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

PHILIP A. MURPHY, JR., *et al.*, Plaintiffs,	)	**CIVIL ACTION NO. 3:09-CV-2262-G**
v.	)	
VERIZON COMMUNICATIONS INC., *et al.*, Defendants.	)	**ORAL ARGUMENT REQUESTED**

VERIZON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.3, defendants Verizon Pension Plan for New York and New England Associates, Verizon Pension Plan for Mid-Atlantic Associates, Verizon Enterprises Management Pension Plan, and Verizon Management Pension Plan ("Verizon Plans"), Verizon Communications Inc. and Verizon Corporate Services Group Inc. ("Verizon"), and Verizon Employee Benefits Committee ("VEBC," and collectively, "Verizon Defendants"), hereby move for summary judgment on Counts I - IV, VI and VII of plaintiffs' Second Amended Complaint. None of the Verizon Defendants is named in Count V.

SUMMARY

Count I. In Count I, plaintiffs allege that VEBC violated ERISA's "full and fair review" requirement. *See* ERISA § 503, 29 U.S.C. § 1133. There is no private right of action for damages for alleged violations of this provision. VEBC is entitled to summary judgment,

inter alia, because there can no genuine dispute that the relevant Verizon Plan fiduciaries substantially complied with ERISA § 503.

Count II. In Count II, plaintiffs allege that VEBC violated ERISA's summary plan description disclosure requirements. *See* ERISA § 102(b), 29 U.S.C. § 1022(b). The elements of a claim under this provision of ERISA include (i) a material violation of the disclosure provision (or the regulations thereunder), (ii) actual harm, and (iii) causation. VEBC is entitled to summary judgment, *inter alia*, because plaintiffs cannot satisfy any of these elements.

Count III. In Count III, plaintiffs allege that VEBC violated ERISA's prohibited transaction rules. *See* ERISA § 406, 29 U.S.C. § 1106. A plaintiff asserting a prohibited transaction claim must demonstrate, *inter alia*, that (i) the alleged conduct was undertaken by a person acting in a fiduciary capacity, (ii) the alleged conduct constituted a prohibited transaction under the statute, and (iii) none of the statutory exceptions to the prohibited transaction rules, *see* ERISA § 408, 29 U.S.C. § 1108, applies. VEBC is entitled to summary judgment, *inter alia*, because there is no evidence that VEBC acted in a fiduciary capacity or that any prohibited transaction took place, and because at least one statutory exception to the prohibited transaction rules applies.

Count IV. In Count IV, plaintiffs allege that VEBC violated ERISA's fiduciary duty requirements. See ERISA § 404, 29 U.S.C. § 1104. A plaintiff asserting an ERISA fiduciary breach claim must demonstrate, *inter alia*, that the alleged conduct was undertaken by a person acting in a fiduciary capacity and that the person violated ERISA's standards for fiduciary conduct. VEBC is entitled to summary judgment, *inter alia*, because there is no evidence that (i) VEBC breached any ERISA duties (including the duty to act in accordance with plan

documents), (ii) any of the actions complained about by plaintiffs were taken in a fiduciary capacity, or (iii) class members suffered any harm as a result of the alleged breaches.

Count VI. In Count VI, plaintiffs seek relief from Verizon and VEBC pursuant to ERISA § 502(a)(2) & (3), 29 U.S.C. § 1132(a)(2) & (3). Neither of these provisions provides an independent ground for relief under ERISA; rather, they authorize suit in certain circumstances for alleged violations of ERISA and/or the terms of an ERISA plan. Verizon and VEBC are entitled to summary judgment, *inter alia*, for the same reasons that VEBC is entitled to summary judgment on Counts I through IV.

Count VII. In Count VII, plaintiffs seek benefits purportedly due to them under the terms of the Verizon Pension Plans. *See* ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B). The Verizon Plans are entitled to summary judgment on Count VII because (i) there is no evidence that plaintiffs were due any benefits under the terms of the Verizon Plans as written and (ii) reformation is not an available remedy under Section 502(a)(1)(B).

* * *

Pursuant to Local Rules 56.5, the Verizon Defendants submit herewith a brief setting forth arguments and authorities in support of this motion. Pursuant to Local Rule 56.6, the Verizon Defendants also submit in support of this motion an appendix containing deposition transcripts, documents and written discovery responses in this action.

The Verizon Defendants request oral argument on this motion.

Dated: August 26, 2011

Respectfully submitted,

/s/ Christopher L. Kurzner
Christopher L. Kurzner
Texas Bar No. 11769100
KURZNER PC
1700 Pacific Avenue, Suite 3800
Dallas, Texas 75201
Tel.: 214-442-0801
Fax: 214-442-0851
ckurzner@kurzner.com

Jeffrey G. Huvelle (admitted pro hac vice)
Christian J. Pistilli (admitted pro hac vice)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel.: (202) 662-6000
Fax: (202) 662-6291

Attorneys for the Verizon Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2011, I caused a true and correct copy of the Verizon Defendants' motion for summary judgment, supporting memorandum, and appendix to be served on counsel for all other parties via the Court's electronic filing system as set forth in Miscellaneous Order 61 as follows:

Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, CO 80237-1741
Fax: (303) 843-0360

Robert E. Goodman, Jr.
Francis Goodman PLLC
8750 N. Central Expressway – Ste. 1000
Dallas, TX 75231
Fax: (214) 368-3974

David Whittlesey
Andrews Kurth LLP
111 Congress Avenue
Suite 1700
Austin, TX 78701
Fax: (512) 320-9292

/s/ Christopher L. Kurzner
Christopher L. Kurzner

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

PHILIP A. MURPHY, JR., ***et al.*****,**	
Plaintiffs,	**CIVIL ACTION NO. 3:09-CV-2262-G**
v.	
VERIZON COMMUNICATIONS INC., ***et al.*****,**	**ORAL ARGUMENT REQUESTED**
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF THE VERIZON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Christopher L. Kurzner
Texas Bar No. 11769100
KURZNER PC
1700 Pacific Avenue, Suite 3800
Dallas, Texas 75201
Tel.: 214-442-0801
Fax: 214-442-0851
ckurzner@kurzner.com

Jeffrey G. Huvelle (admitted pro hac vice)
Christian J. Pistilli (admitted pro hac vice)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel.: (202) 662-6000
Fax: (202) 662-6291

Dated: August 26, 2011

Attorneys for the Verizon Defendants

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 2

A. The Statutory Context 2
1. Pension and Welfare Benefit Plans 2
2. Fiduciary Duties Under ERISA 3
3. Plan Spinoffs and Mergers 4

B. Verizon's Spinoff Of Its Directories Businesses 8

C. The Employee Benefits Aspects Of The Idearc Spinoff 11
1. Pension Benefits 12
2. Post-Retirement Welfare Benefits 14

D. The Verizon Pension Plans 15

E. Verizon's Welfare Benefit Plans 17

F. Plaintiffs And Their Claims 18
1. Plaintiffs' Employment 18
2. Plaintiffs' Pension Benefits 18
3. Plaintiffs' Administrative Claims 19
4. Plaintiffs' Claims in this Lawsuit 19

STANDARD OF REVIEW 21

ARGUMENT 22

I. PLAINTIFFS' CLAIM THAT THE IDEARC SPINOFF VIOLATED ERISA'S FIDUCIARY DUTY REQUIREMENTS FAILS AS A MATTER OF LAW. 22

A. The Idearc Pension Spinoff Fully Complied With ERISA And Applicable Treasury Regulations. 23

B. Verizon's Decision To Spin Off The Plans Was Not Made In A Fiduciary Capacity. 26

C. Defendants Did Not Violate The Plan Documents Rule. 30

D. Defendants Did Not Breach Any Duty To Provide Welfare Benefits To The Class. 33

II. PLAINTIFFS' PROHIBITED TRANSACTION CLAIM IS MERITLESS. 36

III. PLAINTIFFS' SPD DISCLOSURE CLAIM SHOULD BE DISMISSED. 39

A. Verizon's Pension Plan SPDs Did Not Violate ERISA. 39

B. The Supreme Court's "Actual Harm" Requirement For SPD Disclosure Claims Mandates Dismissal Of Plaintiffs' Claims And Any Class Allegations. 41

IV. PLAINTIFFS' CLAIM FOR BENEFITS DUE UNDER THE PLAN FAILS. 42

V. PLAINTIFFS' "FULL AND FAIR REVIEW" CLAIM IS WITHOUT MERIT.................. 43

VI. PLAINTIFFS' FREE-STANDING "EQUITABLE RELIEF" COUNT DOES NOT STATE A DISTINCT CLAIM UPON WHICH RELIEF CAN BE GRANTED. 47

CONCLUSION.. 48

TABLE OF AUTHORITIES

Page(s)

CASES

Ames v. American Nat'l Can Co.,
170 F.3d 751 (7th Cir. 1999) 27

Bakner v. Xerox Corp. Employee Stock Ownership Plan,
No. SA-98-CA-0230-OG, 2000 WL 33348191 (W.D. Tex Aug. 28, 2000) 27

Bigger v. Am. Commercial Lines,
862 F.2d 1341 (8th Cir. 1988) 7, 25

Black & Decker Disability Plan v. Nord,
538 U.S. 822 (2003)..2, 45

Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc.,
998 F.2d 1185 (3d Cir. 1993)..26, 27, 37

Bourgeois v. Pension Plan for Emps. of Santa Fe Int'l Corps.,
215 F.3d 475 (5th Cir. 2000) 43

Celotex Corp. v. Catrett,
477 U.S. 317 (1986)..21

Central Laborers' Pension Fund v. Heinz,
541 U.S. 739 (2004)..8

CIGNA Corp. v. Amara,
131 S. Ct. 1866 (2011)..39, 41, 42, 43

Conkright v. Frommert,
130 S. Ct. 1640 (2010)..2, 31

Cotton v. Mass. Mut. Life Co.
402 F.3d 1267 (11th Cir. 2005) 29

Curtis-Wright Corp. v. Schoonejongen,
514 U.S. 73 (1995)..3, 34, 35

DuMond v. Centex Corp.,
172 F.3d 618 (8th Cir. 1999) 43

Dyce v. Salaried Employees' Pension Plan of Allied Corp.,
15 F.3d 163 (11th Cir. 1994) 32

Ehlmann v. Kaiser Foundation Health Plan of Texas,
198 F.3d 552 (5th Cir. 2000) 22

Evans v. Bexley,
750 F.2d 1498 (11th Cir. 1985) 37, 38

Faircloth v. Lundy Packing Co.,
91 F.3d 648 (4th Cir. 1996) 22

Fischer v. Philadelphia Elec. Co.,
994 F.2d 130 (3d Cir. 1993)....................40

Flanigan v. General Elec. Co.,
242 F.3d 78 (2d Cir. 2001)....................27, 28, 37, 40

Foster Medical Corp. Employees' Pension Plan v. Healthco, Inc.,
753 F.2d 194 (1st Cir. 1985)....................25

Franklin v. First Union Corp.,
84 F. Supp. 2d 720 (E.D. Va. 2000) 32

Gutierrez v. City of San Antonio,
139 F.3d 441 (5th Cir. 1998) 21

Hargrave v. Commonwealth Gen. Corporation's Long Term Disability Plan,
No. 10-30720, 2011 WL 1834490 (5th Cir. May 13, 2011)....................34

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999).................... passim

Hunter v. Caliber System, Inc.,
220 F.3d 702 (6th Cir. 2000) .... passim

Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway Co.,
520 U.S. 510 (1997)....................3

Izzarelli v. Rexene Prods. Co.,
24 F.3d 1506 (5th Cir. 1994) 26

Juliano v. Health Maintenance Org. of N.J., Inc.,
221 F.3d 279 (2d Cir. 2000)....................43, 44

Kirschbaum v. Reliant Energy, Inc.,
526 F.3d 243 (5th Cir. 2008) 4, 29

Koch Indus., Inc. v. Sun Co.,
918 F.2d 1203 (5th Cir. 1990) 23, 25

Lacy v. Fulbright & Jaworski,
405 F.3d 254 (5th Cir. 2005) 43

Lockheed Corp. v. Spink,
517 U.S. 882 (1996)....................4, 36

Malia v. General Elec. Co.,
23 F.3d 828 (3d Cir. 1994)....................5

Massachusetts Mutual Life Insurance Co. v. Russell,
473 U.S. 134 (1985)....................46

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986)....................21

Mertens v. Hewitt Associates,
508 U.S. 248 (1993)....................47

Milofsky v. American Airlines, Inc.,
404 F.3d 338 (5th Cir. 2005)....................29

Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.,
695 F.2d 839 (5th Cir. 1983)....................21

O'Connor v. Boeing N. Am., Inc.,
197 F.R.D. 404 (C.D. Cal. 2000)....................42

Paulsen v. CNF Inc.,
559 F.3d 1061 (9th Cir. 2009)....................27

PBGC v. LTV Corp.,
496 U.S. 633 (1990)....................3

Peacock v. Thomas,
516 U.S. 349 (1996)....................47

Pegram v. Herdrich,
530 U.S. 211 (2000)....................26

Penn v. Howe-Baker Engineers, Inc.,
898 F.2d 1096 (5th Cir. 1990)....................32

