## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHER DISTRICT OF TEXAS DALLAS DIVISION

PHILIP A. MURPHY, Jr.,	§	
SANDRA R. NOE, and	§	
CLAIRE M. PALMER,	§	
Individually, and as Representatives of plan	§	
participants and plan beneficiaries of	§	
VERIZON'S PENSION PLANS	§	
involuntarily re-classified and treated as	§	
transferred into SuperMedia's PENSION PLANS,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO. <b>3:09-cv-2262-G</b>
	§	ECF
VERIZON COMMUNICATIONS INC.,	§	
VERIZON CORPORATE SERVICES GROUP INC.,	§	
VERIZON EMPLOYEE BENEFITS COMMITTEE,	§	
VERIZON PENSION PLAN FOR NEW YORK	§	
AND NEW ENGLAND ASSOCIATES,	§	
VERIZON MANAGEMENT PENSION PLAN,	§	
VERIZON ENTERPRISES MANAGEMENT	§	
PENSION PLAN,	§	
VERIZON PENSION PLAN FOR MID-ATLANTIC	§	
ASSOCIATES,	§	
SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE,	§	
	§	
Defendants.	§	

### PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs PHILIP A. MURPHY, JR., SANDRA R. NOE, and CLAIRE M. PALMER, by

and through their counsel, file their Motion for Partial Summary Judgment as to Claims Two,

Three, Four and Six of the Second Amended Complaint (Docket 64). Plaintiffs incorporate their

memorandum brief and appendix of materials filed herewith.

# TABLE OF CONTENTS

# PAGE

I.	BACKGROUND AND SUMMARY 1
I.	STATEMENT OF UNDISPUTED MATERIAL FACTS 4
III.	CONCLUSION and REQUEST FOR ORAL ARGUMENT

### I. BACKGROUND AND SUMMARY

On November 25, 2009, Philip A. Murphy, Jr., Sandra R. Noe and Claire M. Palmer (Collectively, "Plaintiffs"), filed this civil action against the named Defendants on behalf of themselves and others similarly situated, alleging that the suit should be certified as a class action. On March 3, 2011, the Court class certified this case and set forth in the order a Fed.R.Civ.Proc Rule 23(c)(1)(B) description of the claims as, *inter alia*, "[w]hether plaintiffs and the class are entitled to 'other appropriate equitable relief' under ERISA § 502(a)(3) as a result of the transfer of plaintiffs and class members to Idearc pension plans." (Docket 55, Order at p. 2). On June 21, 2011, plaintiffs filed their "Second Amended Complaint for Proposed Class Action Relief Under ERISA." (Docket No. 64).

Plaintiffs' claims arise out of actions by Verizon Communications Inc. ("Verizon") and the Verizon Employee Benefits Committee ("Verizon EBC") (hereinafter collectively referred to as "Verizon Defendants") during November and December 2006 to involuntarily transfer Plaintiffs and Class members out of Verizon's long established pension plans into pension plans of a newly formed, highly leveraged spin-off company, Idearc Inc. (hereinafter the "Spin-off Transaction" or Spin-off"). Idearc Inc. is now known as SuperMedia Inc.<sup>1</sup> As a result, SuperMedia Employee Benefits Committee ("SuperMedia EBC") became the plan administrator of Plaintiffs' and Class members' pension and retiree welfare benefits. The involuntary transfer of Plaintiffs and Class members proved to be a huge economic detriment to the retirees and their

<sup>&</sup>lt;sup>1</sup> On March 31, 2009, Idearc, Inc. and its domestic subsidiaries filed within the Dallas Division of this District voluntary petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code. As of January 4, 2010, Idearc, Inc. emerged from Chapter 11 bankruptcy proceedings and changed its name to SuperMedia, Inc. (Docket No. 64, Second Amended Complaint ¶ 29).

beneficiaries. After they were transferred, the retirees suffered significant loss of retiree welfare benefits or OPEBs<sup>2</sup> not suffered by tens of thousands of retirees who remained enrolled in Verizon's sponsored pension and welfare benefit plans.

The uncontroverted evidence establishes that Plaintiffs and Class members were simply transferred to Idearc Inc. without their knowledge or consent. They were given no explanation, there were not asked for permission, and they were not even informed of the transfer until several months after the fact.

All of the asserted claims are governed by a single federal law, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. All claims will be tried to the Court. Plaintiffs move for partial summary judgment as to their Second, Third, Fourth and Sixth Claims for Relief asserted in the Second Amended Complaint. (Docket 64).

Plaintiffs contend in their Second Claim for Relief that the Verizon EBC violated ERISA Section 102(b), 29 U.S.C. § 1022(b) and applicable Department of Labor regulations. Each of the required matters will be set forth in Plaintiffs' memorandum brief filed herewith. Plaintiffs' undisputed material facts set forth below, together with their arguments and authorities set forth in their memorandum brief filed herewith, establish that there was a violation of ERISA Section 102(b)(2), and the Court, accordingly, should enter summary judgment for Plaintiffs on the Second Claim for Relief.

Plaintiffs contend in the Third Claim for Relief that the Verizon EBC violated ERISA Sections 406(b)(2) and (b)(3), 29 U.S.C. §§ 1106(b)(2) and (b)(3). Each of the required matters

<sup>&</sup>lt;sup>2</sup> "OPEBs" are other post employment benefits, such as retirement health care, dental and life insurance coverage.

will be set forth in Plaintiffs' memorandum brief filed herewith. Plaintiffs' undisputed material facts set forth below, together with their arguments and authorities set forth in their memorandum brief filed herewith, establish that there were violations of ERISA Sections 406(b)(2 and (b)(3), and the Court, accordingly, should enter summary judgment for Plaintiffs on the Third Claim for Relief.

Plaintiffs contend in their Fourth Claim for Relief that the Verizon pension plan fiduciaries violated the plan documents rules set forth in ERISA Section 404(a)(1)(D), 29 U.S.C. § 1132(a)(1)(D), and breached their fiduciary duty of loyalty in violation of ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1). Each of the required matters will be set forth in the Plaintiffs' memorandum brief filed herewith. Plaintiffs' undisputed material facts set forth below, together with their arguments and authorities set forth in their memorandum brief filed herewith, establish that there were violations of ERISA's duty of loyalty set forth in Section 404(a)(1) and ERISA's plan documents rules set forth in Section 404(a)(1)(D), and the Court, accordingly, should enter summary judgment for Plaintiffs on the Fourth Claim for Relief.

Plaintiffs contend in their Sixth Claim for Relief that the Court should grant Plaintiffs and the Class members appropriate equitable relief, as allowed under ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a) and 1132(a)(3). Plaintiffs ask the Court to enter an order requiring Defendants to restore Plaintiffs and Class members to their former status as participants in Verizon's employee benefit plans and order that Plaintiffs and Class members be made whole. Each of the required matters will be set forth in the Plaintiffs' memorandum brief filed herewith. Plaintiffs' undisputed material facts set forth below, together with their arguments and authorities set forth in their memorandum brief filed herewith, establish their entitlement to

-3-

appropriate equitable relief under ERISA Sections 502(a)(2) and (a)(3), and the Court, accordingly, should enter summary judgment for Plaintiffs on the Sixth Claim for Relief.

### **II. STATEMENT OF UNDISPUTED MATERIAL FACTS**

In accordance with Local Rule 56, the undisputed material facts are set forth below, taken from the supporting documents, stipulations, Verizon Defendants' Answer to the Second Amended Complaint, interrogatory responses, affidavits and other materials set forth in Plaintiffs' Appendix filed herewith:

1. Plaintiff Phillip A. Murphy is a U.S. citizen residing in Mills, Massachusetts. In December 1996, he retired from his employment with NYNEX Information Resources Company and commenced his pension in the form of a 100% joint and survivor annuity with a pop-up feature. (App. 473 ¶¶ 1-2).<sup>3</sup> In November 2006, he was a participant in the Verizon Pension Plan for New York and New England Associates and was transferred to an Idearc pension plan. (App. 62 ¶ 7).

2. Plaintiff Sandra R. Noe is a U.S. Citizen residing in Ipswich, Massachusetts. In April 1995, she retired from her employment with NYNEX Information Resources Company and commenced her pension in the form of a single life annuity. (App. 478 ¶¶ 1-2). In November 2006, she was a participant in the Verizon Pension Plan for New York and New England Associates and was transferred to an Idearc pension plan. (App. 62 ¶ 9).

3. Plaintiff Claire M. Palmer is a U.S. Citizen residing in West Newton,

<sup>&</sup>lt;sup>3</sup> Plaintiffs use the convention "App. 473 ¶¶ 1-2" to refer to Plaintiffs' Appendix of materials filed herewith and the specific page and paragraph number for either the document, Answer, stipulation or formal discovery material that supports the statement of undisputed material fact.

Massachusetts. In April 1995, she retired from her employment with NYNEX Information Resources Company and commenced her pension in the form of a single life annuity. (App. 482 ¶¶ 1-2). In November 2006, she was a participant in the Verizon Management Pension Plan and was transferred to an Idearc pension plan. (App. 63 ¶ 11).

4. The Verizon EBC and/or its chairperson is a fiduciary of and is the plan administrator for a number of Verizon pension and welfare benefit plans, including the pension plans in which Plaintiffs participated. (App.  $63 \ 14$ ).

5. As of the first quarter of 2006, Verizon Communication Inc. ("Verizon"), the sponsor of Plaintiffs' pension plans, was considering whether to spin-off its directories business, Verizon Information Services ("VIS"), and among the questions it considered was whether to transfer pension and/or OPEBs associated with inactive employees whose last service was with a directories business unit in the event of a spinoff. (App. 67-68  $\P$  36). (Hereinafter the proposed spinoff is referred to as the "Spin-off Transaction" or "Spin-off").

6. While it was a segment of Verizon, VIS had "underperformed its incumbent average due to the competitive nature of its markets and execution issues." (App. 284; App. 414-415, Fitzgerald Deposition Tr. 29:15-30-24 ). Verizon deemed VIS as having "limited opportunity for growth and value creation." (App. 284; App. 416, Fitzgerald Deposition Tr. 33:11-25; App. 423, Fitzgerald Deposition Tr. 83:3-6).

7. VIS had no separate pension or employee welfare benefit plans for either current or former workers. All of VIS's current or former workers were participating in Verizon sponsored pension and employee welfare benefit plans. (App.  $2 \P 2$ .).

8. In mid-March 2006, VIS sent to Verizon a proposal with a recommendation that

-5-

should Verizon spin-off VIS, Verizon should retain obligations for all management and union retirees' pension and OPEBs. (App. 223; App. 380-386, Hartnett depo 62:14-66:11).

9. There was no final decision regarding whether to transfer pension and/or OPEB assets and/or liabilities associated with inactive employees whose last service was with a directories business unit at any time between January 2006 and early October 2006. (App. 68 ¶ 39).

10. Verizon planned for the spin-off entity to acquire about \$9.1 billion of Verizon's debt. (App. 413, Fitzgerald Deposition Tr. 23:19-22). Verizon planned for the spin-off entity to have a debt over the amount of the current year estimated cash flow ratio of 5.8 to 1 and Verizon knew the spin-off entity had a limited opportunity for growth and value creation. Verizon planned to be left with a much better debt to annual cash flow ratio of 2 to 1. (App. 293; App. 421-423, Fitzgerald Deposition Tr. 81:14-83:6).

11. Within several weeks before the planned completion date of the Spin-off, VIS received a memorandum from an outside consulting and actuarial firm. (App. 3  $\P$  5; App. 7-8). VIS's consultant was performing due diligence on behalf of VIS. (App. 469, Gist Deposition Tr. 109:11-18). VIS's consultant concluded that "Overall, Verizon is in a better overall position to continue covering the retirees under their programs". (App. 8; App. 445-446, Gist Deposition Tr. 37:19-38:10; App. 448, Gist Deposition Tr. 40:18-25).

12. Within several weeks before the planned completion date of the Spin-off, VIS executives sought to have the better financed Verizon maintain responsibility for Plaintiffs and Class members, including the planned treatment of retiree OPEB liability. (App. 3  $\P$  6). In response to VIS executives' request, Verizon CEO Ivan Seidenberg wrote in an October 7, 2006

-6-

dated email that he spoke with VIS CEO and President Kathy Harless and told her "this is a dead on arrival" and he "advised her to stay out of the way and allow Andy and Mueller to deal with us." (App. 291; App. 418-419, Fitzgerald Deposition Tr. 53:9-54:20).

