Case No. 13-11117

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PHILIP A. MURPHY, JR.; SANDRA R. NOE; CLAIRE M. PALMER, Individually and as Representative of plan participants and plan beneficiaries of Verizon's Pension Plans involuntarily re-classified and treated as transferred into IDEARC's Pension Plans,

Plaintiffs-Appellants,

v.

VERIZON COMMUNICATIONS, INCORPORATED; VERIZON EMPLOYEE BENEFITS COMMITTEE; VERIZON PENSION PLAN FOR NEW YORK AND NEW ENGLAND ASSOCIATES; VERIZON MANAGEMENT PENSION PLAN; SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, formerly known as Idearc Employee Benefits Committee; VERIZON CORPORATE SERVICES GROUP, INCORPORATED; VERIZON ENTERPRISES MANAGEMENT PENSION PLAN; VERIZON PENSION PLAN FOR MID-ATLANTIC ASSOCIATES,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas, Dallas Division
USDC No. 3:09-cv-2262-G

BRIEF OF THE VERIZON DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 may have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Verizon Defendants-Appellees

Verizon Communications Inc.*
Verizon Corporate Services Group Inc.**
Verizon Employee Benefits Committee
Verizon Pension Plan for Mid-Atlantic Associates
Verizon Management Pension Plan
Verizon Pension Plan For New York and New England Associates
Verizon Enterprises Management Pension Plan

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* Verizon Communications Inc. is a publicly-traded corporation, and no other publicly traded corporation owns 10% or more of the stock of Verizon Communications Inc.

** Verizon Corporate Services Group Inc. is a wholly-owned subsidiary of Verizon Communications Inc.

2. SuperMedia Defendants-Appellees

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SuperMedia Employee Benefits Committee
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Claire M. Palmer
A class of former participants in Verizon's pension plans who were transferred into Idearc's pension plans in connection with a spin-off transaction occurring in November 2006 and who were retired or terminated from Verizon at the time of the spin-off, as well as any beneficiaries of such participants.

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STATEMENT REGARDING ORAL ARGUMENT

The Verizon Defendants respectfully request oral argument in this matter. If accepted, Plaintiffs' claims would have a far-reaching impact on both the administration of Verizon's pension plans and the uniformity of the law under ERISA among the courts of appeals.

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STATEMENT OF THE ISSUES

1. Whether the District Court properly granted summary judgment dismissing Plaintiffs' claims for breach of fiduciary duty under Section 404(a)(1) of ERISA, where the challenged conduct was (i) taken not in a fiduciary but in a settlor capacity and (ii) in full compliance with the governing plan documents, ERISA, and applicable treasury regulations.

2. Whether the District Court properly granted summary judgment dismissing Plaintiffs' claims under ERISA's prohibited transaction rules in Section 406(b) of ERISA, where (i) the challenged conduct was taken not in a fiduciary but in a settlor capacity and (ii) there is no evidence of self-dealing or other actionable conduct.

3. Whether the District Court properly granted summary judgment on Plaintiffs' claim that Verizon summary plan descriptions ("SPDs") violated the requirement of ERISA that SPDs disclose circumstances that may result in the loss or denial of plan benefits, where (i) the challenged conduct did not and could not result in a loss or denial of pension benefits and (ii) the SPDs disclosed that Verizon reserved the right to amend or terminate the plan at any time.

4. Whether Plaintiffs may raise on appeal claims alleging that the Verizon Defendants failed to provide them with certain documents, purportedly in violation of ERISA, where Plaintiffs voluntarily abandoned these claims against the Verizon Defendants below.

INTRODUCTION

This case stems from the decision by Defendant-Appellee Verizon Communications Inc. ("Verizon") to transfer pension plan assets and liabilities to Idearc, Inc. ("Idearc," n.k.a "SuperMedia LLC") in connection with the corporate divestiture of Verizon's telephone directories business, Verizon Information Services ("VIS"), in 2006. Plaintiffs-Appellants Phillip A. Murphy, Sandra R. Noe and Claire M. Palmer were long-term employees in the directories business of NYNEX and its predecessors. After retiring from NYNEX in the mid-1990s, Plaintiffs began receiving pension benefits from NYNEX pension plans. Following the merger of NYNEX and Bell Atlantic, Plaintiffs became participants in Bell Atlantic's pension plans. When Bell Atlantic subsequently merged with GTE to form Verizon, Plaintiffs became participants in Verizon's pension plans. And when Verizon spun off its telephone directories business, Plaintiffs became participants in Idearc's pension plans. ROA.6002 & n.1. In 2009, Plaintiffs filed this lawsuit, alleging that the transfer of their pension obligations from Verizon to Idearc violated the Employee Retirement Income Security Act of 1974 ("ERISA").

Pension plan mergers and spinoffs are common, especially in industries such as telecommunications, where radical changes in technology have required companies to transform themselves. ERISA permits pension plan mergers and spinoffs, provided that the requirements of Sections 204(g) and 208 of ERISA –

along with applicable regulations – are satisfied. Plaintiffs do not allege that Verizon's transfer of pension obligations to Idearc failed to comply with these requirements; nor could they.

Instead, the gravamen of Plaintiffs' complaint is that certain Verizon employees breached ERISA's rules governing fiduciary conduct in connection with the Idearc pension transfer. As the District Court properly concluded in its thorough and well-reasoned decision below, however, ERISA's fiduciary duties apply only to the extent that a person exercises discretionary authority or control over the management or administration of an ERISA plan and do *not* apply to plan design decisions, like the decision to spin off a portion of a pension plan in connection with a corporate divestiture. Because there is no record evidence to support the assertion that any defendant acted in a fiduciary capacity in designing the Idearc transaction (or otherwise violated any ERISA requirement in connection with the spinoff), this Court should affirm the decision of the District Court granting the Verizon Defendants' motion for summary judgment.[1]

[1] The "Verizon Defendants" are Verizon, Verizon Corporate Services Group Inc., Verizon Employee Benefits Committee ("Verizon EBC"), Verizon Pension Plan for New York and New England Associates ("NY/NE Plan), Verizon Pension Plan for Mid-Atlantic Associates ("Mid-Atlantic Plan"), Verizon Enterprises Management Pension Plan ("VEMPP"), and Verizon Management Pension Plan ("VMPP" and, collectively, the "Verizon Pension Plans").