Sengpiel v. B.F. Goodrich Co.,
156 F.3d 660 (6th Cir. 1998)....................29, 35

Sprague v. General Motors Corp.,
133 F.3d 388 (6th Cir. 1998)....................22

Sullivan v. CUNA Mut. Ins. Soc'y,
__ F.3d __, No. 10-1558, 2011 WL 3487414 (7th Cir. Aug. 10, 2011)....................34

Systems Council EM-3 v. AT&T Corp.,
159 F.3d 1376 (D.C. Cir. 1998) 6, 23, 27, 28

Tibble v. Edison Int'l,
639 F. Supp. 2d 1074 (C.D. Cal. 2009) 37

Tulley v. Ethyl Corp.,
861 F.2d 120 (5th Cir. 1988) 5

United Steelworkers of Am., Local 2116 v. Cyclops Corp.,
860 F.2d 189 (6th Cir. 1988) 26

Varity Corp. v. Howe,
516 U.S. 489 (1996)....................4

Wade v. Hewlett-Packard Dev. Co. LP Short Term Disability Plan,
493 F.3d 533 (5th Cir. 2007) 46

Walter v. Int'l Ass'n of Machinists Pension Fund,
949 F.2d 310 (10th Cir. 1991) 46

Wise v. El Paso Natural Gas Co.,
986 F.2d 929 (5th Cir. 1993) 34

STATUTES

26 U.S.C. § 411....................6

26 U.S.C. § 414 ....5, 6, 8, 33

29 U.S.C. § 1002....................3, 4, 29

29 U.S.C. § 1021....................23

29 U.S.C. § 1022....................39

29 U.S.C. § 1024....................22

29 U.S.C. § 1054.................... passim

29 U.S.C. § 1058.................... passim

29 U.S.C. § 1104.................... passim

29 U.S.C. § 1106....................36, 37, 38

29 U.S.C. § 1108....................37

29 U.S.C. § 1109....................47

29 U.S.C. § 1132 .....42, 47

29 U.S.C. § 1133 43

29 U.S.C. § 1202 8

OTHER AUTHORITIES

26 C.F.R. § 1.411(d)-3 .....8, 31, 33, 40

26 C.F.R. § 1.411(d)-4 33

26 C.F.R. § 1.414(*l*)-1 ..... passim

26 C.F.R. § 4980F 23

29 C.F.R. Part 4044 (Appendix B) 6

29 C.F.R. § 2509.75-8 29

29 C.F.R. § 2520.102-3 .....39, 40

29 C.F.R. § 2520.104b-3 .....22, 32

29 C.F.R. § 2560.503-1 .....44, 45, 46

43 Fed. Reg. 47713 .....5, 8

Rev. Rul. 2008-40 33

Fed. R. Civ. P. 23 ..... 20, 41-42

Fed. R. Civ. P. 56 21

Bruce Alan Miller, EMPLOYEE BENEFITS: MERGERS AND ACQUISITIONS (Practicing Law Institute 1985) 6, 7, 24

P. Schneider & B. Pinheiro, ERISA: A COMPREHENSIVE GUIDE (3d ed. 2008). 6

Melissa Elaine Stover, *Maintaining ERISA's Balance*, 58 WASH. & LEE L. REV. 689, 715 (2001) 3

Eugene H. Wachtel, *Pension and Profit Sharing Problems In Corporate Acquisitions*, 59 TAXES 905 (1981) 7

INTRODUCTION

Defendants Verizon Communications Inc., Verizon Corporate Services Group Inc., Verizon Employee Benefits Committee, Verizon Pension Plan for New York and New England Associates, Verizon Pension Plan for Mid-Atlantic Associates, Verizon Enterprises Management Pension Plan, and Verizon Management Pension Plan, (collectively, "defendants") submit this memorandum in support of their motion for summary judgment.

This case stems from Verizon's transfer of pension plan assets and liabilities to Idearc, Inc. ("Idearc") in connection with the spinoff of Verizon's telephone directories business, Verizon Information Services ("VIS"), in 2006. Plaintiffs Phillip A. Murphy, Sandra R. Noe and Claire M. Palmer were long-term employees in the directories business of NYNEX and its predecessors. After retiring from NYNEX in the mid-1990s, plaintiffs began receiving pension benefits from NYNEX pension plans. Following the merger of NYNEX and Bell Atlantic, plaintiffs became participants in Bell Atlantic pension plans. And when Bell Atlantic subsequently merged with GTE to form Verizon, plaintiffs became participants in Verizon's pension plans. After Verizon spun off its telephone directories business, plaintiffs became participants in Idearc's pension plans. In 2009, plaintiffs filed this lawsuit, alleging that Verizon's transfer of the obligations for their pension benefits to the Idearc plans violated the Employee Retirement Income Security Act of 1974 ("ERISA").

Pension plan mergers and spinoffs are common, especially in industries such as telecommunications, where radical changes in technology have required companies to transform themselves. ERISA permits pension plan mergers and spinoffs, provided that the requirements of Sections 204(g) and 208 of ERISA – along with applicable regulations – are satisfied. Plaintiffs do not allege that Verizon's transfer of pension obligations to Idearc failed to comply

with these requirements; nor could they. The undisputed factual record establishes that the transfers fully satisfied the requirements of ERISA, the Internal Revenue Code, and all applicable Treasury regulations relating to pension plan mergers and spinoffs.

Instead, the gravamen of plaintiffs' complaint appears to be that defendants breached their fiduciary duties under ERISA in connection with the Idearc pension transfer. ERISA's fiduciary duties, however, apply only to the extent that a person exercises discretionary authority or control over the management or administration of an ERISA plan, and do *not* apply to plan design decisions, like the decision to spin off a portion of a pension plan in connection with a corporate divestiture. Here, because there is no record evidence to support the assertion that defendants acted in a fiduciary capacity in designing the Idearc transaction (or otherwise violated any ERISA requirement in connection with the spinoff), plaintiffs' claims fail as a matter of law and defendants are entitled to summary judgment.

BACKGROUND

A. The Statutory Context

1. Pension and Welfare Benefit Plans

In enacting ERISA, Congress sought both to encourage employers to offer employee benefit plans and to protect the employees who participate in those plans. ERISA allows an employer to choose the plans and the benefits it will offer: ERISA does not require employers to establish employee benefit plans, and it does not specify either the type or the level of benefits that such plans must provide. *See Conkright v. Frommert*, 130 S. Ct. 1640, 1648-49 (2010); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003). At the same time, if an employer elects to offer an employee benefit plan, ERISA protects the employees who participate in the plan. The nature of the protections that ERISA provides depends primarily on whether the plan is a welfare plan or a pension plan.

A plan that provides medical, dental, life insurance or certain other benefits is classified by ERISA as a welfare plan. *See* 29 U.S.C. § 1002(1). "ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits." *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Thus, employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Id.*; *see Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Railway Co.*, 520 U.S. 510, 515 (1997) (same).

A plan that provides for retirement income is classified by ERISA as a pension plan. *See* 29 U.S.C. § 1002(2). Under ERISA, pension plans fall into two categories: defined benefit plans and defined contribution plans. In a defined contribution plan, a participating employee's benefit depends on the value of the plan's assets. A defined benefit plan, by contrast, promises each participating employee a benefit determined by the plan's benefit formula. Under a defined benefit plan, a participating employee's benefit is determined by the plan's benefit formula, *not* by the value of the plan's assets. *See generally Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-41 (1999). Most defined benefit plans are covered by the termination insurance program established under ERISA. If a defined benefit plan is terminated without sufficient assets to provide benefits to participants under the plan, benefits become payable under ERISA's termination insurance program. *See PBGC v. LTV Corp.*, 496 U.S. 633, 636-40 (1990).

2. Fiduciary Duties Under ERISA

ERISA's standards of fiduciary responsibility apply to those who control the assets or the administration of either a welfare plan or a pension plan. While ERISA's fiduciary standards "are grounded in trust law," Congress intentionally modified them "to fit the employee benefit context." Melissa Elaine Stover, *Maintaining ERISA's Balance*, 58 WASH. & LEE L.

REV. 689, 715 (2001). This is because "Congress realized that imposing a fiduciary duty . . . on employers at all times would discourage the development of pension plans by making the costs of maintaining the program too burdensome." *Id.* at 724.

Generally, therefore, ERISA classifies someone as a fiduciary only if he or she possesses or exercises discretionary control, authority or responsibility over the management or administration of a plan or its assets, and then only *to the extent* of such control or authority. *See* 29 U.S.C. § 1002(21)(A). As a result, one can be an ERISA fiduciary for some purposes but not for others. *See Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 251-52 (5th Cir. 2008). Unlike a common law trustee, an employer may wear a "fiduciary hat" at some times and a "corporate hat" at others. As explained further below, when an employer is performing a "settlor function" (*e.g.*, designing or amending a plan), it is not acting as a fiduciary, and its actions are therefore not subject to ERISA's fiduciary standards. *Id.*; *accord Hughes Aircraft*, 525 U.S. at 443-45; *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91 (1996). And ordinary business decisions may be made without fear of liability for breach of fiduciary duty under ERISA, even though they may turn out to have negative consequences for plan participants. *See Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996); *id.* at 529 (Thomas, J., dissenting).

3. Plan Spinoffs and Mergers

Section 208 of ERISA provides that a pension plan may "merge or consolidate with, or transfer its assets or liabilities to" another plan as long as each participant

> would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

29 U.S.C. § 1058. Section 208 thus recognizes that a pension plan may lawfully transfer pension liabilities to another plan and protects the benefit rights of the plan participants who are affected

by such transfers. Section 208 allows the employer to decide, as a matter of plan design, whether to transfer plan liabilities from one plan to another and, if so, what liabilities to transfer. At the same time, Section 208 protects participants' benefit rights by regulating the value of the assets that are transferred in conjunction with the transfer of liabilities. For example, Section 208 prevents a well-funded plan from transferring liabilities for participants' benefits to another plan without also transferring sufficient assets to fund the transferred liabilities. *See id.*

Section 414(*l*) of the Internal Revenue Code ("IRC") generally parallels Section 208 of ERISA. *See* 26 U.S.C. § 414(*l*). The Secretary of the Treasury is responsible for issuing regulations under several provisions of ERISA, including Section 208, as well as under parallel provision of the IRC. *See* Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978) (available at Appx. 577 *et seq.*); *see also Malia v. General Elec. Co.*, 23 F.3d 828, 832 (3d Cir. 1994). Accordingly, this Circuit defers to the Treasury Department's interpretation of the relevant ERISA provisions. *See Tulley v. Ethyl Corp.*, 861 F.2d 120, 125 (5th Cir. 1988).

Under applicable Treasury regulations, a "'transfer of assets or liabilities' occurs when there is a diminution of assets or liabilities with respect to one plan and the acquisition of these assets or the assumption of these liabilities by another plan." 26 C.F.R. § 1.414(*l*)-1(b)(3) (available at Appx. 568 *et seq.*). The regulations treat a transfer of assets and liabilities as a "combination of separate mergers and spinoffs." *Id.* at § 1.414(*l*)-1(o); *see id.* at § 1.414(*l*)-1(b)(4) (defining a "spinoff" as "the splitting of a single plan into two or more plans"). Thus, "if in accordance with the transfer of one or more employees, a block of assets and liabilities [is] transferred from Plan A to Plan B, each of which is a defined benefit plan, the transaction will be

considered as a spinoff from Plan A and a merger of one of the spinoff plans with Plan B." *Id.* at § 1.414(*l*)-1(o).[1]

Under the Treasury regulations, the value of the assets that must be transferred to a spun-off plan is determined, first, by determining whether, prior to the spinoff, the value of the pre-spinoff plan's assets is not less than the actuarial present value of the accrued benefits of all participants on a "termination basis."[2] *See id.* at § 1.414(*l*)-1(n); *see also* Bruce Alan Miller, EMPLOYEE BENEFITS: MERGERS AND ACQUISITIONS (Practicing Law Institute 1985) § 6.02b1, at 220-21 (hereinafter, "EMPLOYEE BENEFITS"). The regulations require that "reasonable actuarial assumptions" be used to calculate the actuarial present value of accrued benefits, and deem "the assumptions used by the Pension Benefit Guaranty Corporation [("PBGC")] as of the date of the merger or spinoff" to be "reasonable." 26 C.F.R. § 1.414(*l*)-1(b)(9); *see* 29 C.F.R. Appendix B to Part 4044 (setting forth PBGC interest rate assumptions). The regulations require the use of PBGC standards to determine the value of the plan's assets. *See* 26 C.F.R. § 1.414(*l*)-1(b)(10).

If the value of the pre-spinoff plan's assets exceeds the present value of the accrued benefits of all participants on a termination basis, there is no requirement that any portion of the plan's surplus assets be transferred to the spun-off plan so long as the employer sponsoring the spun-off plan is outside the "controlled group" of the employer sponsoring the pre-spinoff plan. 26 U.S.C. § 414(*l*)(2)(D)(*ii*); *see Systems Council EM-3 v. AT&T Corp.*, 159

---

[1] When two pension plans are merged, the statutory requirements are satisfied "merely by combining the assets and preserving each participant's accrued benefits," so long as "the sum of the assets of all plans is not less than the sum of the present values of the accrued benefits (whether or not vested) of all plans." 26 C.F.R. § 1.414(*l*)-1(e)(1).