13. Verizon's position when VIS executives advocated their position was that Verizon would not even consider keeping the retiree liabilities. (App. 288; App. 397, Hartnett Deposition Tr. 139:5-17). Therefore, VIS's request went no further. (App. 394, Hartnett Deposition Tr. 135:7-12 "And, of course, then I got the response from my boss [Verizon Executive Vice President John Diercksen] that no, we're not going to consider that. And, therefore it never went any further, other than me telling Bill [Gist] we're not considering it").

14. On or about October 18, 2006, Verizon publicly announced that its Board of Directors had approved the proposed spin-off of VIS to its stockholders as a separate, publicly traded company named Idearc Inc. (App. 294-302; App. 69  $\P$  41). Verizon's October 18, 2006 public disclosure and filing with the United States Securities Exchange Commission did not state that Verizon intended to transfer pension plan assets and liabilities, and/or OPEB liabilities, associated with inactive employees whose last service was with a directories business unit to Idearc or an Idearc pension plan as part of the spinoff transaction. (App. 69  $\P$  43). Verizon's official announcement did not mention retirees. (App. 303-304; App. 400, Hartnett Deposition Tr. 154:2-9).

15. When the October 2006 announcement was made, Plaintiffs were each previously retired from a Verizon sponsored pension plan and each was receiving pension benefits, welfare benefits and other incidental retiree benefits provided by Verizon. (App. 69  $\P$  42).

16. An email dated October 26, 2006 reflects that Verizon decided to retain

-7-

management classified retirees who had earned rights to deferred vested pensions. (App. 305; App. 449-451, Gist Deposition Tr. 45:22-47:4). Verizon decided to retain responsibility for benefit obligations to management deferred vested pensioners in order to meet the requirements of what is known as the "3% de minimus rule" of the Pension Benefit Guaranty Corporation and, thus, avoid having to give the spinoff company, Idearc Inc., about \$400 million which was the proportionate share of the surplus assets in the Verizon Enterprises Management Pension Plan. (App. 310; App. 209 "Generally, if assets and liabilities are spun-off to a plan while part of Verizon, the spun off plan must receive a proportionate share of surplus assets to meet its objectives"; App. 367-368, Hartnett Depo. Tr. 47:10-48:10; App. 401-402, Hartnett Depo. Tr. 156:20-21).

17. In a letter dated November 1, 2006, from Verizon CEO Ivan Seidenberg to Verizon's stockholders, there is information about the formation of Idearc with no mention of retirees being transferred to the new company. (App. 309; App. 452-453, Gist Deposition Tr. 48:19-49:16).

18. As of November 16, 2006, there were more than 100,000 participants in the Verizon sponsored pension plans in the aggregate. (App. 73  $\P$  62). Prior to the November 17, 2006 Spin-off, Plaintiffs and Class members were each previously retired from employment and each was participating in Verizon sponsored pension plans. (App. 2  $\P$  3). In November 2006, Class members comprised less than 3% of the total Verizon pension plan participant population, as there are 2,559 identified Class members. (App. 503  $\P$  6).

19. The Verizon EBC did not obtain a written opinion from independent counsel regarding the advisability of transferring Plaintiffs and Class members to the spin-off entity.

-8-

(App. 97 ¶ 204). The Verizon EBC did not have the proposed Spin-off Transaction reviewed and opined by an independent fiduciary as to the advisability of transferring Plaintiffs and Class members to the spin-off entity. (App. 97 ¶ 206).

20. No final decision regarding whether to transfer pension and/or OPEB assets or to transfer Plaintiffs and Class members was made by Verizon until November 17, 2006. (App. 69  $\P$  45).

21. On November 17, 2006, the final date of the Spin-off, Verizon and Idearc Inc. entered into an Employee Matters Agreement ("EMA"), executed by Verizon Executive Vice President John W. Diercksen and Idearc Inc. President Kathy Harless. (App. 3 ¶ 7; App. 44-45).

22. The EMA constituted Verizon's final decision to transfer the Plaintiffs and Class members from Verizon sponsored pension plans to the spin-off entity sponsored pension plans. (App. 70  $\P$  47).

23. The EMA is not a pension plan document and there are no terms within the Verizon pension plans expressly making the EMA part of any Verizon pension plan. (App. 70  $\P$  48).

24. The Spin-off was completed on November 17, 2006. (App. 3 ¶ 8).

25. Idearc Inc. began operations as an independent publicly traded corporation on November 17, 2006 when it was spun-off from Verizon. (App.  $3 \P 9$ ). Idearc is neither a "participating company" to Verizon's pension plans nor a Verizon affiliate. (App.  $65 \P 21$ , App.  $66 \P 26$ ; App. ¶138).

26. Verizon gave the Verizon EBC, the fiduciary of Verizon's pension plans, ultimate

-9-

responsibility for implementing Verizon's decision to transfer Plaintiffs and Class members out of Verizon sponsored pension plans to Idearc sponsored pension plans. (App. 88-89 ¶¶ 159 and 161). "Members of the Verizon Employee Benefits Committee were the Verizon personnel with principal responsibility for implementing the decision of Verizon, as settlor of the Verizon Pension Plans, to transfer assets and obligations relating to the pension benefits of former VIS employees to Idearc's pension plans in connection with the November 2006 Idearc spin-off transaction." (App. 112-113).

27. Prior to the November 17, 2006 Spin-off, Plaintiffs and Class members were participating in one of four Verizon sponsored pension plans:

Verizon Pension Plan for New York & New England Associates (a union plan); Verizon Pension Plan for Mid-Atlantic Associates (a union plan); Verizon Management Pension Plan (a management plan); and Verizon Enterprises Management Plan (a management plan).

On November 17, 2006, Plaintiffs and Class members, based upon their nonmanagement or management retiree classification, were transferred into one of two Idearc sponsored pension plans:

Idearc Pension Plan for Collectively Bargained Employees (a union plan); and Idearc Management Pension Plan (a management plan).

(App. 2 ¶ 3; App. 487, chart listing plans).

28. During November 2006, Verizon transferred hundreds of millions of dollars in pension assets to Idearc's master trust and pension plans. (App. 71  $\P$  52). In connection with the Spin-off in November 2006, Verizon made an initial transfer of approximately 90% of the pension assets required to be transferred by Section 414(1) of the Internal Revenue Code and the regulations thereunder for all participants whose accrued benefits Verizon transferred to an

Idearc pension plan. (App. 72 ¶ 55). The remaining approximately 10% of necessary pension assets, or \$62.7 million, was not transferred until three years later, on November 20, 2009. (App. App. 490; App. 460, Gist Deposition Tr. 83:4-88:18).

29. Verizon was a party to the Spin-off transaction, the Spin-off transaction involved the Verizon pension plans and, as a result of the Spin-off transaction, Verizon distributed to all members of the Verizon EBC monetary consideration for their own personal accounts in the form of corporate stock issued by Idearc. The members of the Verizon EBC received one share of Idearc stock for every 20 shares of Verizon common stock owned. (App. 91 ¶¶ 173, 171).

30. As of November 2006, Plaintiffs and Class members were vested in one of Verizon's pension plans and Verizon did not seek their consent to their transfer or the transfer of pension assets or liabilities. (App. 73  $\P$  60). SuperMedia EBC has not identified any documents or information indicating that anyone obtained either Plaintiffs' or Class members' consent to be transferred out of Verizon sponsored pension plans into Idearc sponsored pension plans. (App. 3  $\P$  11).

31. In connection with the Spin-off transaction, Verizon transferred responsibility for Plaintiffs' and Class members' retiree benefits to Idearc. (App. 73 ¶¶ 63-64). Plaintiffs and Class members were simply transferred to Idearc without their knowledge or consent. (App. 97 ¶ 206).

32. Idearc pension plans assumed the obligations for payment of Plaintiffs' and Class members' pensions and Idearc Inc. assumed the obligation for payment of Plaintiffs' and Class members' OPEBs. The OPEBs consisted of health care, dental care and life insurance benefits previously due from, and provided by, Verizon. (App. 4  $\P$  12).

-11-

33. Prior to the Spin-off Transaction, Verizon Defendants informed Plaintiffs and Class members by distributing summary plan descriptions ("SPDs") that stated there was a commitment by Verizon to continue paying monthly pension benefits for life:

In general, is you are retired and receiving your monthly benefit or if you are receiving a surviving beneficiary benefit, the amount of <u>your benefit will continue</u> to be paid *by Verizon* without change.

(emphasis added). (App. 126, SPD for New York & New England Associates; App. 153, SPD for Mid-Atlantic Associates).

34. Prior to the Spin-off Transaction, Verizon never disclosed in a forfeiture clause included in a summary plan description issued to Plaintiffs that one manner in which a retiree's pension benefits could be reduced, lost, suspended, delayed or offset was by the plan sponsor unilaterally choosing to remove the retiree from a Verizon sponsored pension plan and transferring the retiree to a separate publicly traded corporation, as part of a spin-off. (App. 473-474, Murphy Affidavit ¶¶ 3-5; App. 478-479, Noe Affidavit ¶¶ 3-5; App. 483, Palmer Affidavit ¶¶ 3-5).

35. The word "spin-off" appears nowhere within the forfeiture clause set forth in the the SPDs last issued to Plaintiffs. (See generally, the forfeiture clauses within the SPDs issued to Plaintiffs and Class members – App. 127-129, the 2001 SPD for New York & New England Associates; App. 155-157, the 2001 SPD for Mid-Atlantic Associates; App. 185-186, the 2001 SPD for management retirees).

36. On December 22, 2006, Verizon adopted pension plan amendments which transferred pension assets and liabilities for certain current VIS employees and inactive employees whose last service was with a VIS unit, including Plaintiffs and Class members, from

-12-

Verizon sponsored pension plans to Idearc pension plans. These amendments made participation in the Idearc pension plans retroactively effective November 17, 2006. (App.  $3 \P 10$ ).

37. Each of the December 22, 2006 dated amendments for the Verizon management pension plans provides that Class members who were Verizon management retirees transferred to Idearc no longer have rights to continue participation in the Verizon management pension plan as of November 17, 2006. (App. 202 and 208). Both management pension plan amendments state, "As a result, except as provided in the paragraph below, former Employees described in the immediately preceding sentence shall cease to be eligible for a Pension or any other benefit from the Plan based on employment before the spin-off date." (*Id.*).

38. Each of the December 22, 2006 dated plan amendments for the Verizon union pension plans provides that Class members who were Verizon nonmanagement retirees transferred to Idearc no longer have rights to continue participation in the Verizon union pension plan as of November 17, 2006. (App. 132 and 160). Both union pension plan amendments state, "As a result, except as provided in the paragraph below, former Employees described in the immediately preceding sentence shall cease to be eligible for a Pension or any other benefit from the Plan based on employment before the spin-off date." (*Id.*).

39. Verizon EBC Chairman Marc C. Reed is the Verizon Executive Vice President who executed the belated pension plan amendments on December 22, 2006 that were made retroactive to November 17, 2006. (App. 113; App. 131; App. 159).

40. Verizon EBC did not disclose in any Summary of Material Modifications ("SMM") provided to Plaintiffs and Class members the execution date of the December 22, 2006 pension plan amendments and the fact that the terms of the amendments were applied retroactively. (App. 96 ¶ 202).

41. Verizon EBC member Donna C. Chiffriller put a hold on mailing of notices to retirees who were to be transferred out of Verizon's pension plans. (App. 313; App. 344-345, Wiley Deposition Tr. 117:20-118:23). As of November 21, 2006, just days after the Spin-off Transaction, the proposed letters for the retirees were on hold and "there were ongoing discussions whether or not these [letters] should be sent, and there is no current plan to send them at this time." (App. 316; App. 346, Wiley Deposition Tr. 127:2-25).

42. By letter dated on or about January 25, 2007, Verizon informed management retirees, including Plaintiff Palmer, that they had been transferred to Idearc. (App. 321; App. 454, Gist Deposition Tr. 58:6-22; App. 75 ¶ 73; App. 484 ¶ 97).

43. By letter dated on or about February 15, 2007, Verizon informed nonmanagement retirees, including Plaintiff Murphy and Plaintiff Noe, that they had been transferred to Idearc. (App. 322; App. 455, Gist Deposition 62:7-17; App. 75 ¶ 75; App. 474 ¶ 7; App. 479 ¶ 7).