STATEMENT OF THE CASE

A. The Proceedings Below

Plaintiffs filed suit on November 25, 2009, and filed a First Amended Complaint shortly thereafter. ROA.13-14. On March 10, 2010, the Verizon Defendants moved to dismiss Count V of the First Amended Complaint on statute of limitations grounds. ROA.182 *et seq*.

Also on March 10, 2010, the Idearc Defendants moved to dismiss various claims asserted in the First Amended Complaint, including Counts I and II. ROA.16. Counts I and II alleged that both the Verizon EBC and the SuperMedia EBC violated Sections 404(a)(1) and 104(b)(4) of ERISA, respectively, by failing to provide all of the documents requested by Plaintiffs in a February 4, 2009 letter sent to both Verizon and Idearc. The SuperMedia Defendants' motion did not address the claims against the Verizon EBC in Counts I and II, and the Verizon Defendants did not join in the SuperMedia Defendants' motion to dismiss.

In October 2010, the District Court granted the Verizon Defendants' motion to dismiss Count V of the First Amended Complaint. ROA.445. Plaintiffs have not appealed that decision to this Court. In the same opinion and order, the District Court concluded that the document disclosure claims brought by Plaintiffs "against SuperMedia EBC should be dismissed." ROA.458; *see* ROA.463-64. The Court

did not consider or dismiss the claims brought by Plaintiffs against the Verizon EBC in Counts I and II of the First Amended Complaint.

In March 2011, the District Court entered an agreed order, pursuant to Federal Rule of Civil Procedure 23(b)(2), certifying a class consisting of:

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

ROA.821; *see* ROA.735 *et seq.*, ROA.756 *et seq.*

On June 21, 2011, with leave of the Court, Plaintiffs filed a Second Amended Complaint, asserting six different claims against one or more of the Verizon Defendants. ROA.913, ROA.915 *et seq.* That complaint did *not* allege that the Verizon Defendants violated Sections 404(a)(1) or 104(b)(4) of ERISA by failing to provide documents purportedly requested by Plaintiffs.

As the District Court explained, Plaintiffs did not contend in the Second Amended Complaint "that their pension plan benefits have been diminished or interrupted since their transfer to Idearc's plans" and did not dispute "that the amount of the assets Verizon transferred was sufficient to conform to ERISA Sections 204(g) and 208." ROA.6004. Rather, Plaintiffs' central claim – set forth in Count IV of the Second Amended Complaint – was that the Verizon EBC breached the duty of loyalty and violated the terms of the Verizon Pension Plans by causing or

permitting Verizon to transfer the assets and liabilities associated with class members' pension benefits to Idearc pension plans.

On August 26, 2011, the Verizon Defendants moved for summary judgment on each of the six claims asserted in Plaintiffs' Second Amended Complaint. ROA.21. On September 16, 2013, in a 53-page decision, Judge A. Joe Fish granted the Verizon Defendants' motion in its entirety. ROA.5999 *et seq.*

With respect to Count IV, the District Court recognized that a person may be liable under ERISA's fiduciary duty provisions only if "that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." ROA.6014 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000)). Citing ample precedent recognizing that "transferring plan assets in a spinoff transaction" is not a fiduciary function, ROA.6015, the District Court concluded on the basis of this "dominant rule in the case law" and the undisputed evidence that the Verizon Defendants did not perform "any act in the context of the pension plan spinoff that constitutes a fiduciary function." ROA.6027-28.

The District Court also rejected Plaintiffs' argument that the Idearc spin-off transaction was not authorized by the terms of the Verizon Pension Plans. While Plaintiffs acknowledged that the terms of the Verizon Pension Plans "permitted transfers of [plan] *assets and liabilities*," they argued that the plans did not permit

"the transfer of individual *persons*, like the retirees, from coverage under one plan to coverage under another." ROA.6017. As the District Court explained, however,

> it is absurd to imagine that the Verizon pension plans provided a mechanism for the splitting of one plan into two via a spinoff transaction that transferred assets and liabilities, without permitting the plan administrator to transfer individuals from participation in the first plan to participation in the second. Indeed, reading the plans this way would render the transfer provisions [of the Verizon Pension Plans] a nullity.

ROA.6020. Rejecting the "absurd results" that follow from Plaintiffs' strained reading, the District Court held that the Verizon Pension Plans in fact did "authorize the transfer of persons from one plan to another." ROA.6017, 6018.

The District Court also rejected Plaintiffs' claim in Count III of the Second Amended Complaint that the Verizon EBC violated ERISA's prohibited transaction rules, ERISA § 406, 29 U.S.C. § 1106, in connection with the Idearc spinoff. As the District Court recognized, ample authority holds that, "in the context of a pension plan spinoff, the prohibited transaction provisions are inapplicable, because the [party] acting to spin off a plan is not acting in a fiduciary capacity." ROA.6029 (collecting cases). Because Plaintiffs' "strained argument" based on a purported distinction between different subparts of Section 406 of ERISA was "foreclosed by the plain language of the statute," the District Court granted the Verizon Defendants' motion for summary judgment on this count. ROA.6030, 6032.

Finally, the District Court rejected Plaintiffs' argument that the Verizon EBC violated ERISA's summary plan description ("SPD") disclosure rules by failing to include language in the SPDs expressly "indicating that a spinoff . . . was a 'circumstance[] which may result in … denial or loss of benefits.'" ROA.6033 (quoting ERISA § 102(b), 29 U.S.C. § 1022(b)). The District Court held that the Verizon Pension Plan SPDs provided "sufficient notice to the plan's beneficiaries that a situation like a spinoff, which results in an amendment of the plan, could lead to a denial or loss of benefits." ROA.6034-35.[2]

B. Statement Of The Facts

1. Verizon's Spinoff Of Its Directories Business

Verizon was formed in 2000 as a result of the merger of Bell Atlantic Corp. and GTE Corp. ROA.1225. In the early 2000s, Verizon's domestic operations consisted of three separate business units: (i) the "Domestic Telecom" business, which provided traditional "wireline" telephone services; (ii) the "Domestic Wireless" business, which provided wireless services and products; and (iii) the "Information Services" business – *i.e.*, VIS – which published on-line and print telephone directories. ROA.1741.