[2] *See* 26 C.F.R. § 1.414(*l*)-1(b)(5) (defining the term "benefits on a termination basis"). Under a "termination basis" method, a "snapshot" of the plan is taken "as if the plan is to be terminated," which means that all benefits – including the benefits of participants who have not yet met the plan's vesting requirements – "are treated as fully vested." P. Schneider & B. Pinheiro, ERISA: A COMPREHENSIVE GUIDE § 13.08[B], at 13-10 (3d ed. 2008).

F.3d 1376, 1382 (D.C. Cir. 1998); *Bigger v. Am. Commercial Lines*, 862 F.2d 1341 (8th Cir. 1988). Rather, in this circumstance, the only requirement is that assets with a value equal to the present value of the accrued benefits of all transferred participants (calculated on a termination basis) be transferred to the spun-off plan. *See* EMPLOYEE BENEFITS § 2.01a1, at 18 (citing 26 C.F.R. § 1.414(*l*)-1(n)).

Normally, if the value of the pre-spinoff plan's assets is less than the actuarial present value of the accrued benefits of all participants on a termination basis, the pre-spinoff plan's assets must be allocated according to the benefit categories established under Section 4044 of ERISA. EMPLOYEE BENEFITS § 6.02b1, at 221; *see id.* § 8.08f, at 253-54. Performing such a Section 4044 actuarial calculation is "extremely complex and expensive." Eugene H. Wachtel, *Pension and Profit Sharing Problems In Corporate Acquisitions*, 59 TAXES 905, 912 (1981). To spare plans the burden of performing complex and expensive calculations whenever a spinoff occurs from a plan that is underfunded on a termination basis, the Treasury Department has prescribed a "de minimis rule." Under the de minimis rule, if the value of the assets of the spun-off plan is less than 3% of the value of the assets of the pre-spinoff plan, the requirements of the statute are "deemed to be satisfied" so long as "the value of the assets spun off . . . [e]quals the present value of the accrued benefits spun off," and a Section 4044 calculation is not required. 26 C.F.R. § 1.414(*l*)-1(n)(2); *see* EMPLOYEE BENEFITS § 6.02b1, at 221-22.

In addition, ERISA's "anti-cutback rule" bars a plan from being amended to reduce any participant's accrued benefit. *See* 29 U.S.C. § 1054(g). As with ERISA's plan merger/transfer provision, a parallel provision is included in the IRC. *See* 26 U.S.C. § 411(d)(6)(A). Under applicable Treasury regulations, "a plan amendment includes any changes to the terms of a plan, including changes resulting from a merger, consolidation, or

transfer (as defined in [26 U.S.C.] section 414(*l*))." 26 C.F.R. § 1.411(d)-3(a).[3] The anti-cutback rule thus prevents a transferee plan from reducing a transferred participant's accrued benefit as a result of the transfer.

B. <u>Verizon's Spinoff Of Its Directories Businesses</u>

Verizon Communications Inc. was formed in 2000 as a result of the merger of Bell Atlantic Corp. and GTE Corp. Appx. 3 (Fitzgerald Dep. at 7:16-18). In the early 2000s, Verizon's domestic operations consisted of three separate business units, which its SEC filings treated as separate "reportable segments." The "Domestic Telecom" business provided traditional "wireline" communications services, which historically consisted principally of local telephone service; the "Domestic Wireless" business provided wireless (cell phone) services and products; and the "Information Services" business – *i.e.*, VIS – published on-line and print telephone directories. Appx. 519.

By the early 2000s, Verizon was undergoing "a refocusing and a transformation" of its businesses. Appx. 18 (Fitzgerald Dep. at 66:11-18). Traditionally, the primary business of both Bell Atlantic and GTE was providing local telephone (wireline) services to various communities throughout the nation. By the 2000s, however, Verizon was experiencing a high rate of growth in its cell phone (wireless) business. *Id.* Verizon was also in the process of reshaping its Domestic Telecom business, primarily by (i) investing in fiber optics (*i.e.*, digital television, voice and internet capabilities) in areas with sufficient density to support such an investment, and (ii) exiting the traditional, wireline telephone business in communities "where it was not economical to deploy fiber optics." *Id.*

---

[3] The Secretary of the Treasury is responsible for issuing regulations under ERISA's anti-cutback rule, as well as under the parallel provision of the IRC. *See* 29 U.S.C. § 1202(c); Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978); *see also Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 746-47 (2004).

Historically, there were significant synergies between Verizon's core operations and the directories business because local wireline telephone companies were able to provide "advantaged access to listing information" to affiliated publishers, such as VIS. *See* Appx. 18 (Fitzgerald Dep. at 66:11 - 67:9). However, by the early 2000s, regulatory changes "eliminated that advantage." *Id.* Moreover, as Verizon's core business moved away from traditional wireline telephone service to wireless services and fiber optics, "it became apparent . . . that there really was not much in the way of fit or relationship between the director[ies] business and where [Verizon] w[as] focusing [its] efforts going forward." *Id.* Accordingly, in 2005 Verizon's management began to consider the possibility of divesting the VIS business unit. Appx. 6 (Fitzgerald Dep. at 21:16-21).

Verizon identified a number of reasons why a divestiture of the VIS business unit would benefit both Verizon and the spun-off entity. *See* Appx. 30. *First*, as a result of Verizon's on-going transition from a traditional wireline telephone provider to a 21st century wireless telecommunication and broadband provider, Verizon was increasingly becoming a "growth business." Appx. 18 (Fitzgerald Dep. at 67:17 - 68:6). By contrast, VIS had "very strong current cash flows," but was less growth-oriented. *Id.* *Second*, Verizon's core business model (*i.e.*, maintaining and deploying fiber optic and cellular networks) required "sizable capital expenditure commitments." Appx. 18 (Fitzgerald Dep. at 68:9-21). The VIS business model, on the other hand, involved "very little capital investment requirement[s]." *Id.* Because of these significant differences between VIS and Verizon's core businesses, Verizon determined that the stock market likely would react positively to a separation of VIS from Verizon. *See* Appx. 18 (Fitzgerald Dep. at 67:17 - 68:6).

Third, Verizon determined that the VIS business unit might benefit from having "[f]ocused independent management" (*i.e.*, a separate board and senior management focused exclusively on the directories business) and "public market discipline" (*i.e.*, its own publicly traded stock). Appx. 18 (Fitzgerald Dep. at 68:22 - 69:13). *Fourth*, Verizon recognized that, by setting up VIS as a stand-alone entity, VIS might become an attractive target for another major directories publisher, thereby creating the possibility of a merger premium for shareholders. *See* Appx. 18-19 (Fitzgerald Dep. at 69:16 - 70:3). *Finally*, Verizon recognized that a separation of the VIS business unit would permit Verizon to devote greater energy and capital to its "main focus at this point in time," which was the "expansion of [its] wireless business" and the development of its "fiber optics business." Appx. 19 (Fitzgerald Dep. at 70:6-12).

Verizon estimated that, on a stand-alone basis in the years immediately following a spinoff, the VIS business unit would have annual revenues in excess of $3 billion and that its EBITDA ("Earnings Before Interest, Taxes, Depreciation And Amortization") would exceed $1.5 billion. Appx. 36. Ultimately it was determined – based on the characteristics of the VIS business unit and an analysis of comparable, publicly traded companies – that an optimal transaction structure would involve leverage of approximately $9 billion for the spun-off entity. *See* Appx. 7, 20 (Fitzgerald Dep. at 24:2-16, 74:4-14).[4] Among other things, Verizon obtained a "solvency opinion" from the investment bank Houlihan Lokey, which opined that the spun-off entity "should be able to pay its debts" and that the spun-off entity's capital "should not be unreasonably small for the business in which the company is engaged." Appx. 40.

[4] Verizon's goal in determining the optimal "capital structure" (*i.e.*, the ratio of debt to equity) for the transaction was to maximize the combined share value of Verizon and the spun-off entity. *See* Appx. 20 (Fitzgerald Dep. at 74:4 - 75:11).

On October 18, 2006, Verizon's board of directors authorized Verizon to proceed with the spinoff of the VIS business unit, and the spinoff was consummated on November 17, 2006. As a result of the spinoff, each Verizon shareholder received one share of Idearc stock for every 20 shares of Verizon stock that the shareholder held as of November 1, 2006. Appx. 252, 329.

C. The Employee Benefits Aspects Of The Idearc Spinoff

The employee benefits of current and former VIS employees was one of the myriad issues Verizon considered in the course of determining whether and how to spin off the VIS business unit. At its October 18, 2006 meeting, Verizon's board of directors approved a resolution authorizing Verizon to enter into various agreements, including an Employee Matters Agreement ("EMA"), establishing that Idearc would be responsible "for Pension and OPEB [*i.e.*, Other Post-Employment Benefits] liabilities for all . . . current and former employees" of VIS and its predecessors. Appx. 16 (Fitzgerald Dep. at 59:12-22), 54, 459. Pursuant to that board resolution, the EMA was executed by Verizon and Idearc on November 17, 2006. *See* Appx. 257 *et seq.*

Under the EMA, Idearc assumed responsibility for the pension, health and other welfare benefits of "Idearc Individuals," *i.e.*, current VIS employees and "Former VIS Employee[s]." Appx. 262-63, 269, 275-76, 279-80. The EMA defined the term "Former VIS Employee" as an inactive employee "whose last employment has been determined by Verizon to have been with the Spinco Business," and defined "Spinco Business" as "Verizon's directory publishing business, internet yellow pages business and other operations comprising what is referred to in Verizon's Annual Report . . . as the Information Services Segment of Verizon." Appx. 262, 265, 515.

1. Pension Benefits

The EMA reflected Verizon's decision to transfer pension assets and liabilities associated with Former VIS Employees to "mirror" Idearc pension plans (*i.e.*, plans providing for the same benefits as the Verizon plans from which the transfers were made). Appx. 274-75. Under the EMA, Verizon's actuaries were required to calculate the "amount required to be transferred" from Verizon's pension plans to Idearc's pension plans "by Section 414(*l*) of the [IRC] and all regulations thereunder," using specified PBGC actuarial factors and assumptions. Appx. 280-81, 297. Pursuant to this provision of the EMA, Verizon's actuaries calculated the liabilities associated with current and former VIS employees on a termination basis, and Verizon caused Verizon's pension plans to transfer assets equal to those liabilities in accordance with IRC Section 414(*l*).[5] As a result of these transfers, Verizon estimated that the Idearc pension plans would be "overfunded . . . on an accounting basis" by approximately $163 million. Appx. 19 (Fitzgerald Dep. at 72:3-5), 120 (Hartnett Dep. at 121:15-21), 164, 177.

As of November 2006, current and former employees of VIS companies (and/or predecessor companies) participated in one of four Verizon-sponsored pension plans: the Verizon Management Pension Plan ("VMPP"), the Verizon Enterprises Management Pension Plan ("VEMPP"), the Verizon Pension Plan for New York And New England Associates ("NY/NE Plan"), or the Verizon Pension Plan for Mid-Atlantic Associates ("Mid-Atlantic Plan,"

---

[5] The total value of pension assets ultimately transferred to Idearc's pension plans was approximately $765 million. Appx. 203. The EMA provided for the assets to be transferred in two stages. Appx. 281. First, on or about November 20, 2006, Verizon's pension plans transferred assets worth approximately $679 million to Idearc's pension plans, which was equal to 90% of the actuarial present value of the estimated liabilities being transferred to the Idearc plans. After actuaries for Idearc and Verizon finally determined the precise actuarial present value of the transferred liabilities, the Verizon pension plans made an additional, "true up" transfer to the Idearc pension plans. *See* Appx. 134 (Hartnett Dep. at 174:24 - 175:14), 201-05, 311 (Gist Dep. at 50:8 - 51:1), 331-35.

and collectively, the "Verizon Pension Plans"). To the extent that a given Verizon Pension Plan was overfunded on a PBGC termination basis, there was no impediment to Verizon's decision to transfer assets to Idearc plans on a full termination basis. To the extent that any given Verizon plan was underfunded on a termination basis, however, the Treasury regulations under IRC Section 414(*l*) generally prohibited a full termination basis asset transfer and instead required a transfer of assets with a value that was "less than the 414(*l*) termination liability," pursuant to a "complicated actuarial accounting" under Section 4044 of ERISA. *See* Appx. 100, 128 (Hartnett Dep. at 39:16 - 40:7, 150:6-17), 193-98.