44. By letter dated on or about March 28, 2007, Idearc notified Plaintiffs and Class members that, as a result of the Spin-off, Idearc assumed both the responsibility and obligations for the benefit plans of Idearc Inc. employees as well as retirees and other former employees whose final Verizon service was with VIS or an associated company. (App. 4 ¶ 16; App. 59).

45. Not until many months *after* the retirees were transferred did plan administrators first disclose in a benefit forfeiture clause contained in newly issued SPDs the consequences of a corporate spin-off: **"How Benefits Could Be Reduced, Lost, Suspended or Delayed**...• You transfer to another company as a result of a sale, spinoff or outsourcing arrangement, and your benefit is transferred to and paid from another pension plan maintained by such other

company." (emphasis original) (App. 140-142, the 2007 SPD for New York & New England Associates; App. 194-196, the 2007 SPD for management retirees).

46. Verizon did not provide Idearc Inc. any funding for Plaintiffs' and Class members' OPEB liabilities. (App. 4 ¶ 13; App. 468, Gist Deposition Tr. 108:18-21).

47. Since they were transferred into Idearc/SuperMedia's pension plans and retiree rolls, Class members have been required to pay substantially more for their OPEBs than they would have been required to pay had they not been involuntarily transferred from Verizon. For instance, Plaintiff Murphy has paid over \$5,000 for retiree health care coverage whereas his peers entitled to benefits from Verizon have paid nothing for their health care coverage. (App. 474-475 ¶ 9). Plaintiff Noe has had to pay more than \$5,000 for Idearc/SuperMedia OPEBs and her peers entitled to benefits from Verizon have paid nothing for their OPEBs. (App. 479-480 ¶¶ 9-10).

48. On March 31, 2009, Idearc Inc, commenced Chapter 11 bankruptcy proceedings within the Dallas Division of this District. On December 31, 2009, Idearc Inc. emerged from Chapter 11 bankruptcy proceedings and announced it had changed its name to SuperMedia Inc. The Idearc EBC was renamed the SuperMedia EBC. (App.  $4 \$  14).

49. When Idearc Inc emerged from bankruptcy with a changed name of SuperMedia,
Inc. the corporation's common stock started trading on January 4, 2010 at \$49.00 per share.
Today, SuperMedia's common stock share price is not much higher than \$2.00 per share, thus,
Plaintiffs and Class members are concerned about the potential for another bankruptcy. (App. 485 ¶ 10).

50. SuperMedia EBC is the current plan administrator of SuperMedia's pension plans

-15-

and has assumed responsibilities for Plaintiffs' and Class members' pensions. SuperMedia EBC administers such plans within this District at 2200 West Airfield Drive, D/FW Airport, Texas. SuperMedia EBC is a body appointed by SuperMedia Inc. and, as a body, performs certain designated fiduciary and administrative functions under SuperMedia Inc.'s pension plans. (App. 4  $\P$  15).

51. The SuperMedia Pension Plan for Collectively Bargained Employees, the pension plan for both Plaintiff Murphy and Plaintiff Noe, is underfunded. (App. 466-467, Gist Deposition Tr. 92:13-93:15; App. 234, Annual Funding Notice reporting liabilities of \$185,344,000 with assets of \$157,989,760).

52. SuperMedia Inc. has stipulated in this case to become bound by certain equitable judicial relief entered herein. (Docket 15 at  $\P$  3).

53. SuperMedia EBC concedes in this case that "[t]o the extent the Court determines a SuperMedia Defendant is needed to effectuate an order transferring retirees back to Verizon's pension plans, the plans' administrator is the appropriate party—SuperMedia EBC." (Docket 29 at p. 3 & n.4).

### III. CONCLUSION and REQUEST FOR ORAL ARGUMENT

For all the reasons set forth in Plaintiffs' memorandum brief filed herewith, this Court should grant Plaintiffs Motion for Partial Summary Judgment and order judgment in favor of Plaintiffs on their Second, Third, Fourth and Sixth Claims for Relief of the Second Amended Complaint. Due to the importance of the issues in this civil action, which case is being monitored by hundreds of Class members, the complexity of the case and the unique legal arguments posed by both sides, an oral argument hearing may be useful to the Court and is requested.

DATED this 26<sup>th</sup> day of August, 2011.

Respectfully submitted,

*s/ Curtis L, Kennedy* Texas State Bar No. 11284320 Colorado State Bar No. 12351 Curtis L. Kennedy, Esq. 8405 E. Princeton Avenue Denver, Colorado 80237-1741 Tele: 303-770-0440 CurtisLKennedy@aol.com *CLASS COUNSEL*  <u>s/ Robert E. Goodman, Jr.</u> Texas State Bar No. 08158100 Robert E. Goodman, Jr., Esq. KILGORE & KILGORE LAWYERS 3109 Carlisle Street Dallas, Texas 75204 Tele: 214-969-9099 Fax: 214-953-0133 reg@kilgorelaw.com *CLASS COUNSEL*  Case 3:09-cv-02262-G -BF Document 81 Filed 08/26/11 Page 20 of 20 PageID 1797

### **CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of August, 2011, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and a courtesy copy was emailed to Defendants' counsel as follows:

	1
Jeffrey G. Huvelle, Esq.	David P. Whittlesey, Esq.
Christian J. Pistilli, Esq.	Texas State Bar No. 00791920
COVINGTON & BURLING LLP	Casey Low, Esq.
1201 Pennsylvania Avenue, NW	Texas State Bar No. 24041363
Washington, DC 20004-2401	ANDREWS KURTH LLP
Tele: 202-662-5526	111 Congress Avenue, Suite 1700
Fax: 202-778-5526	Austin, Texas 78701
jhuvelle@cov.com	Tele: 512-320-9330
cpistilli@cov.com	Fax: 512-320-4930
Counsel for Verizon Defendants	davidwhittlesey@andrewskurth.com
	Counsel for Idearc/SuperMedia Defendants
Christopher L. Kurzner, Esq.	
Texas Bar No. 11769100	Marc D. Katz, Esq.
KURZNER PC	ANDREWS KURTH LLP
1700 Pacific Avenue, Suite 3800	Texas State Bar No. 00791002
Dallas, Texas 75201	1717 Main Street, Suite 3700
Tele: 214-442-0801	Dallas, Texas 75201
Fax: 214-442-0851	Tele: 214-659-4400
CKurzner@kurzner.com	Fax: 214-659-4401
Counsel for Verizon Defendants	marckatz@andrewskurth.com
	Counsel for Idearc/SuperMedia Defendants

Also, copy of the same was delivered via email to Plaintiffs as follows:

Philip A. Murphy, Jr. 25 Bogastow Circle Mills, MA 02054-1039 phil.murphy@polimortgage.com (Philip A. Murphy, Jr.)

Sandra R. Noe 72 Mile Lane Ipswich, MA 01938-1153 capsan@comcast.net (Sandra R. Noe)

Claire M. Palmer 26 Crescent Street West Newton, MA 02465-2008 priesing@aol.com (Claire M. Palmer)

> <u>s/ Curtis L. Kennedy</u> Curtis L. Kennedy

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHER DISTRICT OF TEXAS DALLAS DIVISION

PHILIP A. MURPHY, Jr.,	§	
SANDRA R. NOE, and	§	
CLAIRE M. PALMER,	§	
Individually, and as Representatives of plan	§	
participants and plan beneficiaries of	§	
VERIZON'S PENSION PLANS	§	
involuntarily re-classified and treated as	§	
transferred into SuperMedia's PENSION PLANS,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO. 3:09-cv-2262-G
	§	ECF
VERIZON COMMUNICATIONS INC.,	§	
VERIZON CORPORATE SERVICES GROUP INC.,	§	
VERIZON EMPLOYEE BENEFITS COMMITTEE,	§	
VERIZON PENSION PLAN FOR NEW YORK	§	
AND NEW ENGLAND ASSOCIATES,	§	
VERIZON MANAGEMENT PENSION PLAN,	§	
VERIZON ENTERPRISES MANAGEMENT	§	
PENSION PLAN,	§	
VERIZON PENSION PLAN FOR MID-ATLANTIC	§	
ASSOCIATES,	§	
SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE,	§	
	§	
Defendants.	§	

### PLAINTIFFS' MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

DATED this 26<sup>th</sup> day of August, 2011.

Respectfully submitted,

### s/ Curtis L, Kennedy

Texas State Bar No. 11284320 Colorado State Bar No. 12351 Curtis L. Kennedy, Esq. 8405 E. Princeton Avenue Denver, Colorado 80237-1741 Tele: 303-770-0440 CurtisLKennedy@aol.com *CLASS COUNSEL*  <u>s/ Robert E. Goodman, Jr.</u> Texas State Bar No. 08158100 Robert E. Goodman, Jr., Esq. KILGORE & KILGORE LAWYERS 3109 Carlisle Street Dallas, Texas 75204 Tele: 214-969-9099 Fax: 214-953-0133 reg@kilgorelaw.com *CLASS COUNSEL* 

# TABLE OF CONTENTS

## PAGE

TABL	E OF A	UTHORITIES ii		
I.	STAT	EMENT OF UNDISPUTED FACTS		
II.	BACK	GROUND AND SUMMARY OF ARGUMENT		
III.	II.       ARGUMENT AND AUTHORITIES       3         A.       Rule 56 Motion for Summary Judgment Standard       3			
	В.	Verizon Plan Fiduciaries Breached Their Duty to Disclose, in a Benefit Forfeiture Clause of a Summary Plan Description, That One Manner Whereby Verizon Pension Benefits Could be Lost or Offset Was a Corporate Spin-off and Transfer of the Retirees, the Basis for Plaintiffs'Second Claim for Relief		
	C.	The Involuntary Transfer of Verizon Retirees Violated Rules of the         Governing Plan Documents and Verizon Plan Fiduciaries' Duty of Loyalty,         the Basis for Plaintiffs' Fourth Claim for Relief         1.       The Governing Plan Documents Allowed Only Transfers of         1.       The Governing Plan Documents Allowed Only Transfers of		
		Assets and Liabilities, Not Participants or Beneficiaries. Plaintiffs and Class Members Are Neither "Assets" Nor "Liabilities"		
		2. Verizon Defendants Wrongly Retroactively Applied Plan Amendments Adopted After the Retirees Were Transferred		
		3. Verizon Defendants Violated the ERISA Fiduciary Duty of Loyalty and Duty to Act in the Best Interests of the Retiree Plan Participants		
	D.	Members of the Verizon EBC, the Pension Plan Administrator, While Acting as Corporate Officers, Violated ERISA Sections 406(b)(2) and (b)(3), the Basis for the Third Claim for Relief		
	E.	Plaintiffs' Should Be Granted Appropriate Equitable Relief         As Requested in the Sixth Claim for Relief		
IV.	CONC	CLUSION and REQUEST FOR ORAL ARGUMENT		

# TABLE OF AUTHORITIES

CASES	PAGE(s)
<i>Allison v. Bank One-Denver</i> , 289 F.3d 1223, 1236 (10 <sup>th</sup> Cir. 2002)	16
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986) (citing, 398 U.S. 144, 158-59, 90 S.Ct. 1598 (1970)	4
<i>Bussian v. RJR Nabisco, Inc.</i> , 223 F.3d 286, 294 (5 <sup>th</sup> Cir. 2000)	
<i>Celotex Corporation v. Catrett,</i> 477 U.S. 317, at 323,106 S.Ct. 2548 (1986)	3
<i>Christensen v. Harris County</i> , 529 U.S. 576, 587 (2000)	13
Confer v. Custom Engineering Company, 952 F.2d 41 (3 <sup>rd</sup> Cir. 1991)	17
<i>Curtiss-Wright Corp. v. Schoonejongen</i> , 514 U.S. 73, 78, 115 S.Ct. 1223, (1995)	10
Donovan v. Bierwirth, 680 F.2d 263, 271 (2 <sup>nd</sup> Cir. 1982), cert. denied, 459 U.S. 1069, 103 S.Ct. 488 (1982)	21
Donovan v. Mazzola, 716 F.2d 1226, 1238 (9 <sup>th</sup> Cir.1983), <i>cert. denied</i> , 464 U.S. 1040, 104 S.Ct. 704 (1984)	
Eaves v. Penn, 587 F.2d 453,457 (10 <sup>th</sup> Cir. 1978)	
<i>Eddy v. Colonial Life Ins. Co. of Am.</i> , 919 F.2d 747, 750 (D.C. Cir. 1990)	7
<i>Fontenot v. Upjohn Company</i> , 780 F.2d 1190, 1197 (5th Cir.1986)	4