[2] The District Court also granted summary judgment for the Verizon Defendants on Counts I, VI and VII of the Second Amended Complaint. *See* ROA.6036-42. Because Plaintiffs have abandoned these claims on appeal, the Verizon Defendants do not address them here.

By the early 2000s, Verizon was engaged in "a refocusing and a transformation" of its businesses. ROA.1240. Traditionally, the primary business of both Bell Atlantic and GTE was providing local telephone (wireline) services to various communities throughout the nation. By the 2000s, however, Verizon's cell phone (wireless) business was growing rapidly. *Id.* Verizon was also reshaping its Domestic Telecom business, primarily by (i) investing in fiber optics (*i.e.*, digital television, voice and internet capabilities) in areas with sufficient population density to support such an investment and (ii) exiting the traditional, wireline telephone business in communities "where it was not economical to deploy fiber optics." *Id.*

Historically, there were significant synergies between Verizon's core operations and the directories business because local wireline telephone companies were able to provide "advantaged access to listing information" to affiliated publishers, such as VIS. *See id.* By the early 2000s, regulatory changes eliminated that advantage. *Id.* Moreover, as Verizon's core business moved away from traditional wireline telephone service to wireless services and fiber optics, "it became apparent . . . that there really was not much in the way of fit or relationship between the director[ies] business and where [Verizon] w[as] focusing [its] efforts going forward." *Id.* By 2006, Verizon determined that a divestiture of the VIS business unit would benefit both Verizon and the spun-off entity. *See* ROA.1252, 1240-41.

Verizon estimated in 2006 that, on a stand-alone basis in the years immediately following a spinoff, the VIS business unit would have annual revenues in excess of $3 billion and that its EBITDA ("Earnings Before Interest, Taxes, Depreciation And Amortization") would exceed $1.5 billion. ROA.1258. Ultimately it was determined – based on the characteristics of the VIS business unit and an analysis of comparable, publicly traded companies – that an optimal transaction structure would involve leverage of approximately $9 billion for the spun-off entity. *See* ROA.1229, 1242. Verizon obtained a "solvency opinion" from the investment bank Houlihan Lokey, which opined that the spun-off entity "should be able to pay its debts" and that the spun-off entity's capital "should not be unreasonably small for the business in which the company is engaged." ROA.1262.[3]

On October 18, 2006, Verizon's board of directors authorized Verizon to proceed with the spinoff of the VIS business unit, and the spinoff was consummated on November 17, 2006. As a result of the spinoff, each Verizon shareholder received one share of Idearc stock for every 20 shares of Verizon stock that the shareholder held as of November 1, 2006. ROA.1474, 1551.

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[3] During the recession that affected the U.S. economy beginning in late 2007, Idearc experienced financial distress that ultimately led to its filing for Chapter 11 reorganization. ROA.6000.

2. Employee Benefits Aspects Of The Idearc Spinoff

The employee benefits of current and former VIS employees was one of many issues Verizon considered in connection with a possible spinoff of the VIS business unit. At its October 18, 2006 meeting, Verizon's board of directors approved a resolution authorizing Verizon to enter into various agreements, including an Employee Matters Agreement ("EMA") "substantially on the terms and conditions described at" the board meeting. ROA.1681. The EMA was described in the presentation materials provided to the board as establishing that Idearc would be responsible "for Pension and OPEB [*i.e.*, Other Post-Employment Benefits] liabilities for all . . . current and former employees" of VIS and its predecessors. ROA.1276.

The EMA was executed by Verizon and Idearc on November 17, 2006. *See* ROA.1479, *et seq.* Under the EMA, Idearc assumed responsibility for the pension, health and other welfare benefits of "Idearc Individuals," *i.e.*, current VIS employees and "Former VIS Employee[s]." ROA.1484-85, 1491, 1497-98, 1501-02. The EMA defined "Former VIS Employee" as an inactive employee "whose last employment has been determined by Verizon to have been with" Verizon's "directory publishing business, internet yellow pages business and other operations comprising . . . the Information Services Segment of Verizon." ROA.1484, 1487, 1737.

a) Pension Benefits

The EMA reflected Verizon's decision to transfer pension assets and liabilities associated with Former VIS Employees from the Verizon Pension Plans to "mirror" Idearc pension plans (*i.e.*, plans providing for the same benefits as the Verizon plans from which the transfers were made). ROA.1496-97.

The EMA required Verizon's actuaries to calculate the "amount required to be transferred" from the Verizon Pension Plans to Idearc's pension plans "by Section 414(l) of the [Internal Revenue] Code and the regulations thereunder . . . ." ROA.1502-03, 1519. Pursuant to this provision of the EMA, Verizon's actuaries calculated the liabilities associated with current and former VIS employees, and Verizon caused the Verizon Pension Plans to transfer assets equal to those liabilities in accordance with applicable statutory and regulatory requirements. The total value of pension assets ultimately transferred to Idearc's pension plans was approximately $765 million. ROA.1425. As a result of these transfers, Verizon estimated that the Idearc pension plans would be "overfunded . . . on an accounting basis" by approximately $163 million. ROA.1241, 1342, 1386, 1399.