Because Verizon sought to fund Idearc's pension plans on a full termination basis in accordance with IRC Section 414(*l*) and to avoid the expense and delay associated with a Section 4044 calculation, Verizon took steps to ensure that any transfers from underfunded Verizon plans would satisfy the "de minimis rule," which applies where the value of the assets transferred from a pension plan total less than 3% of the value of that plan's assets. *See* Appx. 98, 100 (Hartnett Dep. at 30:2-22, 39:11-20). With respect to the VMPP, Verizon's actuaries became concerned that the Idearc spinoff transaction might exceed this 3% threshold. *See* Appx. 193-98. Accordingly, Verizon decided to retain responsibility for a small subset of inactive VMPP participants whose last employment was with a VIS entity – deferred vested pensioners ("DVPs") – in order to ensure that the transferred amount was less than 3% of the value of the VMPP's total assets. *See* Appx. 129 (Hartnett Dep. at 157:1-22), 203-04, 262, 267.[6]

[6] Verizon's actuaries determined that the VMPP and the NY/NE Plan were underfunded on a termination basis as of December 31, 2005. *See* Appx. 191. As a result of Verizon's decision to rely on the de minimis rule, the Idearc pension plans created through the spinoff were fully funded on a plan termination basis and, therefore, were "better funded" than the VMPP and the NY/NE Plan. *See* Appx. 120 (Hartnett Dep. at 121:15-21).

Pursuant to a Transition Services Agreement between Verizon and Idearc, the Verizon Pension Plans paid the pension benefits of Idearc plan participants for November and December of 2006. Appx. 236 (Wiley Dep. at 124:13-18), 275, 500-01.

2. Post-Retirement Welfare Benefits

VIS was a "separate business unit within Verizon," and the "cash flows" that VIS generated were used "to support the employee obligations of that business," including "expenses associated with retirees." Accordingly, Verizon decided to transfer the obligations for the employee benefits of inactive VIS employees to Idearc in order to maintain the historical "alignment between the cash flow generating business and . . . the obligations" of that business. Appx. 19 (Fitzgerald Dep. at 71:3-11), 26, 107 (Hartnett Dep. at 66:15 - 67:15).

In determining to transfer the welfare benefit obligations for inactive VIS employees to Idearc, Verizon also took into account the fact that Idearc's pension plans would be substantially over-funded as a result of the spinoff, which would effectively reduce Idearc's overall retiree benefit obligations by delaying the need for Idearc to make pension plan contributions. *See* Appx. 19, 22 (Fitzgerald Dep. at 71:22 - 72:10, 84:7 - 85:2), 26.[7] Finally, Verizon considered the fact that – in two recent, substantially similar spinoff transactions in the telecommunications industry – its competitors had transferred their retiree welfare benefit obligations to the spun-off businesses. *See* Appx. 21 (Fitzgerald Dep. at 78:10 - 80:15), 27.

Shortly before the close of the Idearc spinoff transaction, VIS representatives requested that Verizon consider retaining the welfare benefit obligations for inactive VIS employees. Verizon did not accede to this request both for the reasons set forth above and

[7] Verizon estimated that the Verizon Pension Plans would transfer assets valued at approximately $786 to Idearc's pension plans, and that Idearc's benefit payment obligations as a result of the transfer of both pension and welfare benefit obligations would be $991 million. *See* Appx. 110 (Hartnett Dep. at 79:7 - 80:6), 145.

because the request came far too late in the process. By this time, Idearc's debt level had already become fixed as a practical matter and, without a corresponding increase to Idearc's leverage, a reduction in its benefit obligations likely would have decreased the combined, post-spinoff share value of Verizon and Idearc. *See* Appx. 19-21 (Fitzgerald Dep. at 72:11 - 78:9), 26-27, 122 (Hartnett Dep. at 129:6-25).

Under the EMA, Idearc was required to establish "mirror" welfare plans, *i.e.*, plans providing "health, dental and life insurance" benefits, including benefits for retired (or otherwise inactive) employees, that were "substantially the same as the benefits provided for such employees under the corresponding Verizon Welfare Plan[s]" immediately prior to the spinoff. App. 276. Through 2007, pursuant to a Transition Services Agreement between Verizon and Idearc, Verizon provided "benefit administrative services" to Idearc, and participants in Idearc's welfare plans received the same benefits that they would have received had they remained participants in Verizon's benefit plans. *See* Appx. 236 (Wiley Dep. at 124:13-18), 275, 314-15 (Gist Dep. at 63:23 - 65:14), 330.

D. The Verizon Pension Plans

Prior to the November 2006 spinoff transactions, Verizon's collectively bargained pension plans (*i.e.*, the NY/NE Plan and the Mid-Atlantic Plan) provided that Verizon's "Board shall have the authority in its discretion to terminate the Plan or, from time to time, amend the Plan by or pursuant to resolution." Appx. 365, 383. Verizon's management pension plans (*i.e.*, the VMPP and the VEMPP) similarly provided that Verizon's board of directors, "by duly adopted written resolution," had the power to "modify or amend the Plan[s] in whole or in part, prospectively or retroactively, at any time." Appx. 399, 407. All four plans also permitted either "the most senior Human Resources officer of Verizon" or the Verizon Employee Benefits

Committee ("VEBC"), acting in a settlor capacity, to amend the plans in most circumstances. Appx. 365, 383, 399, 407.[8]

Each of the four plans also expressly contemplated that a portion of the plan's assets and liabilities might be transferred to another plan. For instance, Section 11.3 of the two management plans stated:

> Transactions Subject to Code Section 414(l). Except as otherwise provided herein, the Plan may be merged into or consolidated with another plan, and its assets or liabilities may be transferred to another plan. . . . Any liability transferred from the Plan to another plan pursuant to this Section 11.3 shall result in the extinguishment of such liability hereunder immediately upon such transfer, and no benefit previously payable under the Plan on account of such liability shall be payable under the Plan following such transfer.

Appx. 399-400, 407-08. Similarly, Section 20.6 ("Merger or Consolidation") of the two union plans recognized that the plans might be "merged or consolidated with" another plan or that "the assets or liabilities of" the plans might be "transferred to [another] plan." Appx. 367, 385. The collectively bargained plans also provided that, where an employee's "entire benefit obligation is assumed . . . by a plan maintained by an entity which is a successor to all or part of a Participating Company, no benefits shall be paid under this Plan." Appx. 367, 380.[9]

On December 22, 2006, Verizon adopted pension plan amendments relating specifically to the Idearc spinoff transaction. As amended, the union plans provided, "effective November 17, 2006," that "for each former Eligible Employee whose last employment . . .

---

[8] As of November 2006, the VEBC was comprised of various Verizon officers. (Compl. ¶ 161.) The chairperson of the VEBC was Marc Reed, who was Verizon's Executive Vice President for Human Resources. *Id.*; *see* Appx. 208 (Wiley Dep. at 9:2-3).

[9] The term "Participating Company" was defined to include, *inter alia*, "Verizon Directories Services Inc." and "Verizon Yellow Pages Company." *See* Appx. 362, 369, 376, 386. Idearc is a successor to Verizon Directories Services Inc. and Verizon Yellow Pages Company. *See* Appx. 208 (Wiley Dep. at 11:21 - 12:12), 247. Thus, Idearc is an entity which is a successor to all or part of a Participating Company.

before the spin-off date has been determined by the Plan Administrator to have been with Idearc Inc., an [affiliate] with respect to Idearc Inc., or a predecessor of either,"

> assets and liabilities for benefit obligations under the Plan, if any, for employment before the spin-off date . . . shall be transferred from the Plan to the Idearc Pension Plan for Collectively-Bargained Employees. As a result, former Eligible Employees described in the immediately preceding sentence shall cease to be eligible for a pension or any other benefit from the Plan. . . .

Appx. 358, 371. Substantially similar changes were made to the two management plans. *See* Appx. 391-92, 413-14.[10]

E. Verizon's Welfare Benefit Plans

Prior to November 2006, Verizon's medical and other employee welfare plans generally provided that Verizon, acting through various authorized representatives, had the right to amend or terminate those plans at any time and for any reason. *See, e.g.*, Appx. 431 (Plan For Group Insurance) (stating that "Verizon reserves the right to amend or terminate the Plan or any Component Benefit at any time"). The summary plan descriptions ("SPDs") provided to participants in Verizon's welfare plans likewise advised participants of Verizon's right to amend or terminate those plans at will. *See, e.g.*, Appx. 445 (Medical Expense Plan for NY/NE Post-1986 Associate Retirees SPD) (explaining that the VEBC "reserves the right to amend, modify, suspend or terminate the plans at any time, at its discretion, with or without advance notice to participants"). Pursuant to Verizon's broad and consistent reservation of its rights, on December 8, 2006, Verizon's "various health and welfare plans and programs" were amended, effective November 17, 2006, "to reflect the termination and/or cessation of benefits under the Verizon

---

[10] The Verizon Pension Plans also conferred upon the plans' fiduciaries discretionary authority "to interpret the Plan." *See* Appx. 364, 382, 394, 402.

health and welfare benefit plans and programs for Idearc Individuals and the assumption of those benefits by [Idearc] as described in the EMA." Appx. 440.

F. Plaintiffs And Their Claims

1. Plaintiffs' Employment

Plaintiff Claire Palmer retired from NYNEX Information Resources Company, a subsidiary of NYNEX, in 1995. She retired under a special early retirement incentive program offered by NYNEX, pursuant to which she received enhanced pension benefits under the NYNEX Management Pension Plan. *See* Appx. 565-67. Her entire career with NYNEX (and its predecessors) was spent working in the directories business. *See* Appx. 553. Like plaintiff Palmer, plaintiffs Philip Murphy and Sandra Noe retired from a NYNEX directories business in the mid-1990s. They, too, spent all or most of their careers with NYNEX (or its predecessors) working in the directories business, and both began receiving pension benefits from a NYNEX plan after they retired. *See* Appx. 538-39, 546-47.

As a result of NYNEX's merger with Bell Atlantic, and Bell Atlantic's subsequent merger with GTE Corp., NYNEX's directories businesses became part of VIS. By 2006, as a result of corresponding pension plan mergers and consolidations, responsibility for plaintiffs' pension benefits had been transferred from NYNEX pension plans to Bell Atlantic pension plans, and subsequently from Bell Atlantic pension plans to a Verizon Pension Plan (*i.e.*, the VMPP in the case of plaintiff Palmer and the NY/NE Plan in the case of plaintiffs Murphy and Noe).

2. Plaintiffs' Pension Benefits

At all times since the obligation for their benefits was transferred from a Verizon Pension Plan to an Idearc pension plan, plaintiffs have received 100% of the pension benefits to which they are entitled and 100% of the benefits that they would have received from a Verizon

Pension Plan in the absence of the Idearc spinoff transaction. *See* Appx. 559-60. Plaintiffs cannot identify any damages to them as a result of the pension transfers at issue here. *See* Appx. 537, 544-45, 551-52.

3. Plaintiffs' Administrative Claims

On February 4, 2009, plaintiffs and others, through counsel, filed claims for pension benefits under the terms of their respective Verizon Pension Plans. *See* Appx. 462 *et seq.* By letter dated July 31, 2009, the Verizon Claims Review Unit ("VCRU") denied plaintiffs' claims for pension benefits. *See* Appx. 471 *et seq.* The denial was based upon the VCRU's determination, after a review of "Verizon's payroll records," that "each Claimant's last employment was with the Spinco Business . . . and that each Claimant is otherwise subject to the Idearc benefit transfer provisions of the applicable Plan." Appx. 480. In making this determination, the VCRU relied, among other things, on the fact that "each Plan contained provisions permitting the transfer or merger of all or any portion of the Plan in accordance with section 208 of ERISA." Appx. 478.

Thereafter, plaintiffs appealed the VCRU's determination to the Verizon Claims Review Committee. *See* Appx. 484 *et seq.* That appeal was denied for substantially the same reasons as set forth in the VCRU's determination letter. *See* Appx. 498 *et seq.* At no point during the pendency of their administrative claims for benefits did plaintiffs challenge or submit any evidence to contradict the determination that their last employment was with a VIS predecessor company. Appx. 502.

4. Plaintiffs' Claims in this Lawsuit

Plaintiffs filed suit on November 25, 2009, and filed an amended complaint shortly thereafter. Dkt. Nos. 1 & 6. In March 2011, the Court entered an agreed order certifying

this case as a Rule 23(b)(2), "mandatory" class action. Dkt. No. 55; *see* Dkt. Nos. 44 & 48. The class is defined as:

> All former participants in Verizon's pension plans who were transferred into Idearc's pension plans in connection with a spin-off occurring in November 2006 and who were retired or terminated from Verizon at the time of the spin-off, as well as any beneficiaries of such participants.

Dkt. No. 55.

On May 31, 2011, plaintiffs sought leave to file a Second Amended Complaint, which leave was thereafter granted. Dkt. Nos. 59 & 62. The Second Amended Complaint (herein, "complaint" or "Compl.") does *not* allege that defendants violated ERISA Section 208 or IRC Section 414(*l*) by transferring pension plan assets and obligations to Idearc pension plans. Nor does it allege that the *value* of the assets transferred to the Idearc pension plans was insufficient under governing Treasury regulations.

Instead, the gravamen of plaintiffs' complaint is that the VEBC breached its fiduciary duties and the terms of the Verizon Pension Plans by causing or permitting Verizon to transfer the assets and liabilities associated with class members' pension benefits to the Idearc pension plans. Plaintiffs also allege that the VEBC (i) violated ERISA's "prohibited transaction" provisions (Count III), (ii) failed to make required disclosures in SPDs (Count II); and (iii) failed to provide them with a "full and fair review" of their administrative claims for benefits (Count I). Lastly, plaintiffs assert a claim for "equitable relief" against Verizon and the VEBC (Count VI) and seek benefits allegedly due to them under the terms of the Verizon Pension Plans (Count VII).