Harris Trust and Savings Bank v. Saloman Smith Barney Inc.,         530 U.S. 238, 246, 120 S.Ct. 2080, 2187 (2000)
<i>Hickman v. Tosco Corp.</i> , 840 F.2d 564, 566 (8 <sup>th</sup> Cir.1988), <i>cert. denied</i> , 481 U.S. 1016, 107 S.Ct. 1893 (1987)
<i>Howe v. Varity Corp.</i> , 36 F.3d 746 (8 <sup>th</sup> Cir.1994) <i>aff'd on other grounds</i> , 516 U.S. 489, 116 S.Ct. 1065 (1996)
Hughes Aircraft v. Jacobson, 525 U.S. 432, 439-440, 119 S.Ct. 755, 761 (1999)
In re Consolidated Welfare Fund ERISA Litig., 839 F.Supp 1068, 1073 (S.D. N.Y. 1993)
Isquith for and on behalf of Isquith v. Middle South Utilities Inc., 847 F.2d 186, 199 (5th Cir.), cert. denied, 488 U.S. 926, 109 S.Ct. 310 (1988)
James v. New York City Dist. Council of Carpenters' Benefits, 947 F. Supp. 622, 628 (E.D. N.Y.1996)
<i>Jensen v. SIPCO, Inc.</i> , 867 F.Supp. 1384, 1391 (N.D. Iowa 1993), <i>aff'd</i> , 38 F.3d 945 (8th Cir.1994), <i>cert. denied</i> , 514 U.S. 1050, 115 S.Ct. 1428 (1995)
<i>Kayes v. Pacific Lumber Co.</i> , 51 F.3d 1449, 1468 (9 <sup>th</sup> Cir.1995)
<i>Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan,</i> U.S, 129 S.Ct. 865 (2009)
<i>Lowen v. Tower Asset Management, Inc.</i> , 829 F.2d 1209, 1213 (2 <sup>nd</sup> Cir.1987)
Martin v. SBC Disability Income Plan, Not Reported in F.Supp.2d, 2006 WL 3040926 at *5, fn2 (N.D. Tex. October 26, 2006)
Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986)

<i>McDonald v. Provident Indem. Life Ins. Co.,</i> 60 F.3d 234, 237 (5 <sup>th</sup> Cir. 1995), <i>cert. denied,</i> 516 U.S. 1174, 116 S.Ct. 1267 (1996)
<i>Member Svcs. Life Ins. Co. v. Amer. Nat'l Bank &amp; Trust Co. of Sapulpa</i> , 130 F.3d 950, 954-956 (10 <sup>th</sup> Cir. 1997)
Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan, 144 F.3d 1014, 1022 (7 <sup>th</sup> Cir.1998)9
Michigan Elec. Employees Pension Fund v. Encompass Elec. & Data, Inc., 556 F.Supp.2d 746 779 (W.D. Mich. 2008)
<i>N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc.,</i> 453 U.S. 322, 333–34, 101 S.Ct. 2789, 2796 (1981)
Operating Engineers' Local 324 Fringe Benefit Funds v. Nicolas Equip., L.L.C., 353 F.Supp.2d 851, 854 (E.D. Mich. 2004)
Phillips v. Amoco Oil Co.,         799 F.2d 1464 (11 <sup>th</sup> Cir. 1986), cert. denied,         481 U.S. 1016, 107 S.Ct. 1893 (1987)
Ragas v. Tenn. Gas Pipeline Co.,         136 F.3d 455, 458 (5 <sup>th</sup> Cir. 1998)         5
<i>Reich v. Compton</i> , 57 F.3d 270, 286-87 (3 <sup>rd</sup> Cir. 1995)
<i>Reich v. Lancaster</i> , 843 F.Supp. 194, 202–03 (N.D. Tex.1993), <i>aff'd</i> , 55 F.3d 1034 (5 <sup>th</sup> Cir.1995)
<i>Sengpiel v. B.F. Goodrich Company</i> , 156 F.3d 660 (6 <sup>th</sup> Cir. 1998)
<i>Shaw v. Delta Air Lines</i> , 463 U.S. 85, 90, 103 S.Ct. 2890, 2896 (1983)
<i>Skidmore v. Swift &amp; Co.</i> , 323 U.S. 134, 140 (1944)
Systems Council EM-3, Intern. Broth. of Elec. Workers, AFL-CIO v. A.T.&T. Corp., 972 F. Supp. 21 (D. DC 1997)

<i>Systems Council EM-3 v. AT&amp;T Corp.</i> , 159 F.3d 1376 (DC Cir. 1998)
<i>Walker v. Wal-Mart Stores, Inc.,</i> 159 F.3d 938, 940 (5 <sup>th</sup> Cir. 1998)
Winterrowd v. American General Annuity Ins.,321 F.3d 933 (9th Cir. 2003)17

## STATUTES

ERISA Section 2, 29 U.S.C. § 1001
ERISA Section 3(21), 29 U.S.C. § 1002(21) 10
ERISA Section 3(42), 29 U.S.C. § 1002(42) 12
ERISA Section 102(a)(1), 29 U.S.C. § 1022(a)(1)11
ERISA Section 102(b), 29 U.S.C. § 1022(b)
ERISA Section 201, 29 U.S.C. § 1051 10
ERISA Section 208, 29 U.S.C. § 1058 10, 24
ERISA Section 404(a), 29 U.S.C. § 1104(a)
ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) 16, 20
ERISA Section 406(b)(2), 29 U.S.C. § 1106(b)(2) 28, 31
ERISA Section 406(b)(3), 29 U.S.C. § 1106(b)(3) 28, 31
ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2)
ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3) 1, 3, 8, 31, 32

# **RULES, REGULATIONS AND OTHER AUTHORITIES**

Fed R. Civ. Proc., Rule 23(C)(1)(b)	1
Fed R. Civ. Proc., Rule 56	

26 C.F.R. § 1. 401-2(b)(2)	14
29 C.F.R. § 2510.3-101	13
29 C.F.R. § 2520.102-3-( <i>l</i> )	8
29 C.F.R. § 2520.102–3(b)	7
U.S. Department of Labor, Advisory Op. No. 93–14A (May 5, 1993)	13
FASB Statement of Financial Accounting Concepts No. 6, at p. CON6-13, ¶ 35	14

Plaintiffs PHILIP A. MURPHY, JR., SANDRA R. NOE, and CLAIRE M. PALMER, by and through their counsel, file their Memorandum Brief in support of their Motion for Partial Summary Judgment as to Claims Two, Three, Four and Six of the Second Amended Complaint.

### I. STATEMENT OF UNDISPUTED FACTS

In accordance with Local Rule 56, the undisputed facts are set out in Plaintiffs' Motion for Partial Summary Judgment filed simultaneously with this Memorandum Brief.

### II. BACKGROUND AND SUMMARY OF ARGUMENT

On November 25, 2009, Philip A. Murphy, Jr., Sandra R. Noe and Claire M. Palmer (Collectively, "Plaintiffs"), filed this civil action against the Verizon Defendants and the Idearc/SuperMedia Defendants on behalf of themselves and others similarly situated, alleging that the suit should be certified as a class action. All of the asserted claims are governed by a single federal law, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. All claims will be tried to the Court. On March 3, 2011, the Court class certified this case and set forth in the order a Fed.R.Civ.Proc Rule 23(c)(1)(B) description of the claims as, *inter alia*, "[w]hether plaintiffs and the class are entitled to 'other appropriate equitable relief' under ERISA § 502(a)(3) as a result of the transfer of plaintiffs and class members to Idearc pension plans." (Docket 55, Order at p. 2). On June 21, 2011, plaintiffs filed their "Second Amended Complaint for Proposed Class Action Relief Under ERISA." (Docket No. 64).

Plaintiffs' claims arise out of actions by Verizon Communications, Inc. ("Verizon") and Verizon Employee Benefits Committee (together referred to as "Verizon Defendants") during

- 1 -

November and December 2006 to involuntarily transfer Plaintiffs and Class members out of Verizon's long established pension plans into pension plans of a newly formed, highly leveraged spin-off company, Idearc, Inc. (hereinafter the "Spin-off"). Idearc, Inc. is now known as SuperMedia Inc.<sup>1</sup> As a result, SuperMedia Employee Benefits Committee ("SuperMedia EBC") became the plan administrator of Plaintiffs' and Class members' pension and retiree welfare benefits.

Prior to the November 17, 2006 Spin-off, Plaintiffs and Class members were

participating in one of four Verizon sponsored pension plans:

Verizon Pension Plan for New York & New England Associates (a union plan); Verizon Pension Plan for Mid-Atlantic Associates (a union plan); Verizon Management Pension Plan (a management plan); and Verizon Enterprises Management Plan (a management plan).

On November 17, 2006, Plaintiffs and Class members, based upon their nonmanagement or

management retiree classification, were transferred into one of two Idearc sponsored pension

plans:

Idearc Pension Plan for Collectively Bargained Employees (a union plan); and Idearc Management Pension Plan (a management plan).

The involuntary transfer of Plaintiffs and Class members to Idearc proved to be a huge economic

detriment to the retirees and their beneficiaries. The transferred retirees suffered significant loss

of retiree benefits not suffered by tens of thousands of retirees who remained enrolled in

Verizon's sponsored pension and welfare benefit plans.

<sup>&</sup>lt;sup>1</sup> On March 31, 2009, Idearc, Inc. and its domestic subsidiaries filed within the Dallas Division of this District voluntary petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code. As of January 4, 2010, Idearc, Inc. emerged from Chapter 11 bankruptcy proceedings and changed its name to SuperMedia, Inc. (App. 4  $\P$  14).

The uncontroverted evidence establishes that Plaintiffs and Class members were simply transferred to Idearc, Inc. without their knowledge or consent. They were given no explanation, there were not asked for permission, and they were not even informed of the transfer until several months after the fact. Verizon Defendants contend that the action taken against Plaintiffs and the Class was "proper." Plaintiffs contend that such a complete disregard of the rights and interests of the retirees is a clear breach of fiduciary duty in violation of ERISA Section 404(a)(1). This Court should decree that Defendants' actions to expel-long term retirees from the security of Verizon's pension and welfare benefit plans was fully incompatible with plan terms existing when the Spin-off occurred and runs afoul of ERISA's concept of fiduciary duty.

In their motion for partial summary judgment, Plaintiffs seek judgment in favor of the Class as to the Second, Third, Fourth and Sixth Claims for Relief in the Second Amended Complaint. Plaintiffs request the Court to grant Plaintiffs and the Class appropriate equitable relief as allowed under ERISA Sections 502(a)(2) and (a)(3). The Court should order Defendants to restore Plaintiffs and Class members to their former status as participants in Verizon's employee benefit plans and to make Plaintiffs and Class members whole.

#### **III. ARGUMENT AND AUTHORITIES**

### A. <u>Rule 56 Motion for Summary Judgment Standard</u>

Summary judgment is proper when the pleadings and evidence before the court show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see also *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). The disposition of an ERISA case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination

- 3 -

of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Martin v. SBC Disability Income Plan*, Not Reported in F.Supp.2d, 2006 WL 3040926 at \*5, fn2 (N.D. Tex. October 26, 2006) (quoting *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir.1986)). The movant makes the necessary showing for summary judgment by informing the Court of the basis of his motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. The pleadings, depositions, admissions, and affidavits, if any, must demonstrate that no genuine issue of material fact exists. Fed.R.Civ.P. 56(c). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving part [ies]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986) (citing, 398 U.S. 144, 158-59, 90 S.Ct. 1598 (1970).

If the movant makes the required showing, the nonmovants must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 323-24, 106 S.Ct. at 2553. To carry this burden, the "opponent[s] must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Instead, the nonmovants must show that the evidence is sufficient to support a resolution of the factual issue in their favor. *Anderson*, 477 U.S. at 249. The nonmovants cannot survive a motion for summary judgment, however, by merely resting on the allegations in their pleadings. *Isquith for and on behalf of Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 199 (5th Cir.), *cert. denied*, 488 U.S. 926, 109 S.Ct. 310 (1988); see also *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553. "The party opposing summary judgment is required

to identify specific evidence in the record and to articulate the precise manner in which that evidence supports [the opponent's claim." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5<sup>th</sup> Cir. 1998).