Pursuant to an agreement between Verizon and Idearc, the Verizon Pension Plans paid the pension benefits of Idearc plan participants for November and December of 2006. ROA.1458, 1497, 1722-23.

b) Post-Employment Welfare Benefits

VIS was a "separate business unit within Verizon," and the "cash flows" that VIS generated were used "to support the employee obligations of that business," including "expenses associated with retirees." ROA.1241, 1329. Accordingly, Verizon decided to transfer the obligations for the employee benefits of inactive VIS employees to Idearc in order to maintain the historical "alignment between the cash flow generating business and . . . the obligations" of that business. ROA.1241. Verizon also took into account the fact that Idearc's pension plans would be substantially over-funded as a result of the spinoff, which would effectively reduce Idearc's overall retiree benefit obligations by delaying the need for Idearc to make pension plan contributions. *See* ROA.1241, 1244.[4]

Under the EMA, Idearc was required to establish "mirror" welfare plans, *i.e.*, plans providing "health, dental and life insurance" benefits, including benefits for retired (or otherwise inactive) employees, that were "substantially the same as the benefits provided for such employees under the corresponding Verizon Welfare Plan[s]" immediately prior to the spinoff. ROA.1498. Through the end of 2007,

[4] Shortly before the close of the Idearc spin-off transaction, VIS representatives requested that Verizon consider retaining the welfare benefit obligations for inactive VIS employees. Verizon did not agree to this request both for the reasons set forth above and because the request came far too late in the process. By that time, Idearc's debt level had already become fixed as a practical matter and, without a corresponding increase to Idearc's leverage, a reduction in its benefit obligations likely would have decreased the combined, post-spinoff share value of Verizon and Idearc. *See* ROA.1241-43, 1248-49, 1344.

pursuant to an agreement between Verizon and Idearc, Verizon provided "benefit administrative services" to Idearc, and participants in Idearc's welfare plans received exactly the same benefits that they would have received had they remained participants in Verizon's welfare benefit plans. *See* ROA.1458, 1497, 1536-37, 1552.

3. The Verizon Pension Plans

Prior to the November 2006 spin-off transactions, Verizon's collectively bargained pension plans (*i.e.*, the NY/NE Plan and the Mid-Atlantic Plan) provided that Verizon "shall have the authority in its discretion to terminate the Plan or, from time to time, amend the Plan by or pursuant to resolution." ROA.1587, 1605. Verizon's management pension plans (*i.e.*, the VMPP and the VEMPP) similarly provided that Verizon, "by duly adopted written resolution," had the power to "modify or amend the Plan[s] in whole or in part, prospectively or retroactively, at any time . . . ." ROA.1621, 1629.

Each of the four plans expressly contemplated that a portion of the plan's assets and liabilities might be transferred to another plan. For instance, Section 11.3 of the two management plans stated that the plan's "assets or liabilities may be transferred to another plan" and made clear that "no benefit previously payable under the Plan on account of such liability shall be payable under the Plan following such transfer." ROA.1621-22, 1629-30. Similarly, Section 20.6 of the two union

plans recognized that "the assets or liabilities of" the plans might be "transferred to [another] plan." ROA.1589, 1607.

On December 22, 2006, Verizon adopted pension plan amendments relating specifically to the Idearc spin-off transaction. As amended, the union plans provided, "effective November 17, 2006," that "for each former Eligible Employee . . . whose last employment . . . before the spin-off date has been determined by the Plan Administrator to have been with Idearc Inc., an [affiliate] with respect to Idearc Inc., or a predecessor of either,"

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

ROA.1580, 1593. Substantially similar changes were made to the two management plans. *See* ROA.1613-14, 1635-36.

4. Verizon's Welfare Benefit Plans

Prior to November 2006, Verizon's medical and other employee welfare plans generally provided that Verizon, acting through various authorized representatives, had the right to amend or terminate those plans at any time and for any reason. *See, e.g.*, ROA.1653 (stating that "Verizon reserves the right to amend or terminate the Plan or any Component Benefit at any time"). The SPDs provided to participants in

Verizon's welfare plans likewise advised participants of Verizon's right to amend or terminate those plans at will. *See, e.g.*, ROA.1667. Pursuant to Verizon's broad and consistent reservation of its rights, on December 8, 2006, Verizon's "various health and welfare plans and programs" were amended, effective November 17, 2006, "to reflect the termination and/or cessation of benefits under the Verizon health and welfare benefit plans and programs for Idearc Individuals and the assumption of those benefits by [Idearc] as described in the EMA." ROA.1662.

SUMMARY OF ARGUMENT

1. The District Court correctly granted summary judgment against Plaintiffs on the claim that the Idearc pension spinoff violated fiduciary duties owed to class members under Section 404(a)(1) of ERISA.

a. It is undisputed that the Idearc spin-off transaction fully complied with the statutory and regulatory regime governing the transfer of pension plan assets and liabilities. Numerous circuit court decisions hold that compliance with this detailed regime precludes claims that pension plan spinoffs violate the fiduciary duty provisions in Section 404(a)(1) of ERISA.

b. Liability under ERISA's fiduciary duty provisions may be imposed *only* on a person acting in a fiduciary capacity, and ample precedent holds that the decision to transfer the assets and liabilities of a pension plan to another plan is made in a business or settlor capacity, *not* in a fiduciary capacity. Accordingly, Verizon's

decision to transfer the obligation to pay class members' benefits to Idearc-sponsored plans is not actionable under Section 404(a)(1) of ERISA.

c. The District Court properly held that the Idearc spin-off transaction did not violate the terms of the Verizon Pension Plans and therefore did not run afoul of the requirement that ERISA plan fiduciaries act in "accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). The pre-existing terms of the plans undisputedly contemplated that the assets and liabilities of the plans could be transferred to other plans, and the District Court rightly rejected as "absurd" Plaintiffs' argument that this plan language nevertheless did not permit the transfer of retirees to those other plans. In any event, the Verizon Pension Plans were each amended in December 2006 to reflect the transfer of class members' benefit obligations to Idearc-sponsored plans, and nothing in ERISA prohibits the application of these plan amendments retroactively to November 2006.

2. The District Court correctly granted summary judgment on Plaintiffs' claim that the Idearc spin-off transaction violated ERISA's prohibited transaction rules. As with Plaintiffs' breach of fiduciary duty claim under Section 404(a)(1) of ERISA, the threshold question under Section 406 of ERISA is whether the person engaged in the transaction was acting in a fiduciary capacity. Verizon did not make the decision to transfer the obligation to pay class members' benefits to Idearc in a fiduciary capacity. Accordingly, that decision is not subject to ERISA's prohibited

transaction rules. Plaintiffs, moreover, failed to come forward with any evidence on which a reasonable trier of fact could have found that the Verizon Defendants engaged in the requisite self-dealing or other wrongful conduct required to sustain a claim under Section 406(b) of ERISA.