For relief, plaintiffs' principal request is "reinstatement" of class members into the Verizon Pension Plans. (*E.g.*, Compl. ¶ 208.) Although plaintiffs' complaint makes no substantive allegations relating to the terms of any Verizon-sponsored welfare plan or any

alleged breach of an ERISA duty with respect to any Verizon-sponsored welfare plan, plaintiffs also seek "restor[ation]" of their Verizon "retiree welfare benefits." (*E.g.*, *id.* ¶ 228.)

STANDARD OF REVIEW

Rule 56 provides that summary judgment should be granted if there is "no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). No genuine issue of material fact exists where "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotation marks and citation omitted).[11]

The Supreme Court has made clear that summary judgment must be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In such a case, "there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* (internal quotations and citations omitted). Thus, once a movant points out a nonmovant's inability to prove an essential element of his claim, "the burden of coming forward with evidence in the summary judgment record creating an issue of material fact shifts to the nonmovant." *Gutierrez v. City of San Antonio*, 139 F.3d 441, 444 (5th Cir. 1998). Moreover, mere "general allegations which do not reveal detailed and precise facts will not prevent the award of summary judgment." *Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.*, 695 F.2d 839, 844 (5th Cir. 1983) (internal quotation marks and citation omitted).

---

[11] While the language of Rule 56 was amended in 2010, the intent of those changes was to leave "unchanged" the "standard for granting summary judgment" under prior decisional law. *See* Fed. R. Civ. P. 56 advisory committee's note.

ARGUMENT

I. PLAINTIFFS' CLAIM THAT THE IDEARC SPINOFF VIOLATED ERISA'S FIDUCIARY DUTY REQUIREMENTS FAILS AS A MATTER OF LAW.

Count IV of the complaint alleges that the "involuntary transfer of . . . class members into [Idearc]'s pension plans" violated both the terms of the Verizon Pension Plans and ERISA's fiduciary duty requirements, ERISA § 404, 29 U.S.C. § 1104. (Compl. ¶ 184.) On the basis of undisputed evidence, this claim fails as a matter of law for three separate reasons:

First, the terms of the Idearc pension plan spinoff fully complied with ERISA's rules governing the transfer of plan assets and liabilities, and numerous courts have held that nothing more is required in spinning off part of a pension plan. *Second*, the decision to transfer assets and liabilities associated with class members' pension benefits was made by Verizon in its settlor capacity, and the law is clear that ERISA's fiduciary duty provisions do not apply to such business decisions. *Third*, the Idearc spinoff transaction was entirely consistent with the terms of the pre-November 2006 Verizon Pension Plans, and the case law makes clear that, even if the plans were amended retroactively (as plaintiffs allege), ERISA permits retroactive plan amendments under the circumstances presented here. Accordingly, defendants are entitled to summary judgment on Count IV.[12]

---

[12] Plaintiffs appear also to assert in Count IV that defendants breached fiduciary duties by "not send[ing] a written notice to Plaintiffs and class members [regarding the Idearc transfer] until several months after they had already been transferred." (Compl. ¶ 158; *see id.* at ¶¶ 73, 75 (alleging that plaintiffs received notice of the transfers on or before February 15, 2007).) ERISA, however, requires only that participants be notified of "any material modification to the plan" within "210 days after the close of the plan year in which the modification or change was adopted." *See* 29 U.S.C. § 1024(b)(1); 29 C.F.R. § 2520.104b–3(a). Because plaintiffs undisputedly received notification of the Idearc spinoff less than 210 days after November 2006, plaintiffs' disclosure claim fails. *See, e.g.*, *Ehlmann v. Kaiser Foundation Health Plan of Texas*, 198 F.3d 552, 555 (5th Cir. 2000) (citing *Sprague v. General Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998)) (declining to "supplement" ERISA's specific disclosure requirements); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996) (rejecting argument that ERISA's general fiduciary duty provisions may be used to trump its specific disclosure

A. The Idearc Pension Spinoff Fully Complied With ERISA And Applicable Treasury Regulations.

The gravamen of plaintiffs' complaint is that defendants violated ERISA's fiduciary duty requirements by transferring the obligations for class members' pension benefits to Idearc pension plans as part of the November 2006 spinoff transaction. Notably, however, plaintiffs do *not* allege that defendants violated Section 208 of ERISA, which is the principal provision of ERISA that governs such transfers. *See* 29 U.S.C. § 1058. Nor could they do so, because the undisputed facts conclusively establish that Verizon fully complied with Section 208, as well as all applicable Treasury regulations governing the transfer of plan assets and liabilities. As a matter of law, a pension plan spinoff that complies with Section 208 and the relevant Treasury regulations does not violate ERISA's fiduciary duty requirements.

Section 208 authorizes the transfer of pension assets and liabilities from one plan to another, so long as (i) the benefits are "at least as good . . . under the new pension plan as under the old one," and (ii) the employer "transfer[s] sufficient plan 'assets' to pay previously promised benefits to employees." *Koch Indus., Inc. v. Sun Co.*, 918 F.2d 1203, 1206-07 (5th Cir. 1990). Here, the Idearc plans established pursuant to the EMA were "mirror" plans that provided participants with precisely the same benefits after the spinoff as before. Moreover, Verizon transferred sufficient assets fully to fund the present value of the liabilities that were transferred to the new Idearc plans, calculated on a termination basis using PBGC interest rate and other assumptions. *See* pp. 12-13, *supra*. Thus, Verizon fully complied with Section 208 of ERISA and applicable Treasury regulations. *See generally AT&T Corp.*, 159 F.3d at 1381

---

requirements). Although ERISA requires advance notice of certain plan changes, those requirements do not apply here. *See, e.g.*, 29 U.S.C. § 1054(h) (requiring advance notice of certain plan amendments reducing rate of benefit accrual); 26 C.F.R. § 4980F-1, A-16 (same); *see also* 29 U.S.C. § 1021(j) (requiring advance notice of blackout periods under individual account plans).

(noting that the applicable Treasury regulations provide a "safe harbor" for the use of PBGC actuarial assumptions).

Plaintiffs assert that the Verizon Pension Plans held "surplus assets," and that a "proportionate share" of those surplus assets should have been transferred to Idearc pension plans as part of any spinoff. (Compl. ¶ 168.) Plaintiffs also assert that defendants violated ERISA duties by "structur[ing] the Spin-off transaction so as to apply the . . . 'de minimis' rule exception . . . and, thereby, avoid[ing] having to give the [Idearc plans] hundreds of millions of dollars of surplus assets." (*Id.* ¶ 166.) Plaintiffs' assertions fall wide of the mark, both as a matter of fact and as a matter of law.

First, plaintiffs are wrong in claiming that Verizon's use of the de minimis rule resulted in a transfer of assets with a lower value than would otherwise have been the case. As of December 31, 2005, neither the VMPP nor the NY/NE Plan was fully funded on a termination basis. *See* Appx. 196. Regulations under IRC Section 414(*l*) generally require that, in the event of a spinoff from a plan that is not fully funded on a termination basis, the plan's assets must be allocated according to a complex actuarial formula under Section 4044 of ERISA, with the ultimate result that the spun-off plan almost invariably receives less (and in no event receives more) than the full termination value of the accrued benefits under the plan. *See* 26 C.F.R. § 1.414(*l*)-1(n); EMPLOYEE BENEFITS § 6.02b1, at 220-21. Under the de minimis rule, however, the spun-off plan may receive assets with a value equal to the full termination value of the accrued benefits due under the spun-off plan – even if, as a result, the assets remaining in the original plan fall short of the full termination value of the benefits of the remaining participants. *See* 26 C.F.R. § 1.414(*l*)-1(n)(2)(*i*). Thus, the net result of Verizon's decision to rely on the de minimis rule almost certainly was to transfer a greater dollar value of assets from the VMPP and

the NY/NE Plan to Idearc plans than otherwise would have been legally required. *See* Appx. 120 (Hartnett Dep. at 121:15-21).

Second, plaintiffs' suggestion that Verizon was obligated to transfer any "surplus" assets to the Idearc plans is incorrect as a matter of law. *See Bigger*, 862 F.2d 1341; *Foster Medical Corp. Employees' Pension Plan v. Healthco, Inc.*, 753 F.2d 194, 199 (1st Cir. 1985). In *Bigger*, the defendant employer split "one pension plan . . . into three plans," and participants in one of the spun-off plans sued, alleging that the defendant should have distributed "surplus assets from [the] original defined benefit plan" to the spun-off plan. 862 F.2d at 1342-43. The Eighth Circuit observed that a transfer of "surplus" assets would not benefit participants in the spun-off plan because they "will receive no more than their fixed defined benefit regardless of the value of the assets in the plan." *Id.* at 1344-45; *see also Koch*, 918 F.2d at 1206 (similar). Moreover, because ERISA expressly permits an employer to "recapture all surplus assets after a termination" of the plan, the *Bigger* court noted that it would be "anomalous for Congress to . . . prohibit recoupment during a spinoff." 862 F.2d at 1345. Thus, the Eighth Circuit concluded that there is no obligation to transfer "surplus" assets as part of a pension plan spinoff under Section 208 of ERISA.

The Eighth Circuit also rejected plaintiffs' assertion that ERISA's "general standard of fiduciary duty supersedes and imposes a higher standard than section [208]." *Bigger*, 862 F.2d at 1344. After reviewing the "plain language" of ERISA and its "legislative history," the *Bigger* panel concluded that compliance with the "minimum standards" of Section 208 fully satisfies any fiduciary duties owed to plan participants in structuring a pension plan spinoff. *See id.* at 1344, 1348. At least two other circuits have similarly concluded that "compliance with ERISA's provisions for the funding of merged, transferred or acquired pension plans as set forth

in 29 U.S.C. § 1058 preclude[s] a finding that a fiduciary breach had occurred." *Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1190 (3d Cir. 1993); *see United Steelworkers of Am., Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 200 (6th Cir. 1988) ("[T]he failure to fund a transferred pension plan with more assets than are required by the specific provisions of ERISA cannot form the basis for a breach of fiduciary duty claim.").

Consistent with this appellate authority, this Court should hold that compliance with Section 208 fully satisfies any duties owed to plan participants in spinning off part of a pension plan. Because it cannot genuinely be disputed that Verizon complied with Section 208 and all applicable regulations in effecting the spinoff transactions challenged by plaintiffs, the Court should reject plaintiffs' claim that defendants violated any duties owed to the class in carrying out the Idearc spinoffs.

B. Verizon's Decision To Spin Off The Plans Was Not Made In A Fiduciary Capacity.

Under ERISA, an individual or entity may exercise both fiduciary and non-fiduciary responsibilities that affect a plan. Under the so-called "two-hats" doctrine, a person may wear both a fiduciary hat and an employer (or settlor) hat. ERISA's standards of fiduciary responsibility apply *only* when that person is wearing the fiduciary hat, and not when the person is wearing the employer hat. *See*, *e.g.*, *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994). Thus, the "threshold question" in an action charging breach of fiduciary duty under ERISA is "not whether the actions of some person . . . adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000).

The Supreme Court has made clear that the "decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties." *Hughes Aircraft*, 525 U.S. at 444; *see also Bakner v. Xerox Corp. Employee Stock Ownership Plan*, No. SA-98-CA-0230-OG, 2000 WL 33348191, at *7 (W.D. Tex Aug. 28, 2000) ("[P]lan sponsors who alter the terms of a plan do not come within the category of fiduciaries; they are generally free for any reason at any time to modify or terminate plans."). Every court of appeals to consider the question, moreover, has similarly concluded that the decision to transfer the assets and liabilities of a pension plan as part of a corporate divestiture is made by an employer in a settlor capacity, and so does not implicate ERISA's fiduciary duty provisions. *E.g.*, *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1076 (9th Cir. 2009) (holding that the "decision to spin a plan off . . . is not a fiduciary act"); *Flanigan v. General Elec. Co.*, 242 F.3d 78, 87 (2d Cir. 2001) (holding that the "allocation of pension plan assets and liabilities resulting from the spinoff of a division" does not "trigger[] fiduciary duties under ERISA"); *Hunter v. Caliber System, Inc.*, 220 F.3d 702, 719 (6th Cir. 2000) (holding that "an employer's decision to transfer plan assets" in connection with the spinoff of a subsidiary "is not a fiduciary decision"); *Ames v. American Nat'l Can Co.*, 170 F.3d 751, 757 (7th Cir. 1999) ("[W]hen company representatives are negotiating the sale of a division, they are not acting in their capacity as a plan fiduciary, and thus they do not bear the legal obligations that go along with fiduciary status."); *AT&T Corp.*, 159 F.3d at 1379-80; *Blaw Knox Ret. Income Plan*, 998 F.2d at 1189 (holding that the "decision to sell [corporate divisions] and to transfer the pension plans was a business decision not subject to ERISA's fiduciary provisions").