## B. <u>Verizon Plan Fiduciaries Breached Their Duty to Disclose, in a Benefit</u> <u>Forfeiture Clause of a Summary Plan Description, That One Manner</u> <u>Whereby Verizon Pension Benefits Could Be Lost or Offset Was a</u> <u>Corporate Spin-off and Transfer of the Retirees, the Basis for Plaintiffs'</u> <u>Second Claim for Relief.</u>

For their Second Claim for Relief, Plaintiffs contend Verizon EBC violated ERISA Section 102(b), due to Verizon Defendant's failure to provide a required disclosure in the summary plan descriptions (SPDs) for the pension plans. Verizon Defendants informed Plaintiffs and Class members by distributing SPDs that stated there was a commitment by Verizon to continue paying monthly pension benefits for life:

In general, is you are retired and receiving your monthly benefit or if you are receiving a surviving beneficiary benefit, the amount of <u>your benefit will continue</u> to be paid by Verizon without change.

(emphasis added). (App. 126, SPD for New York & New England Associates; App. 153, SPD for Mid-Atlantic Associates). There was no disclosure of the fact that a corporate spin-off and consequential transfer of pension obligations could result in the retirees' loss of Verizon sponsored pension benefits. (App. 473-474, Murphy Affidavit ¶¶ 3-5; App. 478-479, Noe Affidavit ¶¶ 3-5; App. 483, Palmer Affidavit ¶¶ 3-5).

ERISA Section 102(b) requires, in part, that a pension plan administrator provide each plan participant with an SPD which describes the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b). Department of Labor ("DOL") Regulation requires, in part, the SPD contain a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction or recovery. . . of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits. . .

29 C.F.R. Section 2520.102-3-(*l*). The SPD is considered essential in informing employees and retirees of their rights, reasonable expectations and obligations under a pension plan.

Prior to the November 17, 2006 Spin-off, the Verizon EBC consistently failed to meet ERISA's requirement to disclose in pension plan SPDs all circumstances that Verizon, as plan sponsor, contemplated may result in Plaintiffs' and Class members' ineligibility for or loss of Verizon sponsored pension plan benefits. In none of the SPDs issued to the retirees is there any discussion, disclosure or notice that a retiree with vested rights could be involuntarily removed from enrollment in his or her pension plan and, as a result of a spin-off and consequential transfer of pension obligations to a new entity, thereby made ineligible for continued receipt of Verizon sponsored pension benefits. The word "spin-off" appears nowhere within the forfeiture clause set forth in the SPDs last issued to Plaintiffs. (See generally, the forfeiture clauses within the SPDs issued to Plaintiffs and Class members, App. 127-129, the 2001 SPD for New York & New England Associates; App. 155-157, the 2001 SPD for Mid-Atlantic Associates; App. 185-186, the 2001 SPD for management retirees). No average plan participant would understand from reading any of the pension plan SPDs that he or she could be removed from a Verizon sponsored pension plan and enrolled in a new pension plan sponsored by a new independent corporate entity created as a result of a Verizon spin-off. No such scenario can be envisioned from a reasonable review, reading and understanding of any of Verizon's pension plan SPDs. (App. 473-474, Murphy Affidavit ¶ 3-5; App. 478-479, Noe Affidavit ¶ 3-5; App. 483, Palmer Affidavit ¶¶ 3-5).

- 6 -

The failure to provide Plaintiffs an SPD with a disclosure about the possible consequences of a spin-off, the immediate loss, forfeiture or offset of Verizon benefits, is not a "technical violation", as may be argued by Verizon Defendants. The failure is a statutory violation and breach of fiduciary duty. "The duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trusts long before the enactment of ERISA." *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750 (D.C. Cir. 1990). Verizon EBC, as plan administrator, was obligated to provide each Plaintiff and Class member with such disclosure without any request being made by anyone. Since there was no such disclosure, the SPDs given to Plaintiffs and Class members "ha[d] the effect of failing to inform" the retirees of a key limitation on their right to recover benefits under their pension plans, a violation of 29 C.F.R. § 2520.102–3(b).

Each Plaintiff has testified that had he or she known about the undisclosed possibility of being surreptitiously transferred out of his or her Verizon sponsored pension plan, at the whim of the plans sponsor, each would have taken a different course of action and even used his or her influence to cause the union to make a legal challenge so as to prevent such action against himself or herself and other retirees. (App. 473-474, Murphy Affidavit ¶¶ 3-5; App. 478-479, Noe Affidavit ¶¶ 3-5; App. 483, Palmer Affidavit ¶¶ 3-5). By being uninformed, each Plaintiff was harmed because he or she did not know the possible consequences of a selective spin-off and each lost an opportunity to take appropriate preventive action.

Not until many months *after* Plaintiffs and Class members were transferred out of Verizon sponsored pension plans did plan administrators first disclose the consequences of a corporate spin-off. During or after year 2007, Verizon first disclosed in a benefit forfeiture clause contained in newly issued SPDs: **"How Benefits Could Be Reduced, Lost, Suspended or Delayed**... • You transfer to another company as a result of a sale, spinoff or outsourcing arrangement, and your benefit is transferred to and paid from another pension plan maintained by such other company." (emphasis original) (App. 140-142, the 2007 SPD for New York & New England Associates; App. 194-196, the 2007 SPD for management retirees).

There is no provision of ERISA providing specific relief for violation of ERISA Section 102(b). Therefore, nothing precludes equitable relief for violation of the statute. Pursuant to ERISA Section  $502(a)(3)^2$ , Plaintiffs request, and this Court should grant, appropriate class-wide equitable relief, including a declaration that Verizon EBC violated ERISA Section 102(b), 29 U.S.C. § 1022(b), and DOL Regulation 29 C.F.R. Section 2520.102-3-(*l*), by failing to make timely disclosure in any pension plan SPD issued to Plaintiffs and Class members that a spin-off could result in their loss of eligibility for continued participation in their respective Verizon pension plan.

Verizon Defendants may not use the fact that retirees were transferred in the spin-off - an undisclosed circumstance that could have resulted in forfeiture, offset or loss of Verizon benefits - as a reason for denying Class members' claim for reinstatement and payment of Verizon benefits. It is fundamentally unfair for a plan sponsor to take adverse action against retirees with vested rights when there has been no forewarning or proper disclosure that the undisclosed adverse action against retirees could be taken in the future at the whim of either the plan sponsor

<sup>&</sup>lt;sup>2</sup> ERISA Section 502(a)(3) allows a participant to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3).

or plan administrators.

Courts have refused to allow plan administrators to use undisclosed provisions as a shield so as to deny participants' claims for benefits. See *Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1022 (7<sup>th</sup> Cir.1998) (holding that since SPD failed to satisfy ERISA's disclosure requirements, the undisclosed term could not be enforced against plan participant so as to deny coverage). Similarly, courts have recognized that where the SPD does not contain a benefit forfeiture clause, then such a forfeiture [even when contained in the underlying controlling plan document] will not be enforced against a participant. *Jensen v. SIPCO, Inc.*, 867 F.Supp. 1384, 1391 (N.D. Iowa 1993), *aff'd*, 38 F.3d 945 (8th Cir.1994), *cert. denied*, 514 U.S. 1050, 115 S.Ct. 1428 (1995); *James v. New York City Dist. Council of Carpenters' Benefits*, 947 F.Supp. 622, 628 (E.D. N.Y.1996).

Since the SPDs issued to Plaintiffs and Class members prior to the Spin-off did not satisfy ERISA's disclosure requirements, this Court should estop Verizon Defendants from exercising undisclosed rights. This Court should grant Plaintiffs summary judgment on their Second Claim for Relief in the Second Amended Complaint, grant injunctive relief ordering reinstatement of Plaintiffs and Class members into Verizon's sponsored pension plans and order Plaintiffs and Class members be made whole.

## C. <u>The Involuntary Transfer of Verizon Retirees Violated the Rules of the</u> <u>Governing Plan Documents and Verizon Plan Fiduciaries' Duty of Loyalty,</u> <u>the Basis for Plaintiffs' Fourth Claim for Relief.</u>

An employer plan sponsor that also acts as a plan administrator is said to wear "two hats." When the employer acts in its fiduciary capacity it must comply with ERISA's fiduciary duties. ERISA defines a plan "fiduciary" as one who "exercises any discretionary authority or

- 9 -

discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets" or who "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). Accordingly, courts have typically distinguished between employer actions that constitute "managing" or "administering" a plan and those that are said to constitute merely "business decisions" that have an effect on an ERISA plan; the former are deemed "fiduciary acts" while the latter are not. It is firmly established, for example, that a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan. Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78, 115 S.Ct. 1223, (1995) ("Employers or other plan sponsors are generally free under ERISA for any reason at any time, to adopt, modify, or terminate welfare plans."). Plan sponsors are generally free to make changes to welfare benefits due to Congress' considered decision that welfare benefit plans not be subject to a vesting requirement. In contrast, ERISA provides for automatic vesting of pension plan rights and places strict limitations on an employer's ability to transfer pension plan liabilities. See ERISA Sections 201, 208, 29 U.S.C. §§ 1051, 1058.

When the Spin-off occurred on November 17, 2006, all of the defendants in this case acted as if the November 17, 2006 Employee Matters Agreement ("EMA") governed the retirees' rights. However, Verizon Defendants admit the EMA is not a plan document. (App. ¶ 48).

In their answer to Plaintiffs' prior complaint, Verizon Defendants more directly admitted that "[t]he EMA is neither a governing pension plan document nor an amendment to Verizon's pension plans." (Docket 20, Verizon Defendants' Answer to Amended Complaint ¶ 30

admitting the allegations of Amended Complaint ¶ 30 and further stating the EMA is merely a direction to transfer pension assets and liabilities.). SuperMedia EBC admits that the "Employee Matters Agreement was an exhibit to the Distribution Agreement and that an Idearc officer signed the Distribution Agreement." (Docket 34, SuperMedia's Answer to Amended Complaint ¶ 30). Therefore, Plaintiffs' and Class members' rights under the pension plans were never governed nor controlled by the terms of the EMA.

In an ERISA case, only the applicable plan documents govern the rights and obligations of a participant, beneficiary, administrator or fiduciary. See, e.g., *Walker v. Wal-Mart Stores, Inc.*, 159 F.3d 938, 940 (5<sup>th</sup> Cir. 1998) (per curiam) (stating that a court must "interpret ERISA plans' provisions as they are likely to be 'understood by the average plan participant,' consistent with ERISA's statutory drafting requirements") (quoting 29 U.S.C. § 1022(a)(1)).

### 1. The Governing Plan Documents Allowed Only Transfers of Assets and Liabilities, Not Participants or Beneficiaries. Plaintiffs and Class Members Are Neither "Assets" Nor "Liabilities".

When asked in an interrogatory to identify the specific terms of the pension plans that permitted Verizon to transfer Plaintiffs and Class members out of Verizon sponsored pension plans, Verizon Defendants identified section 20.6 of the union pension plans and section 11.3 of the management pension plans. (App. 440). Section 20.6 of the union plans places a condition whenever assets or liabilities are merged, consolidated or transferred to another plan. (App. 122 ¶ 20.6; App. 150 ¶ 20.6). The condition it that whenever assets or liabilities are transferred to another plan, the plan sponsor and administrator must insure that the benefit that each participant in the pension portion of the Verizon plan would receive, if there were a termination immediately after a merger consolidation or transfer of assets or liabilities, not be less than the

participant would have received if there were a termination of the Verizon plan immediately before the merger, consolidation or transfer of assets or liabilities. (*Id.*). Section 20.6 says nothing about a right to transfer retired persons or other participants or beneficiaries.

Likewise, section 11.3 of the management pension plans places essential the same condition on the transfer of assets or liabilities as applied to the union plans and the section says nothing about a right to transfer retired persons, other participants or beneficiaries. Section 11.3 states in relevant part:

[N]o such merger, consolidation, or transfer shall be consummated unless each Employee, Retired Employee, former Employee and Beneficiary under the [Verizon] Plan would, if the resulting plan then terminated, receive a benefit immediately after the merger, consolidation, or transfer, if the [Verizon] Plan hand then terminated;...