3. The District Court correctly granted summary judgment on Plaintiffs' claim that the Verizon Pension Plan SPDs failed to comply with the requirement that SPDs disclose the circumstances that may result in the loss of plan benefits, ERISA § 102(b), 29 U.S.C. § 1022(b). Because class members were required under ERISA to receive – and have in fact received – exactly the same pension benefits after the Idearc spin-off transaction as before, the spinoff did not result in any loss of benefits. Moreover, SPDs are required to disclose only circumstances that may result in a loss of benefits under existing plan terms, not the possibility that future plan changes may result in benefit changes. In any event, the Verizon SPDs disclosed to participants that the Verizon Pension Plans could be terminated or amended at any time.

4. Plaintiffs' claim that the Verizon Defendants violated Sections 104(b)(4) and 404(a)(1) of ERISA by failing to provide them with certain documents was abandoned below. While the District Court granted Idearc's motion to dismiss these claims, it did not dismiss these claims as against the Verizon Defendants. Rather,

Plaintiffs voluntarily declined to include them in their Second Amended Complaint. Accordingly, they are not properly before this Court on appeal.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo, "applying the same standard as the district court." *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 507 (5th Cir. 2003) (internal quotation marks and citation omitted). Summary judgment may be affirmed on any ground presented to the district court and supported by the record. *Hernandez v. Velasquez*, 522 F.3d 556, 560 (5th Cir. 2008). "Summary judgment must be affirmed if it is sustainable on any legal ground in the record." *Estate of Sanders v. United States*, 736 F.3d 430, 435 (5th Cir. 2013).

ARGUMENT

I. THE TRANSFER OF RETIREES' BENEFITS DID NOT VIOLATE THE FIDUCIARY DUTY PROVISIONS IN SECTION 404 OF ERISA.

The gravamen of Plaintiffs' claim under Section 404 of ERISA is that the Verizon Defendants violated their fiduciary duties by transferring the obligations for class members' pension benefits to Idearc pension plans as part of the November 2006 spin-off transaction. Notably, however, Plaintiffs do not dispute that Verizon fully complied with Section 208 of ERISA, as well as all applicable Treasury regulations governing the transfer of plan assets and liabilities, in carrying out the Idearc spin-off transaction. *See* ROA.6004; Pls. Br. at 44. This Court should hold

that Verizon's undisputed compliance with this detailed statutory and regulatory regime is fatal to Plaintiffs' breach of fiduciary duty claim.[5]

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

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

29 U.S.C. § 1058; *see* 26 U.S.C. § 414(*l*) (parallel provision of the Internal Revenue Code). Thus, Section 208 of ERISA and Section 414(*l*) of the Internal Revenue Code expressly authorize the transfer of pension assets and liabilities from one plan to another, so long as (i) the benefits are "at least as good . . . under the new pension plan as under the old one" and (ii) the employer "transfer[s] sufficient plan 'assets' to pay previously promised benefits." *Koch Indus., Inc. v. Sun Co.*, 918 F.2d 1203, 1206-07 (5th Cir. 1990).[6]

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[5] While the District Court declined to rest its holding on this ground, it acknowledged that "a number of persuasive decisions" support the argument. *See* ROA.6016 n.4.

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

Here, there is no dispute that class members' pension benefits were not reduced as a result of the spinoff and that Verizon transferred sufficient assets in connection with the Idearc pension spinoff. Numerous courts have held that compliance with this statutory and regulatory regime necessarily forecloses any claim that a pension plan spinoff violates ERISA's fiduciary standards. *E.g.*, *Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1190 (3d. Cir. 1993) ("[C]ompliance with ERISA's provisions for the funding of merged, transferred or acquired pension plans as set forth in [Section 208] preclude[s] a finding that a fiduciary breach had occurred."); *Bigger v. Am. Commercial Lines*, 862 F.2d 1341, 1344 (8th Cir. 1988) (noting that "[s]ection [208] provides a specific standard that employers can rely upon in allocating assets to spunoff plans" and rejecting the proposition that ERISA's "general standard of fiduciary duty supersedes and imposes a higher standard than section [208]" in structuring a plan spinoff); *Sys. Council EM-3 v. AT&T Corp.*, 972 F. Supp. 21, 30-31 (D.D.C. 1997) (holding that Section 208 of ERISA provides "the specific means by which to challenge a plan spin-off" and rejecting the assertion of retired plan participants that "ERISA's fiduciary duties . . . apply to the . . . transfer of assets pursuant to a spin-off"), *aff'd*, 159 F.3d 1376 (D.C. Cir. 1998). For this fundamental reason, as well as for the reasons explained below, this Court should hold that Plaintiffs' breach of fiduciary duty claims fail as a matter of law.

A. **The Decision To Transfer The Obligation To Pay Retiree Benefits Is A Settlor Decision That Does Not Implicate ERISA's Fiduciary Duty Requirements.**

Verizon's decision to transfer the obligation to pay class members' benefits was a business or "settlor" decision that does not implicate fiduciary duties under ERISA.

Under ERISA, a person may exercise both fiduciary and nonfiduciary responsibilities under a plan. ERISA's "two-hats" doctrine recognizes that standards of fiduciary responsibility apply *only* when a person is wearing the fiduciary hat and not when the person is wearing the employer (or sponsor) hat. *See*, *e.g.*, *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1524-25 (5th Cir. 1994). Thus, the "threshold question" in an action charging breach of fiduciary duty under ERISA is "not whether the actions of some person . . . adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram*, 530 U.S. at 226; *see also* ROA.6014.

"[A]n employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). The Supreme Court has repeatedly recognized this fundamental principle. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("Plan sponsors who alter the terms of a plan do not fall into

the category of fiduciaries."); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (similar). And "a plan amendment includes any changes to the terms of a plan, including changes resulting from a merger, consolidation, or transfer (as defined in [Internal Revenue Code] section 414(*l*))." IRS Private Letter Ruling, 2009 PLR LEXIS 7164 (June 11, 2009) (discussing 26 C.F.R. § 1.411(d)-3(a)(1)).