The D.C. Circuit's *AT&T* decision is instructive. AT&T "reorganize[d] its corporate structure by spinning off operations into separate, publicly-traded businesses, one of

which was Lucent." *AT&T Corp.*, 159 F.3d at 1378. Pursuant to an "Employee Benefits Agreement" between AT&T and Lucent, AT&T "amended its pension and welfare plans to divide the assets and liabilities of AT&T's defined [benefit] plans and to provide for the continuation of existing defined benefits for both AT&T and Lucent retirees and employees." *Id.* at 1377. Plaintiffs, including retired employees, sought "to overturn AT&T's amendments of the pension and welfare plans." *Id.* They alleged that AT&T violated its fiduciary duties by favoring AT&T over Lucent in structuring the pension plan spinoff. *See id.* at 1378. The D.C. Circuit held that plaintiffs "failed to state a legally cognizable claim under ERISA's fiduciary provisions, because there has been no showing that AT&T acted in a fiduciary capacity" when it "amended its pension and welfare plans and allocated the assets and liabilities of those plans between AT&T and Lucent." *Id.* at 1379.

Here, as in *AT&T*, Verizon's decision to transfer the benefit obligations for current and former VIS employees to Idearc as part of the spinoff transaction was not made in a fiduciary capacity. *Id.*; *accord Flanigan*, 242 F.3d at 88 ("Because GE's decision to spin-off the division along with its pension plan was, at its core, a corporate business decision, and not one of a plan administrator, GE was acting as a settlor, not a fiduciary. . . ."). Thus, plaintiffs' claim that defendants breached ERISA's fiduciary duty provisions by authorizing or permitting the Idearc spinoff transaction fails as a matter of law.

In an effort to escape this result, plaintiffs assert that defendants were involved in implementing Verizon's decision to undertake the Idearc spinoff, and are therefore subject to ERISA's fiduciary duty requirements. Specifically, plaintiffs allege that "the November 2006 Spin-off transaction was . . . in part[] a fiduciary function" because the VEBC "made the determination as to whether Plaintiffs and each class member met the criteria for being

transferred into [Idearc]'s pension plans." (Compl. ¶¶ 193-95.) Plaintiffs are correct that Verizon was responsible for determining whether an inactive employee was a Former VIS Employee within the meaning of the EMA, and that Verizon plan fiduciaries were ultimately responsible for determining whether the obligation for a given participant's benefits should have been transferred to an Idearc pension plan. These facts, however, cannot save plaintiffs' claims.

First, under ERISA, the performance of a purely ministerial task does not trigger ERISA's fiduciary duty provisions because it does not involve the exercise of any *discretionary* control or authority. 29 U.S.C. § 1002(21)(A); *see Milofsky v. American Airlines*, *Inc.*, 404 F.3d 338, 342 (5th Cir. 2005); *see also* 29 C.F.R. § 2509.75-8, D-2 ("a person who performs purely ministerial functions," such as "[a]pplication of rules determining eligibility for participation or benefits," is "not a fiduciary"). Here, the EMA and the plans established clear criteria for determining whether the benefit obligations for a former employee of Verizon (or a Verizon predecessor) should be transferred to an Idearc pension plan. *See* p. 11, *supra*. The mere fact that certain defendants may have been ultimately responsible for the application of those criteria, however, does not implicate ERISA's fiduciary duty provisions because the determination did not involve the exercise of discretion. *See Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 666 (6th Cir. 1998).

Second, plaintiffs do not (and could not) complain that they were erroneously categorized as participants whose last employment was with an Idearc predecessor company. *Third*, and more fundamentally, under the "two hats" doctrine, "fiduciary status under ERISA is not an 'all-or-nothing' concept." *Kirschbaum*, 526 F.3d at 251 (quoting *Cotton v. Mass. Mut. Life Co.* 402 F.3d 1267, 1277 (11th Cir. 2005)); *see, e.g.*, *Hunter*, 220 F.3d at 718. Thus, even assuming *arguendo* that any of the defendants owed class members fiduciary duties in

determining whether they were properly categorized as former employees of VIS (or VIS predecessor companies), it does not follow that the decision to transfer the benefit obligations for such employees to Idearc was itself subject to ERISA's fiduciary duty requirements. Because plaintiffs challenge the latter decision (and not the former), their fiduciary breach claim fails.

C. Defendants Did Not Violate The Plan Documents Rule.

Plaintiffs allege that (i) the terms of the Verizon Pension Plans in effect as of November 2006 did not permit the transfer of the obligation for class members' pension benefits to Idearc pension plans, and (ii) the December 2006 pension plan amendments adopted by Verizon regarding the Idearc spinoff may not be given effect. Accordingly, plaintiffs assert, defendants violated the requirement of ERISA Section 404(a)(1)(D) that plan fiduciaries act "in accordance with the documents and instruments governing the plan." (*See, e.g.*, Compl. ¶¶ 177-79.) Plaintiffs are mistaken.

First, the pre-November 2006 terms of the Verizon Pension Plans expressly contemplated that assets and liabilities might be transferred from the plans in accordance with IRC Section 414(*l*) and ERISA Section 208. For instance, Section 11.3 of the VMPP and the VEMPP stated that a portion of either plan's "assets or liabilities may be transferred to another plan," and that "no benefit previously payable under the Plan on account of such liability shall be payable under the Plan following such transfer." Appx. 399-400, 407-08. Similarly, Section 20.6 of the NY/NE Plan and the Mid-Atlantic Plan provided that "the assets or liabilities" of the Plans may be "transferred to[] any other plan," so long as the requirements of Section 208 of ERISA and 414(*l*) of the IRC are satisfied. Appx. 367, 385.

In response, plaintiffs appear to assert that Verizon Pension Plan provisions authorizing the transfer of plan "assets" and "liabilities" do not apply because class members are "persons," not "liabilities." (Compl. ¶ 182.) This is a distinction without a difference: the

paradigmatic pension plan "liability" is the plan's obligation to pay benefits to participants. The plan language, moreover, directly tracks the language of Section 208 of ERISA and Section 414(*l*) of the IRC, which indisputably authorize precisely the type of pension plan spinoffs at issue here. *See, e.g.*, 26 C.F.R. § 1.414(*l*)-1(o) (making clear that a "transfer of assets and liabilities" encompasses "the transfer of one or more employees"). Finally, even were the plan terms ambiguous, the interpretation adopted by the plans' fiduciaries is entitled to deference, *Conkright*, 130 S.Ct. at 1646-52, and the fiduciaries responsible for determining plaintiffs' benefit claims interpreted the terms of the plans to authorize the Idearc transfers challenged by plaintiffs (*see, e.g.*, Appx. 478, 502). Especially under a deferential standard of review, there can be no legitimate dispute that the terms of the Verizon Pension Plans in effect prior to November 2006 authorized the pension benefit transfers at issue here.

Second, even if an amendment were required to permit a merger or transfer, the Verizon Pension Plans reserved Verizon's right to amend the plans at will. Appx. 365, 383, 399, 407. Under applicable Treasury regulations, "a plan amendment includes any changes to the terms of a plan, including changes resulting from a merger . . . or transfer (as defined in section 414(*l*))." 26 C.F.R. § 1.411(d)-3(a). Thus, prior to November 2006, Verizon was free to amend its plans in order to provide for the transfer of pension assets and liabilities.

Third, in October 2006, Verizon's board of directors adopted a written resolution authorizing Verizon to enter into an "Employee Matters Agreement . . . substantially on the terms and conditions described at" the October 18, 2006 board meeting. Appx. 459. The EMA was described in the presentation materials provided to the board as establishing that Idearc would be responsible "for Pension and OPEB liabilities for all of [VIS's] current and former employees" after the spinoff. Appx. 16 (Fitzgerald Dep. at 59:12-22), 54. This October 2006

board resolution – together with the EMA – could be viewed as an amendment to the Verizon plans authorizing a transfer of the benefit obligations for class members to the Idearc plans. *See generally Franklin v. First Union Corp.*, 84 F. Supp. 2d 720, 727-28 (E.D. Va. 2000).

Fourth, under ERISA, retroactive amendment of a pension plan is permissible so long as the amendment does not reduce a participant's accrued benefit. *Dyce v. Salaried Employees' Pension Plan of Allied Corp.*, 15 F.3d 163, 165 (11th Cir. 1994); *see* 29 C.F.R. § 2520.104b-3(a) (setting forth disclosure obligations relating to "retroactive application" of a plan amendment); *see also* 29 U.S.C. § 1054(g) (prohibiting the reduction of an accrued benefit by plan amendment). Here, it is undisputed that plaintiffs and class members were entitled to receive (and in fact received) exactly the same pension benefits after the Idearc spinoff as before. *See* Appx. 274-75, 559-60. Because retroactive application of the December 2006 plan amendments did not reduce any accrued benefit, retroactive application of those amendments was permissible. *See Dyce*, 15 F.3d at 165-66 (permitting retroactive application of plan amendment implementing terms of a merger agreement); *cf. Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1104 (5th Cir. 1990) ("find[ing] no difficulty with . . . retroactive application" of a plan amendment).

Although plaintiffs appear to argue that their accrued benefits were reduced by the December 2006 Idearc plan amendments, and that these retroactive amendments were therefore not permissible, this argument rests on the assertion that those amendments deprived them of the "right" to receive benefits *from Verizon plans*. (Compl. ¶¶ 190-91.) Plaintiffs' argument cannot be correct. If a participant's "accrued benefit" under ERISA encompassed the right to receive payment from a particular plan, or from a plan sponsored by a particular employer, *every* pension plan merger or spinoff – at least where the transferee and transferor plans do not have the same

sponsor – would necessarily violate ERISA's anti-cutback provision, 29 U.S.C. § 1054(g). Because ERISA, the IRC, and applicable Treasury regulations expressly authorize mergers and spinoffs (so long as equivalent benefits are provided before and after the merger or spinoff), it is clear that a participant's "accrued benefits" are not reduced merely because the obligation to pay those benefits is transferred from one plan to another. *See* 29 U.S.C. § 1058; 26 U.S.C. § 414(*l*)(2)(D)(ii); 26 C.F.R. § 1.411(d)-3(a); *id.* § 1.411(d)-4 A-2(a)(3) & A-3; *see also* Rev. Rul. 2008-40, 2008-2 C.B. 166 (noting that "a transferee plan is a continuation of the transferor plan with regard to transferred assets and liabilities").

Finally, plaintiffs' retroactivity argument is ultimately a red herring. Even if the amendments to the Verizon Pension Plans could not be given retroactive effect, plaintiffs would not be entitled to any relief. It is undisputed that plan amendments prescribing the transfer of assets and liabilities to the Idearc plans were adopted no later than December 22, 2006. Plaintiffs have not identified, and could not identify, any reason that these pension plan amendments should not be given effect *prospectively*. And at all times prior to December 31, 2006, class members in fact received all of the pension benefits to which they were entitled, and they received them *from a Verizon Pension Plan* as a transition service provided to Idearc and the Idearc pension plans. *E.g.*, Appx. 500-01. Thus, during November and December of 2006 – the only two months between the effective date of the spinoff and the adoption of the plan amendments – plaintiffs suffered no legally cognizable harm.

D. **<u>Defendants Did Not Breach Any Duty To Provide Welfare Benefits To The Class.</u>**

Plaintiffs' complaint is devoid of any substantive allegations of wrong-doing in connection with Verizon's transfer of their welfare benefit obligations to Idearc. For example, plaintiffs point to no welfare benefit plan provision, statute or regulation that purportedly

prohibits the Idearc welfare benefit transfers. Nevertheless, in light of plaintiffs' request to be "restored to their former status as participants in Verizon's pension *and welfare plans*" (Compl. ¶ 229 (emphasis added)), defendants briefly address any argument that they violated ERISA duties by transferring the obligation for plaintiffs' welfare benefits to Idearc. Any such argument would fail for substantially the same reasons that plaintiffs' pension benefit claims fail.

First, because ERISA does not "establish any minimum participation, vesting, or funding requirements for welfare plans," employers are "free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtis-Wright Corp.*, 514 U.S. at 78. Unless Verizon, through "clear and express language," manifested an "inten[t] to confer unalterable and irrevocable benefits" on plaintiffs, Verizon was free to amend or terminate plaintiffs' welfare benefits at any time. *Hargrave v. Commonwealth Gen. Corporation's Long Term Disability Plan*, No. 10-30720, 2011 WL 1834490, at *4 (5th Cir. May 13, 2011) (internal quotation marks and citation omitted); *see Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937-38 (5th Cir. 1993); *see also Sullivan v. CUNA Mut. Ins. Soc'y*, __ F.3d __, No. 10-1558, 2011 WL 3487414 (7th Cir. Aug. 10, 2011).

