that may have resulted in the loss of Plan provided benefits, and

that circumstance should have been disclosed in the SPDs. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993) ("Section 1022(b) relates to an individual employee's eligibility under then existing, current terms of the Plan. . .). Yet, no SPD ever informed any retiree that, under existing terms of the Plan, 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 and, thereby lose all associated federal rights and the uniform PBGC protection. The SPDs 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, when everyone is affected alike. (App. 18).

There is no legal support for the Verizon Defendants' argument that a generally worded reservation of rights provision permitting changes and amendments suffices to comply with the more detailed disclosure requirements mandated by ERISA Section 102(b) and the companion federal regulation. Thus, no SPD provided adequate notice to the transferee class that, during the ongoing Plan, they might be transferred outside ERISA's regulatory regime and, thus lose valuable federal rights and the PBGC uniform guarantee.

For all the reasons stated, Verizon Defendants' motion to dismiss Count One of the Amended Complaint must be denied.

III. The Transferee Class Has Stated An ERISA Section 510 Claim.

Count Three of the Amended Complaint alleges that the Verizon Defendants violated ERISA Section 510. 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 other Plan participants were unaffected.

ERISA Section 510, "Interference with Protected Rights," make such discrimination illegal. 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 my become entitled

under the plan, 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. The Fifth Circuit's own review of ERISA's legislative history "found nothing to suggest that Congress intended to protect the pension and welfare benefits of active employees any more strenuously than that of retirees." *Heimann v. National Elevator Industry Pension Fund*, 187 F.3d 493, 508 (5th Cir. 1999), *overruled on other grounds*, *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003). Instead, Congress's aim was to safeguard equally the rights of all participants. The Fifth Circuit has declared:

> ERISA's basic purpose is "to strengthen and improve the protections and interests of participants and beneficiaries of employee pension and welfare plans." s. Rep, No. 93-127. See also, h.R. Rep. No. 95-533, stating that the "primary purpose of the bill is the protection of individual pension rights[.]" ERISA's basic purposes, plain words and legislative history, require a reading of §§ 510 and 502(a)(3) that provides all participants and beneficiaries, including former employees, former union members, and retirees with a remedy for economic retaliation because of participants' and beneficiaries' exercise of pension plan rights. (citation omitted).

Heimann, 187 F.3d at 508.[5] Accordingly, contrary to the Verizon Defendants argument, retirees are not excluded from ERISA Section 510's prohibition against discrimination.

By choosing to remove from the Plan the pensions of approximately 41,000 retirees and entering into the Prudential annuity transaction without there being a complete termination of the Plan, Verizon, the Verizon EBC and VIMCO had and continue to have the specific intent to violate ERISA, to discriminate against and expel Plaintiffs and the putative class of retirees from ongoing participation in the Plan and to interfere with retirees' rights and protections accorded by the terms of the Plan and ERISA.

The primary Plan rights that the Verizon/Prudential annuity transaction interferes with are Plaintiffs' and putative class members' rights to continued participation in the Plan until such time as their respective vested pension benefits are paid in full. The current SPD for the Plan

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[5] *Heimann's* analysis with respect to a different legal issue, ERISA preemption and removal of a state filed action, was subsequently overruled. *Arana,* 338 F.3d. at 440.

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). **(App. 19)**.

Clearly, the SPD reflects that, until all pension benefits from the Plan are paid to the retiree, i.e., received by the retiree, he or she will continue participating in the ongoing Plan. Without their consent and in violation of the Plan, Plaintiffs' and putative class members' rights to receive a full distribution of their respective vested pension benefits were defeated.

The Verizon Defendants argue there has been no ERISA Section 510 violation only by misapplying the Fifth Circuit's seminal ERISA Section 510 case. *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir.1991), *cert. denied sub nom. Greenberg v. H & H Music Co.*, 506 U.S. 981, 113 S.Ct. 482 (1992), concerned a welfare benefit "to which an employee may have conceivably become entitled" and the appellate court held that an employer could amend the plan so as to reduce the lifetime maximum benefit available for Acquired Immune Deficiency Syndrome ("AIDS") claims from $1,000,000.00 to $5,000.00. While this affected only those plan members who wished to make AIDS related claims, and thus, in a sense, "discriminated" against those plan members with AIDS, <u>the change applied to all plan members</u>. Indeed, the *McGann* court noted the change affected all employees generally and was not specifically designed to deny [Mr. McGann] particular medical benefits in effect. *McGann*, 946 F.2d at 404. By contrast in this case, the Verizon Defendants have not applied a uniform change to all Plan participants.

Notwithstanding the fact that the Plan had almost 47,000 retirees of equal status, all receiving fixed monthly annuity payments, the Verizon Defendants expelled 41,000 retirees from the Plan and kept within the ongoing Plan 6,000 similarly situated retirees. The Verizon Defendants do not advance any legitimate, nondiscriminatory reason for dividing the retirees and maintaining full ERISA protection for the group of 6,0000 retirees. The Verizon Defendants'

transfer of retirees out of an ongoing pension plan in the middle of their retirement years demonstrates invidious intent and thwarts Congress's aim to safeguard equally the rights of all Plan participants. *Heimann,* 187 F.3d at 508.