Not surprisingly, *every* court of appeals to consider the question has held that the decision to transfer the assets and liabilities of a pension plan as part of a corporate divestiture is made by an employer in a settlor capacity and so does not implicate ERISA's fiduciary duty provisions. *E.g.*, *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1076 (9th Cir. 2009) (holding that the "decision to spin a plan off . . . is not a fiduciary act"); *Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 87 (2d Cir. 2001) (holding that the "allocation of pension plan assets and liabilities resulting from the spin-off of a division" does not "trigger[] fiduciary duties under ERISA"); *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 719 (6th Cir. 2000) (holding that "an employer's decision to transfer plan assets" in connection with the spinoff of a subsidiary "is not a fiduciary decision"); *Ames v. Am. Nat'l Can Co.*, 170 F.3d 751, 757 (7th Cir. 1999) ("[W]hen company representatives are negotiating the sale of a division, they are not acting in their capacity as a plan fiduciary, and thus they do not bear the legal obligations that go along with fiduciary status."); *Sys. Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1379-80 (D.C. Cir. 1998); *Blaw Knox Ret. Income Plan*, 998 F.2d at 1189 (holding

that the "decision to sell [corporate divisions] and to transfer the pension plans was a business decision not subject to ERISA's fiduciary provisions").[7]

Plaintiffs fail to address *any* of this precedent except for the *AT&T* decision. While Plaintiffs suggest that the retirees in *AT&T* alleged only that the pension transfer violated Section 208 of ERISA, *see* Pls. Br. at 43-44, that is not so. Like Plaintiffs here, the AT&T retirees urged that ERISA's standards of fiduciary conduct should govern a company's "decisions to restructure itself and to spin-off its pension and welfare plans as part of [a corporate] restructuring." *AT&T Corp.*, 972 F. Supp. at 34; *see id.* at 30-31. The district court rejected that argument, explaining that "under prevailing ERISA case law," those "decisions and the actions necessary to implement them are not subject to ERISA's fiduciary standards," *id.*, and the circuit court agreed, 159 F.3d at 1379 ("The District Court found, and we agree, that appellants have failed to state a legally cognizable claim under ERISA's fiduciary provisions, because there has been no showing that AT&T acted in a fiduciary capacity in taking the actions at issue in this case.").

[7] Plaintiffs assert that this "cited case law" is distinguishable because the cases "only concern[] nonvested contingent benefits." Pl. Br. 40-41. But none of these cases involved only "nonvested contingent benefits" and many involved factual circumstances very similar to those presented here. *See, e.g.*, *Paulsen*, 559 F.3d at 1066-67, 1076 (decision to spinoff retiree pension benefit obligations is not a fiduciary act); *Flanigan*, 242 F.3d at 87-88 (ERISA's fiduciary duty rules do not apply to the decision to spinoff off a portion of a defined benefit pension plan); *Blaw Knox Ret. Income Plan*, 998 F.2d at 1189-90 (similar). Although Plaintiffs curiously cite and distinguish a handful of cases involving nonvested contingent benefits, this is a classic straw man: they are not cases on which the Verizon Defendants have ever relied for this point.

Against this overwhelming weight of authority, Plaintiffs point to a single decision, *Howe v. Varity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994), to support their claim. *See* Pls. Br. at 39-40. In *Howe*, the Eighth Circuit held that it was a breach of fiduciary duty under ERISA to transfer the welfare benefit obligations for retired employees to a new entity – known by defendants to be "essentially bankrupt" from the outset – without the retirees' knowledge or consent. *See* 36 F.3d at 749-50, 756.[8] That decision, however, is not good law.

First, the Supreme Court subsequently held in *Curtiss-Wright* that employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." 514 U.S. at 78. That decision effectively overruled *Howe*'s holding that an employer may be subject to ERISA's fiduciary duty provisions when amending a plan to alter plan benefits. Moreover, as the Sixth Circuit has noted, "[t]o the extent that the Eighth Circuit's holding" in *Howe* was "grounded in the retirees' lack of consent to the transfer," the holding is "an anomaly within the case law governing the scope of employer action subject to ERISA's

[8] In *Howe*, the employer both (i) fraudulently induced current employees voluntarily to transfer to a new entity and (ii) involuntarily transferred retired employers to the new entity, and the Eighth Circuit held that these actions constituted separate violations of ERISA's fiduciary duty requirements. *See* 36 F.3d at 749, 756. The Supreme Court subsequently affirmed the lower courts' holding that the employer breached its fiduciary duties by making false statements to induce current employees to elect to transfer to the new entity voluntarily. *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996). The Supreme Court, however, declined to reach the Eighth Circuit's separate holding regarding the involuntary transfer of retired employees. *Id.* at 496 ("[A]s we construe Varity's petition, it does not sufficiently call into question the District Court's holding that Varity breached a fiduciary duty with respect to the [] retirees whose benefit obligations had been involuntarily assigned.").

fiduciary standards" and "is limited to the unique and egregious facts of that case." *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 668 n.8 (6th Cir. 1998).

The District Court correctly recognized that the facts of this case are readily distinguishable from the "egregious facts" found in *Howe*. *See* ROA.6023-27. Unlike *Howe*, there is no record evidence here that (i) Idearc was "doomed, and known by Verizon to be doomed, from the beginning of its existence" or (ii) the Verizon Defendants "materially misled" retirees or engaged in other, "similar acts of misconduct." *See* ROA.6025. Verizon, moreover, undisputedly structured the Idearc transaction (i) to fully comply with ERISA's detailed regulations governing the transfer of pension liabilities and (ii) to ensure that class members would receive the same health and welfare benefits as Verizon plan participants in the year following the spinoff. ROA.6005, 6026. Thus, *Howe* is readily distinguishable from this case.

* * *

In sum, because the decision to transfer pension plan assets and liabilities is a fundamental plan design decision made in a settlor capacity, Plaintiffs' fiduciary duty claims are without merit.

B. <u>Verizon Complied With The Plan Documents Rule In Carrying Out The Idearc Transfer.</u>

Plaintiffs allege that (i) the terms of the Verizon Plans in effect as of November 2006 did not permit the transfer of the obligation for class members'

pension benefits to Idearc pension plans and (ii) the December 2006 pension plan amendments adopted by Verizon regarding the Idearc spinoff may not be given effect. Accordingly, Plaintiffs assert, the Verizon Defendants violated the requirement of the plan document rule in Section 404(a)(1)(D) of ERISA that fiduciaries act "in accordance with the documents and instruments governing the plan." *See, e.g.*, Pls. Br. at 35-36 & n.11. Plaintiffs are mistaken.