(App. 171-172 ¶ 11.3; App 177-178 ¶ 11.3). Plaintiffs do not contend that Verizon Defendants ran afoul of this provision because Verizon transferred a portion of surplus assets from the management pension plans, leaving sufficient funding for all of the management plans' participants and beneficiaries benefits.

None of Verizon's pension plans contain terms that define assets so as to include retired persons. ERISA Section 3(42) states that "the term 'plan assets' means plan assets as defined by such regulations as the Secretary [of Labor] may prescribe, except that under such regulations the assets of any entity shall not be treated as plan assets if, immediately after the most recent acquisition of any equity interest in the entity, less than 25 percent of the total value of each class of equity interest in the entity is held by benefit plan investors...." 29 U.S.C. § 1002(42). The United States Department of Labor, ("DOL") the federal agency charged with administering and enforcing Title I of ERISA, issued a regulation in 1986 that gives the term "plan assets" a very

ordinary monetary and investment connotation and it does not include either persons or plan participants. See 29 C.F.R. § 2510.3-101. The DOL has advised that plan assets should be identified based on "ordinary notions of property rights." See, U.S. Department of Labor, Advisory Op. No. 93–14A (May 5, 1993) (letter to the Covington & Burling law firm stating, ". . .the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law.") (App. 494, 497).<sup>3</sup> Put simply, persons are not property rights to which either the plan or the plan sponsor has any beneficial ownership interest.

Courts have focused solely on categorizing items of financial concern as "plan assets". See e.g., *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1468 (9<sup>th</sup> Cir.1995) (holding collateral for a bridge loan was a plan asset); *Michigan Elec. Employees Pension Fund v. Encompass Elec.* & *Data, Inc.*, 556 F.Supp.2d 746, 779 (W.D. Mich. 2008) (finding that unpaid benefit contributions were assets of the plan); *Operating Engineers' Local 324 Fringe Benefit Funds v. Nicolas Equip., L.L.C.*, 353 F.Supp.2d 851, 854 (E.D. Mich. 2004) (holding a company's contributions to benefit funds, as they become due, constitute plan assets under ERISA); *Reich v. Lancaster*, 843 F.Supp. 194, 202–03 (N.D. Tex.1993), *aff'd*, 55 F.3d 1034 (5<sup>th</sup> Cir.1995) (payment of commissions and fees paid to service providers constitutes transfer of plan assets because agent improperly purchased policies that offered him extra compensation); *In re Consolidated Welfare Fund ERISA Litig.*, 839 F.Supp. 1068, 1073 (S.D. N.Y. 1993) (commission earned for investment plan management constitutes "plan assets" under ERISA). There are no reported court cases wherein plan participants or retirees have been categorized as plan "assets".

<sup>&</sup>lt;sup>3</sup> Federal agency interpretations in opinion letters are "entitled to respect" to the extent they have the "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 164 (1944).

"A defined benefit plan", such as the four Verizon pension plans involved in this case, "consists of a general pool of assets" . . and . . "no plan member has a claim to any particular asset that composes a part of the plan's general asset pool." *Hughes Aircraft v. Jacobson*, 525 U.S. 432, 439-440, 119 S.Ct. 755, 761 (1999). When Verizon decided to transfer pension assets to Idearc for the Spin-off, none of the assets could be tied or traced to any particular Plaintiff or Class member.

None of Verizon's pension plans contain terms that define "liabilities" so as to include retired persons. ERISA does not give a definition for "liabilities." Treasury Regulation § 401–2(b)(2) provides, in relevant part: "The term 'liabilities' as used in section 401(a)(2) includes both fixed and contingent obligations to employees." 26 CFR § 1.401–2(b)(2). That is to say the very definition of "liabilities" excludes individuals. Probably the most accepted definition of liabilities is the one used by the Financial Accounting Standards Board (FASB). The following is a quotation from the FASB Framework: "Liabilities are probable future sacrifices of economic benefits arising from present obligations of a particular entity to transfer assets or provide services to other entities in the future as a result of past transactions or events." (App. 497, FASB Statement of Financial Accounting Concepts No. 6, at p. CON6-13, ¶ 35).

Plaintiffs will concede that Verizon, as plan sponsor, had the right to assign to another fund or trust the responsibility for paying very limited amounts otherwise payable by Verizon pension plans, such as administrative costs, asset investment fees, actuarial fee charges, costs of SPD photocopying and distribution, or certain benefit claims. That is self evidently not a license for the plan sponsor to remove from the pension plans a select group of retirees having vested pension rights. Neither Section 20.6 of the union plans nor Section 11.3 of the management pension plans permit the suggestion that the plan sponsor had the right to either remove, sell, trade, barter, or transfer retirees and treat them as if they were mere property rights. Retired persons, plan participants, have none of the characteristics of either assets or liabilities.

Notably, both Verizon and Idearc have agreed upon a definition of liabilities that does not include persons. Section 1.1 at page 4 of the November 17, 2006 EMA executed by Verizon and Idearc, Inc. states:

<u>Liabilities</u>" means any and all losses, claims, charges, debts, demands, actions, costs and expenses (including administrative and related costs and expenses of any plan, program or arrangement), of any nature whatsoever, whether absolute or contingent, vested or unvested, matured or unmatured, liquidated or unliquidated, accrued or unaccrued, known or unknown, whenever arising.

(App. 17, Section 1.1).

Moreover, Verizon's pension plans prohibited a change that affected the employee's benefit rights without the consent of an employee with vested benefits. See Section 15.1(b) of the Verizon Pension Plan for New York & New England Associates which provision states: "A change or termination shall not affect the rights of any Employee, without his or her consent, to any benefit or pension to which he may have previously become entitled hereunder." (App. 121, Section 15.1(b)); App. See, also Section 15.1(b) of the Verizon Pension Plan for Mid-Atlantic Associates. (App. 149) (stating same). Retirees with vested pension rights should have no lesser protection.

In interpreting the provisions of Sections 15.1(b) and 20.6 in Verizon's union plans and Section 11.3 in Verizon's management plans, the Court should recognize that ERISA's central objective is to protect the interests of employees and retirees and to guard against the termination of vested benefits. See ERISA Section 2, 29 U.S.C. § 1001; *Shaw v. Delta Air Lines*, 463 U.S. 85, 90, 103 S.Ct. 2890, 2896 (1983). The Court should declare that, while the Verizon pension plans contain provisions for the plan sponsor to transfer <u>assets</u> and <u>liabilities</u>, the plans do not contain any authorization for the plan sponsor to unilaterally and involuntary remove <u>retirees</u> with rights to vested benefits.

# 2. <u>Verizon Defendants Wrongly Retroactively Applied Plan</u> <u>Amendments Adopted After the Retirees Were Transferred.</u>

When the Spin-off occurred on November 17, 2006, existing pension plan terms permitted only the transfer of assets or liabilities. There were no existing terms or provisions allowing Verizon to remove the retirees and transfer them to Idearc. The fact that the EMA executed on November 17, 2006 reflected an intent that the pension plans be amended is nothing more than that, and the plans' terms as then written remained in effect. The Supreme Court emphasized the importance of the plan documents rule in *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, ---U.S. ----, 129 S.Ct. 865 (2009).<sup>4</sup> In *Kennedy*, the Supreme Court declared that ". . .ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule. . ." *Id.*, 129 S.Ct. at 875. A court should reject efforts to stray from the express terms of a pension plan, regardless of whom those express terms may benefit. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10<sup>th</sup> Cir. 2002). Since all Plaintiffs and Class members had vested rights, as of November 17, 2006, they should have

<sup>&</sup>lt;sup>4</sup> ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), is commonly known as the "plan documents rule." The Supreme Court amplified that a "plan administrator is obliged to act 'in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA],' § 1104(a)(1)(D), and the Act provides no exemption from this duty when it comes time to pay benefits." *Kennedy*, 129 S.Ct. 865, 875 (2009).

remained as participants in the Verizon sponsored pension plans.

The Verizon EBC and plan administrators breached their duties to continue administering benefits in strict accordance with existing plan terms. They improperly participated in the plan sponsor's devious scheme to retroactively apply amendments adopted after the retirees had been surreptitiously transferred to Idearc. On December 22, 2006, Verizon adopted amendments which stated the retirees were no longer eligible, as of November 17, 2006, to participate in Verizon's pension plans. Such action was wrongful because courts have consistently held that attempts to backdate plan amendments and apply them retroactively so as to defeat plan participants' rights are ineffective to amend the plan. *Confer v. Custom Engineering Company*, 952 F.2d 41 (3<sup>rd</sup> Cir. 1991); *Member Svcs. Life Ins. Co. v. Amer. Nat'l Bank & Trust Co. of Sapulpa*, 130 F.3d 950, 954-956 (10<sup>th</sup> Cir. 1997); *Winterrowd v. American General Annuity Ins.*, 321 F.3d 933 (9<sup>th</sup> Cir. 2003).

Specifically, on December 22, 2006, Verizon amended section 5.11 to the Verizon Pension Plan for New York and New England Associates (App. 132). The changed provision was given a stated effective date of November 17, 2006. (*Id.*). However, the pension plan had no term permitting an amendment to section 5.11 to be retroactively applied so as to affect participants in retirement status. Moreover, the Verizon Pension Plan for New York & New England Associates had and continues to have the following provision specifically preventing Verizon Defendants from applying the December 22, 2006 adopted change to section 5.11 so as to adversely affect the rights of Plaintiffs and Class members, persons who were separated from employment service:

In the case of <u>a provision with a stated effective date</u> earlier or later than January 1, 1999, the provision <u>shall apply</u> (if otherwise applicable) <u>only to Employees</u>

- 17 -

who perform services for the Company or Affiliate on or after the stated effective date. . . . The provisions of section 5.10 and Articles X, XIII, XIV, XV and XX shall apply to all Participants, regardless of the date of separation from service.

(emphasis added) (App. 116, Section 1.2(b)). Clearly, the intent of the pension plan was for

section 5.11 to be effective only for persons performing employment services. The pre-

amendment Section 5.11 of the New York & New England Associates plan provided in pertinent

part:

### 5.11 Offset Due to Transfer of Benefit Obligation.

In the case of an Employee whose entire obligation is assumed. . . (d) 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.

(emphasis original) (App. 118, Section 5.11). The New York and New England Associates plan defines "Employee" as "any individual employed by the Company or an Affiliate," (App. 117, Section 2.28). "Employee" does not include inactives or persons such as Plaintiffs and Class members who are in retirement status.

When Verizon Defendants amended Section 5.11, they failed to realize their hands were tied by virtue of the rule stated in Section 1.2(b) precluding retroactive effect to any amendment to Section 5.11 except with respect to persons actively employed by Verizon. It was wrong for Verizon Defendants to give the December 22, 2006 amendment retroactive application so as to defeat Plaintiff Murphy's, Plaintiff Noe's and other Class members' rights to continued participation in the Verizon Pension Plan for New York and New England Associates.

Likewise, Verizon Defendants repeated the same wrongdoing with respect to Class members who were participants in the Verizon Pension Plan for Mid-Atlantic Associates. On December 22, 2006, Verizon amended section 5.12 to the Verizon Pension Plan for Mid-Atlantic Associates (App. 160). Pre-amendment Section 5.12 of the plan contemplated an obligation to an <u>active</u> employee being transferred or assumed by another pension plan, not an obligation to a person in retirement status:

# 5.12 Offset Due to Transfer of Benefit Obligation.

In the case of an Employee whose entire obligation is assumed. . . (d) 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.

(emphasis original) (App. 147, Section 5.12). Once again, "Employee" is a defined term,

meaning "any individual employed by the Company or an Affiliate." (App. 145, Section 2.25).

"Employee" does not include inactives or persons such as Plaintiffs and Class members who are

in retirement status.

About five weeks after transferring the retirees, Verizon amended Section 5.12 of the

Mid-Atlantic Associates union plan and gave the changed provision a stated effective date of

November 17, 2006. However, the pension plan had no term permitting an amendment to

Section 5.12 to be retroactively applied so as to affect participants in retirement status.