In their brief, the Verizon Defendants misrepresent the holding of three appellate court decisions in an attempt to support their proposition that ERISA Section 510 cannot be the basis for challenging a discriminatory plan amendment: *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491 (3rd Cir.1994); *Mattei v. Mattei*, 126 F.3d 794 (6th Cir. 1997); and *Deeming v. American Standard, Inc.,* 905 F.2d 1124 (7th Cir. 1990). Neither case supports the Verizon Defendants' position.

In *Haberern*, the defendant employer had altered the terms of its ERISA welfare plan so as to reduce life insurance coverage for all persons over the age of fifty-six, while raising coverage for all others under age fifty-six, an amendment that resulted in hurting the plaintiff alone, the only person over age fifty-six. In deciding whether this sort of "discrimination" was actionable under ERISA Section 510, the Third Circuit adopted the employer's argument that "while [§ 1140] prohibits discrimination against a plan participant for the purpose of interfering with the attainment of plan rights, it does not prohibit plan amendments which affect only one person," *Haberern*, 24 F.3d at 1502. In this case more than one individual is involved.

In *Mattei v. Mattei*, 126 F.3d 794 (6th Cir. 1997), the widow brought suit against her daughter and her deceased husband's estate for refusing to make payments to her as retaliation since she had exercised her rights to receive certain death benefits under a pension plan. The underlying dispute in *Mattei* did not, however, involve a plan amendment. The Verizon Defendants cite to mere dicta not pertaining to the decision's holding. In a divided opinion the result was a ruling that the widow's state law claim was properly brought under ERISA Section 510. *Id*., at 806.

In *Deeming v. American Standard, Inc.,* 905 F.2d 1124 (7th Cir. 1990), the appellate court

noted when deciding the case that the exact parameters of ERISA Section 510 had not yet been decided and stated, an ERISA Section 510 claim requires "an allegation that the employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way." *Id.*. at 1127. Subsequently, in *Feinberg v. RM Acquisition, LLC*, 629 F.3d 671 (7th Cir. 2011), the same appellate court ruled that the *Deeming* "language is dictim," disagreeing that the statute is limited to employer-employee situations and declaring that "[t]here is more to the statute." *Id.*, at 675.

In the wake of the Fifth Circuit's *McGann* decision, courts within the Fifth Circuit have 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 (N.D. Tex. 2000) (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"). In *Taylor v. Bank One, Texas, N.A.*, 137 B.R. 624 (S.D. Tex. January 15, 1992), the court ruled the employer violated ERISA Section 510 by attempting to exclude one group of retirees while maintaining plan participation for another group of retirees, stating

> Bank One has not attempted to apply a uniform change to all ERISA plan participants. Rather, it has attempted to exclude the Subject Participants entirely, while still providing benefits to the Bank One Participants. *McGann* does not sanction such activity. Indeed, *McGann* makes it clear that section 510 prohibits discrimination "motivated by a desire ... to deprive an employee of an existing right to which he may become entitled."

Id., 137 B.R. at 643.

In light of the cited authorities, Verizon Defendants' motion to dismiss Count One of the Amended Complaint must be denied.

IV. Plaintiff Pundt Has Stated An ERISA Breach of Fiduciary Duty Claim.

Count Four of the Amended Complaint is brought, pursuant to ERISA Section 502(a)(2) by Plaintiff Pundt for sole benefit of the Plan.[6] Specifically, Plaintiff Pundt alleges the Prudential annuity transaction occurred when the Plan was "at-risk", i.e., less than 80 percent actuarially funded.[7] Also, Plaintiff Pundt has alleged that Plan funds were used to pay expenses and costs that should have been paid with Verizon corporate operating revenues. All relief is sought for the benefit of the Plan.

A. Plaintiff Pundt Has Article III Standing Based On The Invasion Of His Statutory Right To Proper Management Of Trust Assets Held On His Behalf.

There can be no dispute that Plaintiff Pundt has statutory standing to bring Count Four on behalf of the Plan. However, Verizon Defendants contend Count Four must be dismissed on the grounds that Plaintiff Pundt lacks Article III standing because he has not suffered a personal "injury in fact" sufficient to confer Article III standing. Plaintiff 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

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[6] 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). Plaintiff Pundt does not bring suit under § 502(a)(2) to recover personal damages for misconduct, but rather he seeks recovery on behalf of the Plan. *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.

[7] Under requirements established by Congress, a defined benefit pension plan is considered to be in at-risk status for a plan year if the statutory funding ratio is less than 80 percent. *Perelman v. Perelman*, __ F.Supp.2d ___, 2013 WL 271817, at *5 (E.D. Pa. Jan. 24, 2013) (citing 29 U.S.C. § 1083(i)(4)(A)).