Here, Verizon's welfare plan documents and SPDs consistently and unequivocally informed participants that Verizon did *not* intend to provide vested benefits. For example, the omnibus welfare plan document generally applicable to non-collectively bargained employees and retirees made clear that "Verizon reserve[d] the right to amend or terminate the Plan or any Component Benefit at any time." Appx. 431. Similarly, the SPD applicable to plaintiff Murphy's and plaintiff Noe's medical benefits stated that defendants "reserve[d] the right to amend, modify, suspend or terminate the plans at any time." Appx. 445. Because plaintiffs are unable to point to any evidence that Verizon intended to provide them with vested welfare

benefits, any claim that Verizon was obligated to continue providing them with welfare benefits fails as a matter of law.[13]

Second, as with a decision to spin off part of a pension plan, the decision to spin off a portion of a welfare benefit plan is a settlor function that does not implicate ERISA's fiduciary duty provisions. *See, e.g.*, *Sengpiel*, 156 F.3d at 666. *Sengpiel* concerned the decision by B.F. Goodrich ("BFG") to spin off its tire division to a new company, and to transfer the obligation for the welfare benefits of certain retired employees to that new company. *See id.* at 662. Plaintiffs, who were retired BFG employees, alleged that BFG violated its fiduciary duties by transferring the obligation for their benefits. The Sixth Circuit concluded that transferring plaintiffs' benefit obligations was "analogous to amending, modifying, or terminating the then-existing welfare plans," and so held that the decision to do so did "not constitute [a] fiduciary act[]." *Id.* at 665-66. Here, for precisely the same reasons, Verizon's decision to spin off the welfare benefit obligations for inactive VIS employees did not constitute a fiduciary act under ERISA, and so cannot give rise to a breach of fiduciary duty claim. *See* Part I.B, *supra*.

Third, the undisputed facts refute any assertion that Verizon's various welfare plans were impermissibly amended retroactively. In October 2006, Verizon's board of directors adopted a written resolution approving the transfer of "OPEB liabilities" for "current and former [VIS] employees" to Idearc. *See* Appx. 54, 459. Moreover, nothing in ERISA would prohibit the retroactive application of the December 8, 2006 amendment to Verizon's welfare benefit

---

[13] Plaintiffs may also assert that defendants breached their fiduciary duties because "Verizon did not provide any funding for Plaintiffs' and class members' OPEB liabilities which were assigned to Idearc." (Compl. ¶ 163.) Under ERISA, however, there is no requirement to do so. *See Sengpiel*, 156 F.3d at 664 (noting that employer "did not transfer any funds . . . for the transferred retirees' welfare benefits" because there is "no . . . ERISA requirement" to do so); *see also Curtis-Wright Corp.*, 514 U.S. at 78 (noting that ERISA does not contain minimum funding requirements for welfare benefit plans).

plans. Accordingly, any challenge to the alleged "retroactivity" of the amendment transferring the obligation for plaintiffs' welfare benefits to Idearc fails as a matter of law.

Finally, even if the Court were to find that the December 8, 2006 amendment could not be given retroactive effect, plaintiffs would be entitled, at most, to welfare benefits from Verizon welfare plans for the period between November 17, 2006 and December 8, 2006. The undisputed record establishes, however, that plaintiffs in fact received their medical and other welfare benefits during this three-week period as a transition service provided by Verizon to Idearc. *See* Appx. 236 (Wiley Dep. at 124:13-18), 275, 314-15 (Gist Dep. at 63:23 - 65:14), 330.

In sum, any assertion that defendants violated ERISA fiduciary duties by transferring the obligations for plaintiffs' welfare benefits fails as a matter of law.

II. PLAINTIFFS' PROHIBITED TRANSACTION CLAIM IS MERITLESS.

Count III asserts that defendants violated ERISA's prohibited transaction rules, ERISA § 406, 29 U.S.C. § 1106, by permitting or authorizing Verizon to spin off the obligation for class members' benefits. This assertion falls wide of the mark.

First, ERISA's prohibited transaction rules apply *only* to acts taken in a fiduciary capacity. *See Hunter*, 220 F.3d at 724 (noting that "§ 1106 applies only to those who act in a fiduciary capacity" and therefore rejecting claim that transfer of retirement plan assets might give rise to a prohibited transaction claim); *see also Hughes Aircraft*, 525 U.S. at 437, 444-46 (amending the terms of a plan is a settlor function that cannot give rise to a claim for breach of ERISA's prohibited transaction rules); *Lockheed,* 517 U.S. at 891 ("Lockheed acted not as a fiduciary but as a settlor when it amended the terms of the Plan. . . . Thus, § 406(a)'s requirement of fiduciary status is not met."). For this reason, every circuit to consider the question has rejected the proposition that the decision to spin off an ERISA plan may be

challenged under ERISA's prohibited transaction rules. *See, e.g.*, *Flanigan*, 242 F.3d at 87; *Hunter*, 220 F.3d at 724; *Blaw Knox Retirement Income Plan*, 998 F.2d at 1191. Here, because the decision to transfer the obligation for class members' benefits to Idearc was made by Verizon in its settlor capacity, that decision is not subject to ERISA's prohibited transaction rules. *See* Part I.B, *supra*.

Second, the gravamen of plaintiffs' prohibited transaction claim appears to be that (unspecified) members of the VEBC "endeavored to assist and promote Verizon's corporate interests and goals" in structuring the Idearc spinoff transaction (*see* Compl. ¶ 156), purportedly in violation of ERISA's prohibition against a plan fiduciary acting "on behalf of a party . . . whose interests are adverse" to plan participants, *see* 29 U.S.C. § 1106(b)(2). This provision, however, has been interpreted narrowly, *see Evans v. Bexley*, 750 F.2d 1498, 1500 n.3 (11th Cir. 1985), to "prohibit[] a fiduciary from engaging in a self-dealing transaction," *Tibble v. Edison Int'l*, 639 F. Supp. 2d 1074, 1093 (C.D. Cal. 2009) (internal quotation marks and citation omitted). Here, there is no evidence of the requisite "self-dealing" on the part of the VEBC to invoke Section 406(b)(2) of ERISA.

Moreover, the only "party" on whose behalf these Verizon employees plausibly acted in connection with the Idearc spinoff is Verizon itself. A statutory exemption makes clear that a fiduciary may act on behalf of his or her employer, notwithstanding ERISA's prohibited transaction rules. Under the exemption, "[n]othing in section 1106 . . . shall be construed to prohibit any fiduciary from . . . serving as . . . an officer, employee, agent, or other representative of a party in interest." 29 U.S.C. § 1108(c)(3). In light of this statutory exemption, the mere fact that members of the VEBC fulfilled their responsibilities as Verizon employees in connection with the Idearc transaction cannot give rise to a prohibited transaction claim against them. *See*

Evans, 750 F.2d at 1499 ("Logic demands that if a fiduciary may hold such positions, then he may fulfill the concomitant responsibilities.").[14]

Finally, plaintiffs suggest that (unspecified) members of the VEBC received Idearc stock in connection with the Idearc spinoff transaction (Compl. ¶ 171), and that this violated ERISA's prohibition against a fiduciary receiving consideration "from any party dealing with [a] plan in connection with a transaction involving the assets of the plan," *see* 29 U.S.C. § 1106(b)(3). The only stock that any member of the VEBC might have received in connection with the Idearc spinoff, however, was the Idearc stock that he or she received on exactly the same basis as every other holder of Verizon common stock. *See* Appx. 252, 329. Plaintiffs' assertion that this constitutes a "prohibited transaction" borders on the frivolous.

As a threshold matter, it is far from clear that receipt of Idearc shares constitutes "consideration." This is so because a holder of Verizon shares prior to the spinoff already held an interest in the VIS business unit, and the effect of the spinoff was simply to separate out the shareholder's interest in VIS from the shareholder's interest in Verizon's remaining businesses. In any event, these shares were distributed as a result of the corporate transaction spinning off VIS as a separate, publicly traded company, *not* the transfer of pension plan assets, and so the shares were not distributed "in connection with a transaction involving the assets of [any] plan." Lastly, receipt of such "incidental" benefits – on precisely the same terms as every other Verizon shareholder – simply does not fall within the scope of ERISA's prohibited transaction rules. *See* *Hughes Aircraft*, 525 U.S. at 445-46; *Hunter*, 220 F.3d at 724-25.

---

[14] Plaintiffs' claim under Section 406(b)(2) of ERISA also fails because there is no evidence in the record that the interests of Verizon and the interests of class members were "adverse" in the Idearc spinoff transaction. To the contrary, the undisputed evidence is that (i) plaintiffs' pension and welfare benefits did not change as a result of the transaction, (ii) unlike the Verizon Pension Plans, each of the Idearc pension plans was fully funded on a termination basis as a result of the pension asset transfer. *See* pp. 12-13, *supra*.

In sum, plaintiffs' prohibited transaction claim fails as a matter of law, and defendants are entitled to summary judgment on Count III.

III. PLAINTIFFS' SPD DISCLOSURE CLAIM SHOULD BE DISMISSED.

Count II alleges that defendants violated Section 102(b) of ERISA, 29 U.S.C. § 1022(b), by failing to disclose in Verizon Pension Plan SPDs that "a spin-off could result in their loss of eligibility for continued participation in their respective Verizon pension plan." (Compl. ¶ 149.) This claim fails as a matter of law. Moreover, the Supreme Court recently ruled that, when participants make a claim based upon faulty SPD disclosures, each participant must individually prove "actual harm" resulting from the disclosure violation. Accordingly, in the alternative, this Court should rule that (i) plaintiffs' claim in Count II may not be pursued on a class basis, and (ii) plaintiffs have not and cannot come forward with evidence that they suffered any "actual harm" as a result of the allegedly faulty SPD disclosures. *See CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1870 (2011).

A. Verizon's Pension Plan SPDs Did Not Violate ERISA.

Plaintiffs assert that Verizon's SPDs impermissibly failed to describe the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," 29 C.F.R. § 2520.102-3(*l*). This argument misses the mark for three separate reasons.

First, plaintiffs are wrong that the transfer of pension benefit obligations to another plan constitutes a circumstance that results in the denial or loss of benefits. Under ERISA, any such transfer must ensure that a participant's benefit immediately after the spinoff is "equal to or greater than" his or her benefit immediately before the spinoff. *See* 29 U.S.C. § 1058; *see also id.* § 1054(g). Here, class members' pension benefits did not change as a result of the Idearc spinoff, and plaintiffs have continued to receive from an Idearc pension plan 100% of the benefits that they received from a Verizon Pension Plan immediately prior to the spinoff.

See Appx. 559-60. Plaintiffs have not offered and could not offer any evidence that the transfer of the obligations for class members' benefits resulted in any denial or loss of benefits.

Second, ERISA requires only that plan administrators disclose to participants the circumstances that might result in a denial or reduction of benefits *under existing plan terms*. *See* 29 C.F.R. § 2520.102-3 ("The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed."). Plan administrators do not have a "duty of clairvoyance," and ERISA does not require them to anticipate and disclose in an SPD every plan amendment that the plan's sponsor might conceivably make to the plan in the future that might result in a diminution of benefits. *See Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993). Here, by disclosing all of the circumstances that could result in a reduction of benefits under the terms of the then-existing Verizon Pension Plans, Verizon's SPDs fully complied with ERISA's disclosure requirements. *See Flanigan*, 242 F.3d at 84-85 (fiduciaries not required to disclose changes in a plan before they are adopted).

Third, to the extent plaintiffs are correct that the transfer of class members' pension assets and liabilities to Idearc plans represents a "denial or loss of benefits," the circumstance resulting in such "denial or loss" was (according to plaintiffs) the amendment of the Verizon Pension Plans. SPDs relating to the pension plans in which plaintiffs participated informed participants that Verizon reserved "the right to amend, modify, suspend, terminate or partially terminate the Plan at any time, at [its] discretion, with or without advance notice to participants." *E.g.*, Appx. 448, 455. And, under ERISA, a transfer of plan assets and liabilities to another pension plan is treated as a plan amendment. *See* 26 C.F.R. § 1.411(d)-3(a).

Accordingly, the SPDs did disclose the "circumstance" that resulted in the purported denial of benefits at issue here.

B. The Supreme Court's "Actual Harm" Requirement For SPD Disclosure Claims Mandates Dismissal Of Plaintiffs' Claims And Any Class Allegations.

The Supreme Court recently held that an ERISA plan participant may not "obtain relief" for a disclosure violation absent proof that he or she suffered "actual harm" caused by the disclosure violation. *Amara*, 131 S. Ct. at 1881. Accordingly, the Court should alternatively hold that (i) plaintiffs' claims in Count II fail because there is no record evidence that they suffered "actual harm," and (ii) the "actual harm" inquiry renders class treatment of Count II inappropriate.

Under *Amara*, a plan participant may obtain relief for an SPD disclosure violation only upon an individualized showing of "harm and causation," *id.*, and the participant's remedy (if any) is limited to the "harm stemming from [the plaintiff's] reliance on the SPD," *see id.* at 1885 (Scalia, J., dissenting). Here, there is no record evidence that plaintiffs suffered any harm *caused by* the alleged deficiencies in the pension plan SPDs (or, for that matter, any harm whatsoever). Furthermore, plaintiffs have not explained and could not explain how their requested remedy of reinstatement in the Verizon Pension Plans would be a proper measure of the harm they allegedly suffered as a result of the purported disclosure violation. Defendants are therefore entitled to summary judgment on plaintiffs' SPD disclosure claims.