Finally, the Mid-Atlantic Associates union plan had and continues to have the following provision which specifically serves to prevent Verizon Defendants from applying the December 22, 2006 adopted change to section 5.12 so as to affect the rights of retirees, persons who were separated from employment service:

In the case of <u>a provision with a stated effective date</u> earlier or later than January 1, 1999, the provision <u>shall apply</u> (if otherwise applicable) <u>only to Employees</u> who perform services for the Company or Affiliate on or after the stated effective date.... The provisions of section 5.11 and Articles X, XIII, XIV, XV and XX shall apply to all Participants, regardless of the date of separation from service.

(emphasis added) (App. 144, Section 1.2(b)). Clearly, the intent of the Mid-Atlantic Associates union plan was for Section 5.12 to be effective only as to persons performing employment services. When Verizon Defendants amended Section 5.12, they failed to take any account of the rule stated in Section 1.2(b). It was, accordingly, wrong for Verizon Defendants to give the December 22, 2006 amendment retroactive application so as to defeat Class members' rights to continued participation in the Verizon Pension Plan for Mid-Atlantic Associates.

Verizon Defendants compounded their error by trying to adversely affect the vested rights of management retirees as well. About five weeks after Plaintiff Palmer and other management retirees were surreptitiously removed from Verizon's management pension plans and enrolled in Idearc's management pension plan, Verizon made the plan amendments effective retroactive to November 17, 2006. (App. 201, Schedule VIII; App. 207, Schedule XLV). The amendments removed Plaintiff Palmer and other management retirees, all persons with vested rights, from Verizon sponsored plans and specifically stated those persons "shall cease to be eligible for a Pension or any other benefit from the Plan based on employment before the spin-off date." (App. 202; App. 208). By allowing Plaintiffs' and Class members' rights to receive payment of accrued benefits from Verizon's pension plans to be reduced to zero percent and nullified based on the November 2006 Spin-off transaction, Verizon EBC's conduct violated the terms of Section 11.2 of both management pension plans which section provides that "no amendment shall reduce any benefit, or the percentage (if any) of such benefit that is vested. . ." (App. 171, Section 11.2; App. 177, Section 11.2).

Since Verizon Defendants did not pay homage to the existing terms of the pension plan and the rules protective of the retirees, plan participants who were no longer in active employment status, the Court must rule there was a violation of the plan documents' rules, a violation of ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

# 3. <u>Verizon Defendants Violated the ERISA Fiduciary Duty of Loyalty</u> and Duty to Act in the Best Interests of the Retiree Plan Participants.

At all times, the Verizon EBC and plan administrators had a duty of loyalty to Plaintiffs

and Class members, a duty long recognized by the federal courts.

Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries. <u>Restatement of Trusts</u> 2d s 170 (1959); <u>II Scott on Trusts</u> s 170, at 1297-99 (1967) (citing cases and authorities); <u>Bogert, The Law of Trusts and Trustees s</u> 543 (2d ed. 1978). This, in turn, imposes a duty on the trustees to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan.

Donovan v. Bierwirth, 680 F.2d 263, 271 (2nd Cir. 1982), cert. denied, 459 U.S. 1069, 103 S.Ct.

488 (1982); *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 294 (5<sup>th</sup> Cir. 2000). A fiduciary must discharge plan responsibilities as a "prudent man", solely in the interest of the participants and beneficiaries (not the sponsoring employer) and for the exclusive purpose of providing benefits to participants and their beneficiaries and of defraying the reasonable expenses of the plan, in accordance with the lawful terms of the plan's controlling documents. ERISA § 404(a), 29 U.S.C. § 1104(a). The duty is analogous to the common trust law duty of "undivided loyalty". <u>E.g., *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5<sup>th</sup> Cir. 1995), *cert. denied*, 516 U.S. 1174, 116 S.Ct. 1267 (1996); *Eaves v. Penn*, 587 F.2d 453,457 (10<sup>th</sup> Cir. 1978).</u>

Before the November 17, 2006 Spin-off, all Plaintiffs and Class members had vested rights to continued participation in Verizon's sponsored pension plans. Verizon Defendants admit that no consent was obtained from any Plaintiff or any other retiree within the Class before Verizon expelled them from continued participation in Verizon's pension plans. The

surreptitious transfer of Plaintiffs and Class members to the financially overwhelmed Idearc Inc.

was eerily similarly to the fate of retirees involuntarily transferred in the case of Howe v. Varity

Corp., 36 F.3d 746 (8th Cir.1994), aff'd on other grounds, 516 U.S. 489, 116 S.Ct. 1065 (1996).

In *Howe*, the trial court summarily concluded that an employer violated its fiduciary duties under

ERISA when it transferred its obligation to pay retirees' benefits to a nearly-bankrupt company

without informing the retirees' of the change or obtaining their consent. The Eighth Circuit

affirmed that determination, ruling:

As we have indicated, these employees were simply "transferred" to MCC without their knowledge or consent. They were given no explanation, they were not asked for permission, and they were not even informed of the "transfer" until MCC went into receivership. Such a complete disregard of the rights and interests of beneficiaries is a clear breach of fiduciary duty in violation of Section 1104(a)(1), and the named individual plaintiffs have a right of action for redress under Section 1132(a)(3). An obligor (here, M-F and Varity) cannot free itself of contractually created duties without the consent of the persons to whom it is obligated. <u>Restatement (2d) of Contracts</u>, Section 318(3), comment d. M-F and Varity cannot unilaterally relieve themselves of obligations to the individual retirees. Their attempt to do so is of no legal effect, and we uphold the District Court's ruling in favor of the ten named individual plaintiffs.

(*Id.*, at 756).<sup>5</sup> The Eighth Circuit found a breach of fiduciary duty in the fact that retirees'

benefit obligations were transferred to the new company without their consent. Similarly, herein, the hard fact for the Verizon Defendants is that both the New York and New England Associates union plan and the Mid-Atlantic Associates union plan specifically required consent

of active employees with vested benefits for there to be either a change or termination of Verizon

<sup>&</sup>lt;sup>5</sup> The *Howe* case proceeded to the Supreme Court, but the Justices declined to review this portion of the Eighth Circuit's opinion because it construed the petition for certiorari as not having raised the issue.

benefits. Therefore, Plaintiffs and Class members, retirees with vested benefits, should have first been consulted and then their consent obtained before they were switched over to the highly indebted spin-off entity's pension plans. When carrying out the Spin-off, Verizon pension plan fiduciaries breached their duty of loyalty to Plaintiffs and Class members.

Verizon Defendants may argue that the decision to include retirees in the Spin-off did not implicate any fiduciary duties under ERISA and cite case law involving the sale or division of a corporate entity. But the case law only concerns nonvested contingent benefits. For example, in *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11<sup>th</sup> Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893 (1987), the Eleventh Circuit upheld the trial court's decision that a sale of a corporate division which had an adverse impact on employees' rights to future contingent nonvested benefits did not implicate ERISA fiduciary duties. Notably different was the fact that the courts were not grappling with any retirees' vested rights and the appellate court specifically stated:

We emphasize that the only "interests" at stake in this case are contingent and non-vested future retirement benefits. There is no dispute that Amoco has fulfilled and continues to fulfill its obligations with respect to vested retirement benefits earned under the Standard Plan.

*Id.*, at 1471. Other courts have held that normal business decisions with potential collateral effects on prospective, non-vested contingent benefits need not be made in the interest of plan participants. *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8<sup>th</sup> Cir.1988), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893 (1987). See also, *Sengpiel v. B.F. Goodrich Company*, 156 F.3d 660 (6<sup>th</sup> Cir. 1998) wherein the court held that "BFG's decision to spin off its tire division and to transfer a share of its welfare benefit liabilities approximately equivalent to the portion of its business devoted to tires does not constitute discretionary plan administration according to the plan's

terms or management of its assets." (*Id.*, at 666). The considered result in *Sengpiel* was based upon the court's observation that:

There is nothing in the record to suggest that BFG was motivated by bad faith or self-dealing considerations. Nor is there evidence that BFG's actions, when taken, were imprudent or manifestly adverse to plaintiffs' interests. Because welfare benefits are not vested, plaintiffs were in the same position after the transfer that they were in when the BFG plans still covered them. In fact, from 1990 until 1995, plaintiffs and their fellow transferred retirees were in better positions than their former colleagues still under the BFG plans. Michelin recently made a contribution to the retirees' pension fund that now makes their pensions fully-funded. Nothing in the record suggests that Michelin will ultimately be a less stable or secure sponsor of the retirees' benefit plans than BFG.

*Id.*, at 667. In contrast, there is ample evidence that Verizon was motivated by self-dealing considerations, especially given that the soon-to-become Idearc executives sought to have the better financed Verizon maintain responsibility for Plaintiffs and Class members, including the planned treatment of retiree OPEB liability, and were soundly rebuffed. Moreover, the bankruptcy of Idearc Inc. confirms Idearc was a less stable or secure sponsor of the retirees' benefit plans.<sup>6</sup>

In *Systems Council EM-3, Intern. Broth. of Elec. Workers, AFL-CIO v. A.T.&T. Corp.,* 972 F.Supp. 21 (D. DC 1997), the plaintiffs were both current workers and retirees who made a challenge, pursuant to ERISA Section 208,<sup>7</sup> concerning the percentage of surplus pension assets

<sup>&</sup>lt;sup>6</sup> When Idearc Inc emerged from bankruptcy with a changed name of SuperMedia, Inc. the corporation's common stock started trading on January 4, 2010 at \$49.00 per share. Today, SuperMedia's common stock share price is not much higher than \$2.00 per share, thus, giving good reason for Plaintiffs and Class members to be concerned about the potential for another bankruptcy. (App. 485, Palmer Affidavit ¶ 10).

<sup>&</sup>lt;sup>7</sup> ERISA. Section 208 states: "A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan ... unless each participant in the plan 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,

retained by AT&T when spinning off and creating Lucent Technologies, Inc. The trial court noted "[p]laintiffs make it clear that their challenge is to AT & T's allocation of plan assets and liabilities resulting from the spin-off of Lucent and its benefit plans." *Id.*, at 29. The trial court determined those acts were not fiduciary in nature, ruling " it is well settled that ERISA's fiduciary duties do not apply to the allocation and transfer of assets pursuant to a spin-off." (citation omitted). *Id.*, at 30. The trial court's dismissal of the claims was affirmed. *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376 (DC Cir. 1998) (holding AT&T was not acting in a fiduciary capacity when it allocated pension and welfare plan assets and liabilities between AT&T and Lucent).

In contrast, the Plaintiffs and Class members make no challenge as to Verizon's transfer and allocation of pension assets and liabilities to Idearc's master trust and pension plans. They directly challenge the unauthorized and non-consensual transfer of the retirees, all of whom had vested non-forfeitable rights under a Verizon pension plan. No such challenge was made in the *Systems Council EM-3* case.

During the last few weeks before the Spin-off was conducted, the soon-to-become senior leadership of Idearc Inc. expressed reservations about the wisdom of Idearc assuming the burden of the retirees' liabilities. VIS had obtained an independent consultant's advisement that concluded, "Overall, Verizon is in a better overall position to continue covering the retirees under their programs". (App. 8; App. 445-446, Gist Deposition Tr. 37:19-38:10; App. 448, Gist Deposition Tr. 40:18-25). While summarily dismissing the VIS executives' request that

consolidation, or transfer (if the plan had then terminated)." 29 U.S.C. § 1058.

Verizon maintain responsibilities for Plaintiffs' and Class members' benefits, none of the Verizon Defendants ever sought guidance from either a disinterested independent fiduciary or any neutral legal advisor.

Verizon decided to divide the group of deferred vested pensioners who had worked in the directories business and give management classified retirees more favorable treatment. Verizon informed VIS, soon-to-become Idearc Inc., that Verizon would retain management classified retirees who had earned rights to deferred vested pensions. Verizon made that selfserving decision in order to avoid having to give Idearc about \$400 million, the proportionate share of surplus assets in the Verizon Enterprises Management Pension Plan. Thus, while all of the non-management deferred vested pensioners were surreptitiously transferred to Idearc, Verizon kept within its safety net and on its pension rolls all management retirees with rights to deferred vested pensions. Verizon Defendants' action was the antithesis of the pension plans' underlying premise that they were "created for the exclusive benefit of the Participants or their Beneficiaries." (App. 121, Section 14.8; App. 149, Section 14.8). Verizon's last hour decision to give more favorable treatment to the management deferred vested retirees and maintain corporate responsibility for their pensions was carried out, after all the number crunching was done, simply in order to make certain that Verizon would not have to share a percentage of its surplus pension assets with Idearc Inc., the spin-off entity, under the rules of the Pension Benefit Guaranty Corporation.<sup>8</sup>

<sup>&</sup>lt;sup>8</sup> Verizon's sole motivation for maintaining responsibility for the carved out group of management retirees who had rights to deferred vested pensions is more fully explained in Paragraph No. 16 of the Statement of Undisputed Material Facts set forth in Plaintiffs' Motion for Partial Summary Judgment.