1. The Pre-Existing Terms Of The Verizon Plans Were Consistent With The Idearc Benefit Transfers.

Each of the Verizon Pension Plans expressly contemplates that a portion of the plan's assets and liabilities could be transferred to another plan. For instance, Section 20.6 of the two union plans stated:

> In case the pension portion of the Plan is merged or consolidated with, or the assets or liabilities of the Pension Fund are transferred to, any other plan, provision must be made such that the benefit that each Participant in the pension portion of the Plan would receive if there were a termination immediately after such merger, consolidation or transfer shall not be less than he would have received if there were a termination immediately before such merger, consolidation or transfer.

ROA.1589, 1607. Similarly, Section 11.3 of the two management plans recognized that the plans "may be merged into or consolidated with another plan" and that the plans' "assets or liabilities may be transferred to another plan." ROA.1621-22, 1629-30. Because these plan provisions are clear, Plaintiffs make "no challenge" to Verizon's transfer of "pension assets and liabilities" to Idearc. Pls. Br. at 44.

Notwithstanding this concession, Plaintiffs argue that these plan provisions are inapplicable because class members are neither assets nor liabilities and the plans "did not contain any authorization for the plan sponsor to unilaterally and involuntar[il]y remove retirees" from participation in the plans. Pls. Br. 32-35 (emphasis omitted). The District Court rightly rejected this argument as "absurd." ROA.6017.

As the District Court recognized, the "liabilities" that these plan provisions "permitted to be transferred were not free-floating abstractions." ROA.6019. Rather, these liabilities are the paradigmatic pension plan liability of "pay[ing] benefits to individuals." *Id.* Under ERISA, class members ceased being participants in the Verizon Pension Plans and became participants in Idearc's plans as a result of the transfer of the obligation to pay their benefits to the Idearc plans. *See* ERISA § 3(7), 29 U.S.C. § 1002(7) (defining "participant" in relevant part as a "former employee of an employer . . . who is . . . eligible to receive a benefit of any type from an employee benefit plan"); *see Chastain v. AT&T*, No. CIV-04-0281-F, 2007 U.S. Dist. LEXIS 83038, at *14, 31 (W.D. Okla. Nov. 8, 2007) (plaintiffs no longer participants in plan after the obligation to pay their benefits was transferred to a new plan as part of a spinoff), *aff'd*, 558 F.3d 1177 (10th Cir. 2009); *see also Varity Corp.*, 516 U.S. at 515 (noting that employees whose benefit obligations were spun off were "no longer members of" the transferor plan).

Notably, the relevant provisions of the Verizon Pension Plans closely track the language of ERISA § 208 and Internal Revenue Code § 414(*l*). And, as the District Court correctly recognized, the Treasury regulations implementing those statutory provisions contemplate that the liabilities transferred in connection with pension plan spinoffs and mergers will be associated with particular plan participants. *See* ROA.6020; *see also* 26 C.F.R. § 1.414(*l*)-1(o) (making clear that a "transfer of assets and liabilities" encompasses "the transfer of one or more employees").[9] Thus, the transfer of asset and liabilities necessarily implies that individuals will cease being participants in one plan and will become participants in another. Plaintiffs' effort to draw a distinction between pension obligations and the participants to whom those obligations are owed makes no sense.[10]

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[9] The Secretary of the Treasury is responsible for issuing regulations under several provisions of ERISA, including Section 208, as well as under parallel provision of the Internal Revenue Code. *See* Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978) (available at ROA.1799 *et seq.*); *see also Malia v. Gen. Elec. Co.*, 23 F.3d 828, 832 (3d Cir. 1994). This Court defers to the Treasury Department's interpretation of the relevant ERISA provisions. *See Tulley v. Ethyl Corp.*, 861 F.2d 120, 125 (5th Cir. 1988).

[10] Even if the Court were to consider the relevant provisions of the Verizon Pension Plans to be ambiguous, the responsible plan fiduciaries have interpreted them to authorize the pension transfers challenged by Plaintiffs. *See* ROA.3037-39, 3044-50. These good-faith interpretations of the plans are entitled to deference where, as here, the plan documents vest the fiduciaries with discretionary authority to interpret plan terms and to resolve any ambiguities therein (*see* ROA.3036-37). *Conkright v. Frommert*, 559 U.S. 506, 509 (2010); *see Worthy v. New Orleans S.S. Ass'n*, 342 F.3d 422, 427-28 (5th Cir. 2003) (deferring to ERISA trustee's interpretation of trust language in a suit alleging that trust administrators violated their fiduciary duties).

2. The December 2006 Pension Plan Amendments Regarding The Idearc Transfer May Be Given Retroactive Effect.

Plaintiffs assert that "the District Court erred by not addressing [their] argument that the Verizon Defendants wrongly retroactively applied plan amendments adopted after the spinoff . . . to justify their transfer." Pls. Br. at 35. There was no need, however, for the District Court to reach this argument because it held that the pre-existing terms of the Verizon Pension Plans authorized the Idearc transaction. *See supra* Part I.B.1. In any event, Plaintiffs are wrong to assert that ERISA does not permit retroactive plan amendments under the circumstances of this case.

Each of the Verizon Pension Plans reserved Verizon's right to amend the plans at will. ROA.1587, 1605, 1621, 1629. Under applicable Treasury regulations, "a plan amendment includes any changes to the terms of a plan, including changes resulting from a merger . . . or transfer (as defined in [Internal Revenue Code] section 414(*l*))." IRS Private Letter Ruling, 2009 PLR LEXIS 7164 (June 11, 2009) (discussing 26 C.F.R. § 1.411(d)-3(a)(1)). Thus, Verizon was free to amend its plans in order to provide for the transfer of pension assets and liabilities at any time.