To the extent plaintiffs purport to bring this claim on behalf of the class, moreover, the Court should hold that any such claim may not proceed on a class-wide basis. In light of *Amara*'s holding that an individualized showing of "actual harm" caused by a deficient SPD is required to recover for a disclosure violation, any appropriate relief in this case would not apply generally to the class as a whole, as is required under Federal Rule of Civil Procedure

23(b)(2). Thus, in the unlikely event that the Court finds a notice violation, it should strike plaintiffs' class allegations with respect to Count II.[15]

IV. PLAINTIFFS' CLAIM FOR BENEFITS DUE UNDER THE PLAN FAILS.

Count VII sets forth an "alternative" claim under Section 502(a)(1)(B) of ERISA for benefits purportedly due to members of the class "under the terms of" the Verizon Pension Plans. This claim fails for the simple reason that, pursuant to the terms of the Plans as written, plaintiffs undisputedly are not entitled to any benefits.

Under Section 502(a)(1)(B), a plan participant may sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). As the Supreme Court recently made clear, this provision "speaks of '*enforc[ing]*' the 'terms of the plan,' not of *changing* them." *Amara*, 131 S. Ct. at 1877 (emphasis in original). Thus, an action to reform the terms of a pension plan under Section 502(a)(1)(B) does not lie. *See id.*

Here, it is undisputed that each of the Verizon Pension Plans has provided at all times since at least December 2006 that inactive employees whose last Verizon service was with a VIS business unit (other than VMPP DVPs) "shall cease to be eligible for a pension or any other benefit from the Plan." Appx. 358, 371, 392, 414. To be sure, plaintiffs assert that those plan terms violate ERISA or pre-existing plan provisions, and so effectively seek to reform the

[15] While defendants consented to class certification in this case in March 2011, they did so before plaintiffs filed their Second Amended Complaint, which for the first time sought to assert an SPD disclosure claim. Accordingly, the parties' agreed-to class certification order does not encompass plaintiffs' new, SPD disclosure claim. Moreover, the May 2011 *Amara* decision represents an intervening change in the law necessitating decertification of any class-wide disclosure claim in this case. *See, e.g.*, *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 410 (C.D. Cal. 2000) ("changes in the . . . law[] will necessitate reconsideration" of class certification (internal quotation marks and citation omitted)).

Verizon Pension Plans to suppress the terms of the Idearc amendments. But such a claim may not be pursued under Section 502(a)(1)(B). *See Amara*, 131 S. Ct. at 1877.[16]

Because plaintiffs plainly are not entitled to any benefits under the terms of the plans as written, the Verizon Pension Plans are entitled to summary judgment on Count VII.

V. PLAINTIFFS' "FULL AND FAIR REVIEW" CLAIM IS WITHOUT MERIT.

Count I alleges that plaintiffs were denied a "full and fair review" of the administrative decisions denying their claims for post-November 2006 benefits from Verizon Pension Plans. (Compl. ¶ 116.) For relief, plaintiffs request "an award of reasonable attorney's fees and costs necessarily incurred in this civil action in order to litigate the class certification issue and the merits of Plaintiffs' administrative claim." (Compl. ¶ 132.) Plaintiffs' claim is without merit, and the relief plaintiffs' request is not available under ERISA.

Section 503(2) of ERISA provides that an "employee benefit plan shall . . . afford a reasonable opportunity to any participant whose claim for benefits has been denied . . . a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. § 1133(2). "The purpose of [the 'full and fair review'] requirement is to provide claimants with enough information to prepare adequately for further administrative review or an appeal to the federal courts." *Juliano v. Health Maintenance Org. of N.J., Inc.*, 221 F.3d 279, 287 (2d Cir. 2000) (quoting *DuMond v. Centex Corp.*, 172 F.3d 618, 622 (8th Cir. 1999)). "[S]ubstantial rather than strict compliance" with the requirement "is all that the law requires." *Lacy v. Fulbright & Jaworski*, 405 F.3d 254, 257 (5th Cir. 2005).

---

[16] To the extent that plaintiffs purport to seek welfare benefits in Count VII, their claims fail for the additional reason that none of them ever made an administrative claim for welfare benefits under any Verizon welfare plan. *See, e.g.*, *Bourgeois v. Pension Plan for Emps. of Santa Fe Int'l Corps.*, 215 F.3d 475, 479 (5th Cir. 2000) ("[C]laimants seeking benefits from an ERISA plan must first exhaust available administrative remedies under the plan before bringing suit to recover benefits.").

Here, defendants went beyond "substantial compliance"; they fully complied with ERISA's "full and fair review" regulations, *see* 29 C.F.R. § 2560.503-1. The letters denying plaintiffs' administrative appeals set forth the "specific . . . reasons for the adverse determination[s]"; "[r]eference[d] . . . the specific plan provisions on which the determination [wa]s based"; and included, as appropriate, either a "description of the plan's review procedures" or a "statement of the claimant's right to bring a civil action." *See* 29 C.F.R. § 2560.503–1(g).[17] Accordingly, the record evidence makes clear that plaintiffs were furnished with more than sufficient information to "prepare adequately for further administrative review or an appeal to the federal courts." *Juliano*, 221 F.3d at 287.

In response, plaintiffs appear to make two arguments, neither of which has merit. *First*, they assert that they were not provided with "copies of[] all documents, records, and other information relevant to the[ir] claim[s] for benefits," *see* 29 C.F.R. § 2560.503–1(h)(2)(*iii*), after their claims were initially denied. (Compl. ¶ 103.) The only documents about which plaintiffs specifically complain are "demand letters the plan administrators received from other retirees who, like Plaintiffs, sought payment of Verizon pension plan benefits." (*Id.* ¶ 126.) The applicable regulations, however, require the production only of "relevant" documents, and define relevant documents as consisting (in pertinent part) only of documents "relied upon," "submitted, considered, or generated in the course of making the benefit determination." 29 C.F.R. § 2560.503–1(m)(8). Here, as common sense would suggest, there is simply no evidence that demand letters submitted by *other* claimants were relied upon or considered by the responsible Verizon plan fiduciaries in considering plaintiffs' administrative claims for benefits. *See*

[17] Plaintiffs' claim denial letters did not include a "description of any additional material or information necessary for the claimant to perfect the claim," *see* 29 C.F.R. § 2560.503–1(g)(*iii*), because no such material or information existed.

generally Black & Decker Disability Plan, 538 U.S. at 831-32 (scope of permissible judicial innovation is narrow with regard to benefit claims procedures).

Second, Plaintiffs assert that they were denied a "full and fair review" of their administrative claims because the relevant Verizon plan fiduciaries did not state the "special circumstances" requiring an extension of time to decide their administrative appeal. (Compl. ¶ 99.) This assertion is meritless.

Plaintiffs submitted their administrative appeal letter on September 15, 2009. Under applicable regulations, such an appeal must be decided

> not later than 60 days after receipt of the claimant's request for review by the plan, unless the plan administrator determines that special circumstances . . . require an extension of time for processing the claim. If the plan administrator determines that an extension of time for processing is required, written notice of the extension shall be furnished to the claimant prior to the termination of the initial 60-day period. In no event shall such extension exceed a period of 60 days from the end of the initial period.

29 C.F.R. § 2560.503–1(i)(1)(*i*). Here, the undisputed record establishes that the Verizon Pension Plan fiduciaries (i) determined that special circumstances warranting an extension existed, (ii) informed plaintiffs in writing of the need for an extension on November 13, 2009 (within 60 days of September 15, 2009), and (iii) decided plaintiffs' administrative claim for benefits on January 12, 2010 (within 60 days from "the end of the initial period," *i.e.*, from November 14, 2009).

Plaintiffs, however, complain that the letter informing them of the extension did not set forth the special circumstances necessitating the extension. But the letter explained that an extension was needed so that plaintiffs' appeals could be taken up at a December 17, 2009 meeting. Moreover, on November 24, 2009 – just one day after counsel for plaintiffs first raised a concern on this score – counsel for the Verizon plans responded, explaining in greater detail

the special circumstances necessitating an extension. As counsel explained, the extension was required, among other reasons, because plaintiffs' counsel had not responded to a letter dated September 22, 2009 "requesting clarification on several matters relating to the appeal" until October 19, 2009. Appx. 496. Under these circumstances, there can be no genuine dispute that, at the very least, the Verizon plan fiduciaries "substantially complied" with the timing requirements of the regulations.[18]

Finally, the monetary relief plaintiffs seek in Count I is not available under ERISA. In *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 144 (1985), the Supreme Court observed that "[n]othing in" Section 503 or the regulations thereunder "expressly provides for a recovery from either the plan itself or from its administrators if" the statute or regulations are violated, and noted that "the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan – § 502(a)(1)(B)" – "says nothing about the recovery of extracontractual damages." *Id.* The Court therefore held that violation of Section 503 does not give rise to a "private right of action for compensatory or punitive relief." *Id.*; *see Walter v. Int'l Ass'n of Machinists Pension Fund*, 949 F.2d 310, 316 (10th Cir. 1991) ("There is no explicit provision providing a cause of action for damages caused by a delay in processing one's pension application, and we decline Walter's invitation to fashion one from 29 C.F.R. § 2650.503-1(e)."); *see also Wade v. Hewlett-Packard Dev. Co. LP Short Term Disability Plan*, 493 F.3d 533, 540 (5th Cir. 2007) (noting in case alleging violations of ERISA § 503 that "[f]ailure to fulfill procedural requirements generally does not give rise to a

---

[18] Plaintiffs' "full and fair review" claim also fails because the VEBC – the only Verizon defendant named in Count I – was not the "appropriate named fiduciary" responsible for deciding plaintiffs' administrative appeals. Rather, under the terms of the VMPP and the NY/NE Plan, this responsibility was vested in (and was exercised by) the Verizon Claims Review Committee. *See* Appx. 373-74, 382, 402-05, 498 *et seq.*

substantive damage remedy"). Here, plaintiffs seek money damages – specifically, an award of "attorneys' fees" – as relief for the asserted violation of Section 503. Any such award, however, would in substance constitute precisely the sort of "extracontractual damages" precluded under *Russell*. Accordingly, even if this Court were to find a violation of Section 503, plaintiffs would not be entitled to any monetary relief as a result.[19]

VI. PLAINTIFFS' FREE-STANDING "EQUITABLE RELIEF" COUNT DOES NOT STATE A DISTINCT CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Count VI purports to state a claim against Verizon and the VEBC for appropriate equitable relief pursuant to Sections 502(a)(2) and (3) of ERISA. At best for plaintiffs, this claim is duplicative of their other claims, and so fails for substantially the same reasons as plaintiffs' other claims.

Section 502(a)(3) provides redress *only* where a defendant is found to have violated ERISA or the terms of the plan. *See* 29 U.S.C. § 1132(a)(3). In other words, "Section 502(a)(3) 'does not . . . authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions' of ERISA.'" *Peacock v. Thomas*, 516 U.S. 349, 353 (1996) (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 253 (1993)).[20] Here, to the extent that Count VI rests upon the

---

[19] The question whether plaintiffs are entitled to an award of attorneys' fees as a remedy for the asserted violation of Section 503 of ERISA is, of course, distinct from the question whether plaintiffs (or defendants) might be entitled to an award of attorneys' fees under ERISA's fee-shifting provision, ERISA § 502(g), 29 U.S.C. § 1132(g).

[20] Similarly, Section 502(a)(2), 29 U.S.C. § 1132(a)(2), authorizes suit only "for appropriate relief under [29 U.S.C. §] 1109." That section, in turn, provides that a plan fiduciary "who breaches any of the 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." ERISA § 409, 29 U.S.C. § 1109. Thus, equitable relief is available under Section 502(a)(2) only to the extent that someone acting in a fiduciary capacity violates the fiduciary standards imposed by Subchapter I of ERISA.

purported violations of ERISA or the Verizon Pension Plans set forth in the complaint's other counts, Count VI fails for precisely the same reasons that those counts are defective. To the extent Count VI purports to go further than the other counts, it fails to state a claim upon which relief can be granted.

CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion for summary judgment.

Dated: August 26, 2011

Respectfully submitted,

/s/ Christopher L. Kurzner
Christopher L. Kurzner
Texas Bar No. 11769100
KURZNER PC
1700 Pacific Avenue, Suite 3800
Dallas, Texas 75201
Tel.: 214-442-0801
Fax: 214-442-0851
ckurzner@kurzner.com

Jeffrey G. Huvelle (admitted pro hac vice)
Christian J. Pistilli (admitted pro hac vice)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel.: (202) 662-6000
Fax: (202) 662-6291

Attorneys for the Verizon Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2011, I caused a true and correct copy of the foregoing instrument to be served on counsel for Plaintiffs via the Court's electronic filing system as set forth in Miscellaneous Order 61 as follows:

Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, CO 80237-1741
Fax: (303) 843-0360

Robert E. Goodman, Jr.
Kilgore & Kilgore PLLC
3109 Carlisle Street
Dallas, TX 75204
Fax: (214) 953-0133

David Whittlesey
Andrews Kurth LLP
111 Congress Avenue
Suite 1700
Austin, TX 78701
Fax: (512) 320-9292

*_/s/ Christopher L. Kurzner_*
Christopher L. Kurzner