This Court should hold that whenever a corporate employer negotiates and carries out either the sale or spinoff of a division or business segment which will include retirees having vested rights to future benefits, the corporate employer's actions and those actions of pension plan fiduciaries assisting the corporate employer implicate fiduciary duties as to the retirees, and the parties must act in accordance with the pension plans' existing terms. The Spin-off resulted in Plaintiffs and Class members losing the security of Verizon sponsored vested and nonforfeitable pension benefits, not to mention welfare benefits. On the facts presented in this case, when Verizon Defendants imposed upon Idearc Inc. all future responsibility for the retirees' panoply of benefits, they acted arbitrarily and capriciously. Verizon Defendants did not carefully assess the impact of the Spin-off on the Plaintiffs and Class members. With knowledge that Idearc Inc. was confronted with a crushing financial burden, an oppressive debt to annual cash flow revenue of 5.8 to 1, Verizon Defendants acted in bad faith by including the retirees in the Spin-off mix.

Plaintiffs ask this Court to find Verizon Defendants' conduct towards Plaintiffs and Class members, all without their consent and contrary to the specific requirements of Verizon's pension plans, violated ERISA's fiduciary duty of loyalty and requirement to act in the best interests of the retirees, in accordance with ERISA Section 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). Plaintiffs should be granted summary judgment on their Fourth Claim for Relief.

# D. <u>Members of the Verizon EBC, the Pension Plan Administrator,</u> <u>While Acting as Corporate Officers, Violated ERISA Sections 406(b)(2)</u> and (b)(3), the Basis for the Third Claim for Relief.

In their Third Claim for Relief, Plaintiffs contend the Verizon EBC violated ERISA Sections 406(b)(2) and (b)(3), 29 U.S.C. §§ 1106(b)(2) and (b)(3). (Docket 64, Second Amended Complaint ¶¶ 150-174). ERISA Section 406 states:

(b) **Transactions Between Plan and Fiduciary.**— A fiduciary with respect to a plan shall not—

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(emphasis original) 29 U.S.C. § 1106(b)(2), (b)(3). By enacting ERISA Section 406(b)(2), prohibiting any transaction between the trust or pension plan and a "party in interest" or fiduciary, Congress intended to prevent the fiduciary from "being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries." *N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc.*, 453 U.S. 322, 333–34, 101 S.Ct. 2789, 2796 (1981) (internal quotations omitted).

Verizon was a party to the Spin-off transaction, which transaction involved the Verizon pension plans. Verizon gave the Verizon EBC, the fiduciary of Verizon's pension plans, ultimate responsibility for implementing Verizon's decision to transfer Plaintiffs and Class members out of Verizon sponsored pension plans to Idearc sponsored pension plans. "Members of the Verizon Employee Benefits Committee were the Verizon personnel with principal responsibility for implementing the decision of Verizon, as settlor of the Verizon Pension Plans, to transfer assets and obligations relating to the pension benefits of former VIS employees to Idearc's pension plans in connection with the November 2006 Idearc spin-off transaction." (App. 112-113).

Verizon Defendants contend that, when Verizon EBC members were taking action to

carry out the Spin-off Transaction, no person was acting in his or her fiduciary capacity, that each was acting in his or her capacity as an officer of the corporation. (*Id.*). Nevertheless, the language of ERISA Section 406(b)(2) extends the scope of liability beyond fiduciaries and parties in interest by prohibiting a transaction between a plan and a third party when the transaction is "for the benefit of a party in interest." See *Reich v. Compton*, 57 F.3d 270, 286-87 (3<sup>rd</sup> Cir. 1995). Furthermore, that statutory subsection "applies regardless of whether the transaction is "fair" to the plan." *Id.*, at 288 (citing *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1213 (2<sup>nd</sup> Cir.1987) (noting that section 406(b) needs to be "broadly construed" and that liability may be imposed "even where there is 'no taint of scandal, hint of self-dealing, no trace of bad faith") (citations omitted); *Donovan v. Mazzola*, 716 F.2d 1226, 1238 (9<sup>th</sup> Cir.1983), *cert. denied*, 464 U.S. 1040, 104 S.Ct. 704 (1984) (noting that per se prohibition of section 406(b) is consistent with the remedial purpose of ERISA, for "at the heart of the fiduciary relationship is the duty of complete and undivided loyalty to the beneficiaries of the trust") (citations omitted).

As officers, the members of the Verizon EBC were acting to promote the financial interests of Verizon when they included Plaintiffs and Class members in the Spin-off transaction and, thereby, eliminated the corporation's obligations to the retirees. The Verizon EBC members took no steps to protect or advocate for the best interests of Plaintiffs and Class members. Instead, the officers endeavored to assist and promote Verizon's corporate interests and goals which were adverse to Plaintiffs' and Class members' interests. Both prior to and on the Spin-off date, the Verizon EBC assisted and allowed Verizon to go forward with transferring Plaintiffs and Class members out of Verizon's pension plans, despite the nonexistence of pension plan terms that would allow such action. Verizon EBC Chairman Marc C. Reed is the Verizon Executive Vice President who executed the belated pension plan amendments on December 22, 2006 that were made retroactive to November 16, 2006. (App. 131, 159 and 203). The plan amendments directed the Plan Administrator, the Verizon EBC, to make the decisions as to which retirees were to be transferred to Idearc.<sup>9</sup> Verizon EBC member Donna Chiffriller is the Vice President who held off sending the retirees any notice until several months after they had been surreptitiously transferred. Clearly, those two pension fiduciaries allowed themselves to be put in a position where they had dual loyalties, but dishonored their primary ERISA duty of loyalty in failing to act exclusively for the benefit of the pension plans' participants and beneficiaries.

Plaintiffs contend "[i]t was in the best interest of Plaintiffs and class members that they *not* be included in the Spin-off transaction and that they be permitted to continue participation in Verizon's sponsored pension and welfare benefit plans." (Docket 64, Second Amended Complaint ¶ 165). Curiously, in response, Verizon Defendant state they "do not have sufficient information to admit, and so deny the allegations of paragraph 165 of the amended complaint." (App. 90 ¶ 165).

As a result of the Spin-off transaction, Verizon distributed to all members of the Verizon EBC monetary consideration for their own personal accounts in the form of corporate stock

<sup>&</sup>lt;sup>9</sup> The amendments to the Verizon management pension plans identify each transferred management retiree as a person who "has been determined by the Committee" (meaning the Verizon EBC) to have met the necessary last active employment criteria. (App. 201 and 207). Likewise, the amendments to the Verizon union pension plans identify each transferred union retiree as a person "who has been determined by the Plan Administrator" (meaning the Verizon EBC) to have met the necessary last active employment criteria. (App. 132 and 160).

issued by Idearc. Inc. The Verizon Defendants admit that the members of the Verizon EBC received one share of Idearc stock for every 20 shares of Verizon common stock owned. (*Id.*,  $\P$  171).

Plaintiffs have established the required elements of their Third Claim for Relief that ERISA Sections 406(b)(2) and (b)(3), 29 U.S.C. §§ 1106(b)(2) and (b)(3), were violated and the Court, accordingly, should enter summary judgment for Plaintiffs on that claim.

# E. <u>Plaintiffs' Should Be Granted Appropriate Equitable Relief As Requested in</u> the Sixth Claim for Relief.

Plaintiffs contend in their Sixth Claim for Relief that the Court should grant Plaintiffs and the Class members appropriate equitable relief, as allowed under ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a) and 1132(a)(3). ERISA Section 502(a)(3) authorizes a civil action "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]" 29 U.S.C. § 1132(a)(3).

Plaintiffs have established their Second, Third and Fourth Claims for Relief that Verizon Defendants violated duties imposed by ERISA and the pension plans, and ERISA Section 502(a)(3) authorizes appropriate relief for the purpose of redressing the violations and enforcing the Verizon pension plans' provisions. *Harris Trust and Savings Bank v. Saloman Smith Barney Inc.*, 530 U.S. 238, 246, 120 S.Ct. 2080, 2187 (2000). Plaintiffs ask the Court to enter an order requiring Defendants to restore Plaintiffs and Class members to their former status as participants in Verizon's employee benefit plans and order that Plaintiffs and Class members be made whole. Plaintiffs have established their entitlement to appropriate equitable relief under ERISA Section 502(a)(3), and the Court, accordingly, should enter summary judgment for Plaintiffs on the Sixth Claim for Relief.

## IV. CONCLUSION and REQUEST FOR ORAL ARGUMENT

For all the foregoing reasons, this Court should grant Plaintiffs Motion for Partial Summary Judgment and order judgment in favor of Plaintiffs on their Second, Third, Fourth and Sixth Claims for Relief of the Second Amended Complaint. Due to the importance of the issues in this civil action, which case is being monitored by hundreds of Class members, the complexity of the case and the unique legal arguments posed by both sides, an oral argument hearing may be useful to the Court and is requested.

DATED this 26<sup>th</sup> day of August, 2011.

Respectfully submitted,

<u>s/ Curtis L, Kennedy</u> Texas State Bar No. 11284320 Colorado State Bar No. 12351 Curtis L. Kennedy, Esq. 8405 E. Princeton Avenue Denver, Colorado 80237-1741 Tele: 303-770-0440 CurtisLKennedy@aol.com *CLASS COUNSEL*  s/ Robert E. Goodman, Jr. Texas State Bar No. 08158100 Robert E. Goodman, Jr., Esq. KILGORE & KILGORE LAWYERS 3109 Carlisle Street Dallas, Texas 75204 Tele: 214-969-9099 Fax: 214-953-0133 reg@kilgorelaw.com CLASS COUNSEL Case 3:09-cv-02262-G -BF Document 83 Filed 08/26/11 Page 40 of 40 PageID 1854

#### **CERTIFICATE OF SERVICE**

I hereby certify that on the 26<sup>th</sup> day of August, 2011, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and a courtesy copy was emailed to Defendants' counsel as follows:

Jeffrey G. Huvelle, Esq.	David P. Whittlesey, Esq.
Christian J. Pistilli, Esq.	Texas State Bar No. 00791920
COVINGTON & BURLING LLP	Casey Low, Esq.
1201 Pennsylvania Avenue, NW	Texas State Bar No. 24041363
Washington, DC 20004-2401	ANDREWS KURTH LLP
Tele: 202-662-5526	111 Congress Avenue, Suite 1700
Fax: 202-778-5526	Austin, Texas 78701
jhuvelle@cov.com	Tele: 512-320-9330
cpistilli@cov.com	Fax: 512-320-4930
Counsel for Verizon Defendants	davidwhittlesey@andrewskurth.com
	Counsel for Idearc/SuperMedia Defendants
Christopher L. Kurzner, Esq.	
Texas Bar No. 11769100	Marc D. Katz, Esq.
KURZNER PC	ANDREWS KURTH LLP
1700 Pacific Avenue, Suite 3800	Texas State Bar No. 00791002
Dallas, Texas 75201	1717 Main Street, Suite 3700
Tele: 214-442-0801	Dallas, Texas 75201
Fax: 214-442-0851	Tele: 214-659-4400
CKurzner@kurzner.com	Fax: 214-659-4401
Counsel for Verizon Defendants	marckatz@andrewskurth.com
	Counsel for Idearc/SuperMedia Defendants

Also, copy of the same was delivered via email to Plaintiffs as follows:

Philip A. Murphy, Jr. 25 Bogastow Circle Mills, MA 02054-1039 phil.murphy@polimortgage.com (Philip A. Murphy, Jr.)

Sandra R. Noe 72 Mile Lane Ipswich, MA 01938-1153 capsan@comcast.net (Sandra R. Noe)

Claire M. Palmer 26 Crescent Street West Newton, MA 02465-2008 priesing@aol.com (Claire M. Palmer)

> *s/ Curtis L. Kennedy* Curtis L. Kennedy