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*. The Supreme Court has 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 (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 Plaintiff Pundt and all other employee benefit plan participants 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. Plaintiff Pundt has 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 Plaintiff Pundt, fiduciaries, and the Secretary. 29 U.S.C. § 1132(a)(2); *Massachusetts*, 549 U.S. at 516, 127 S.Ct. at 1452-53. Congress 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.

Moreover, the Fifth Circuit and other appellate courts have 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). These decisions assumed constitutional standing and their holdings correctly recognized that Congress expected participants would have such standing to allege prohibited transactions regardless of whether they individually experienced pecuniary harm.

As noted in the Verizon Defendants' brief, several appellate courts have found plaintiffs to be without Article III standing when the alleged breaches of fiduciary duty occurred when the pension plan had a surplus and resulted in no economic harm. 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 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 when the Plan was at-risk and Plan assets were used to pay expenses that should have been borne by Verizon corporate revenues. Even if there was no direct harm to Plaintiff Pundt when the Verizon Defendants engaged in the annuity transaction and used Plan funds to pay expenses that should have been charged to corporate revenues. Therefore, Plaintiff Pundt has Article III standing. All of the Plan assets continued to be held in trust for the benefit of all Plan participants and beneficiaries, and the fiduciary duties

the Verizon Defendants allegedly violated are owed to the Plan participants and beneficiaries.

Thus, since Congress gave statutory standing to Plaintiff Pundt 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 Plaintiff Pundt to have Article III standing.

B. Count Four States a Claim That the Plan Was Not Minimally Funded.

In Count Four of the Amended Complaint, Plaintiff Pundt alleges the Verizon Defendants violated rules prohibiting accelerated benefit distributions when the Plan's funding ratio calculated as of January 1, 2012 was below 80 percent. (Dkt. entry 59, ¶¶ 41, 50, 121 citing ERISA Section 206(g)(3)(C)). When a pension plan's funding ration is less than 80 percent, the plan has limited ability to make lump sum distributions and annuity purchases. IRC Sections 436(d)(3), (5), 26 U.S.C. §§ 436(d)(3), (5). In their motion to dismiss the Verizon Defendants submit heresay evidence, an unsworn letter from an actuary reporting the Plan's adjusted funding level as of January 1, 2012, taking into account subsequent contributions, to be just over 100 percent. (Dkt. entry 64-2, pp. 10-15). The actuary does not attest to the truthfulness and accuracy of the report which is further undermined by the actuary's statement dated September 28, 2012 containing the caveat, ". . . we cannot verify the accuracy of all this information. . . " (Dkt. entry 64-2, at p. 13 of 15).

While there is a SEC filing submitted by Verizon reporting a contribution made to the Plan during September, 2012, it does not state the actual date of the Plan's receipt and the Plan's funding level. The Verizon Defendants cannot contend that the purported actuary's statement is a public record. Public records include any materials subject to judicial notice, including securities filings made with the SEC and publicly available stock prices. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 2509 (2007).

Accordingly, since there has been no verification of the purported chart showing a figure

for the Plan's adjusted funding ratio, which chart is attached to a heresay statement made by an actuary, the Court should not accept the evidence for the truth of the matter asserted when ruling upon the Verizon Defendants' motion made under Fed.R.Civ.Proc. Rule 12(b)(6).

C. Count Four States AClaim That the Plan Funds Were Improperly Used To Pay Verizon Corporate Expenses.

In Count Four of the Amended Complaint, Plaintiff Pundt alleges the Plan was charged with expenses that should have been charged to Verizon corporate revenues. (Dkt. entry 59, ¶). 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. Plaintiff Pundt contends an "extra $1billion payment was applied towards excessive and unreasonable expenses, not for administering the on-going Plan, but for commissions and excessive legal fees generated by many third parties, including consultants to the Verizon/Prudential annuity transaction, thus violating Section 8.5 [of the Plan] and the terms of the Master Trust. (emphasis original) (Dkt. entry 59, ¶ 122). The Verizon Defendants contend it is okay to use Plan funds to pay certain legal fees and sales commissions pertaining to the administration of a pension plan and that significant contributions to the plan were made after the annuity transaction. True, but 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. 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 course of its business operations. DOL Advisory Opinion 2001-01A: http://www.dol.gov/ebsa/regs/aos/ao2001-01a.html. There has been neither an allegation nor evidence presented that all of the extra billion dollars

paid by the Plan to the Prudential were for both necessary and reasonable expenses incurred by the Plan. There are numerous unresolved fact issues that cannot be determined when ruling on the pending Rule 12(b)(6) motion to dismiss.

CONCLUSION

For all the foregoing reasons, the Court should deny Docket No. 64, the Verizon Defendants' Motion to Dismiss.

DATED this 18TH day of March, 2013. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of March, 2013, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and causing a copy to be emailed to Defendants' counsel as follows:

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