On December 22, 2006, Verizon adopted pension plan amendments relating specifically to the Idearc spin-off transaction. As amended, the union plans, for example, provided – "effective November 17, 2006" – that "for each former Eligible Employee . . . whose last employment . . . before the spin-off date has been

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

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

ROA.1580, 1593. Substantially similar changes were made to the two management plans. *See* ROA.1613-14, 1635-36. These duly authorized amendments eliminate any possible dispute about whether the terms of the Verizon Pension Plans authorized the pension transfers at issue here.

There is no merit to Plaintiffs' argument that these December 2006 amendments may not be given retroactive effect. *First*, as this Court has recognized, "nothing in ERISA prohibits retroactive application of" pension plan amendments that do not result in the reduction of accrued benefits. *Spacek v. Mar. Ass'n ILA Pension Plan*, 134 F.3d 283, 293 (5th Cir. 1998); *see* 29 C.F.R. § 2520.104b-3(a) (setting forth disclosure obligations relating to "retroactive application" of a plan amendment); *see also* 29 U.S.C. § 1054(g) (prohibiting the reduction of an accrued benefit by plan amendment). Here, the amendments resulted in no reduction in accrued benefits: Plaintiffs and class members were entitled to receive (and in fact received) exactly the same pension benefits after the Idearc spinoff as before.

ROA.1496-97, 1781-82. Thus, the plan amendments may be applied retroactively. *See Dyce v. Salaried Emps.' Pension Plan of Allied Corp.*, 15 F.3d 163, 165-66 (11th Cir. 1994) (permitting retroactive application of plan amendment implementing terms of a merger agreement); *cf. Penn v. Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1104 (5th Cir. 1990) ("find[ing] no difficulty with . . . retroactive application" of a plan amendment).

To the extent that Plaintiffs mean to argue that their "accrued benefits" under the Verizon Pension Plans included not only the amount of their benefits but also a "vested right[]" to continue receiving benefits *from Verizon*, *see* Pls. Br. at 36, they are mistaken. If a participant's "accrued benefit" under ERISA encompassed the right to receive payment from a particular plan, or from a plan sponsored by a particular employer, every pension plan merger or spinoff – at least where the transferee and transferor plans do not have the same sponsor – would necessarily violate ERISA's anti-cutback provision, 29 U.S.C. § 1054(g). Because ERISA, the Internal Revenue Code, and applicable Treasury regulations expressly authorize mergers and spinoffs (so long as equivalent benefits are provided before and after the merger or spinoff), it is clear that participants' "accrued benefits" are not reduced merely because the obligation to pay those benefits is transferred from one pension plan to another. *See* 29 U.S.C. § 1058; 26 U.S.C. § 414(*l*)(2)(D)(ii); 26 C.F.R. § 1.411(d)-3(a); *id.* § 1.411(d)-4 A-2(a)(3) & A-3; *see also* Rev. Rul. 2008-40,

2008-2 C.B. 166, 2008 IRB LEXIS 495 (noting that "a transferee plan is a continuation of the transferor plan with regard to transferred assets and liabilities").[11]

Second, Plaintiffs' retroactivity argument is ultimately a red herring. Even if the amendments to the Verizon Pension Plans could not be given retroactive effect, Plaintiffs would not be entitled to any relief. It is undisputed that plan amendments prescribing the transfer of assets and liabilities to the Idearc plans were adopted no later than December 22, 2006. *See* Pls. Br at 11. Plaintiffs have not identified, and could not identify, any reason that these pension plan amendments should not be given effect *prospectively*. And at all times prior to December 31, 2006, class members received all of the benefits to which they were entitled, and they received them *from a Verizon Plan* as a transition service provided to Idearc and the Idearc pension plans. *E.g.*, ROA.1722-23. Thus, during November and December of 2006 – the only two months between the effective date of the spinoff and the adoption of the plan amendments – Plaintiffs suffered no legally cognizable harm.

[11] Plaintiffs also cite a handful of cases for the proposition that "attempts to backdate plan amendments and apply them retroactively . . . are ineffective to amend the plan." Pls. Br. at 37. Of course, there is (and could be) no allegation here that the Verizon Defendants backdated anything. Moreover, each of the cases cited by Plaintiffs is readily distinguishable. At most, the cases cited by Plaintiffs stand for the uncontroversial proposition that vested benefits may not be reduced or eliminated by a plan amendment. For the reasons discussed above, those cases are inapplicable here because the Idearc plan amendments did not reduce or eliminate any vested benefits.

* * *

In sum, Plaintiffs' argument that the terms of the Verizon Pension Plans did not authorize the Idearc spin-off transaction is incorrect for two reasons. The pre-existing terms of the plans authorized mergers and spinoffs, and the December 2006 plan amendments memorializing the Idearc spin-off transaction may be given effect.

II. THE VERIZON EBC DID NOT VIOLATE ERISA'S PROHIBITED TRANSACTION RULES.

Plaintiffs contend that the Verizon EBC violated ERISA's prohibited transaction rules, ERISA § 406(b), 29 U.S.C. § 1106(b), in connection with the Idearc spinoff transaction. *See* Pls. Br. at 20-31. But ERISA's prohibited transaction rules apply only to acts taken in a fiduciary capacity, and Verizon's decision to enter into the Idearc spin-off transaction plan was not made in a fiduciary capacity. Moreover, there is no evidence of the requisite "self-dealing" or receipt of "consideration" necessary to invoke Sections 406(b)(2) and (b)(3) of ERISA.[12]

[12] Plaintiffs further assert that the Verizon EBC violated Section 406(b) of ERISA by "effectuat[ing] the transfer of retirees" at a time when there were "no plan terms to authorize the removal." Pls. Br. at 20 (emphasis omitted). Plaintiffs, however, fail to explain why the alleged lack of plan terms authorizing the Idearc spinoff would be relevant to their prohibited transaction claim. In any event, the terms of the Verizon Pension Plans did authorize the Idearc spin-off transaction. *See* Part I.B, *supra*.

A. <u>ERISA's Prohibited Transaction Rules Do Not Apply Because The Decision To Enter Into The Idearc Transaction Was Not Made In A Fiduciary Capacity.</u>

ERISA's prohibited transaction rules "apply only to acts performed in a fiduciary capacity." ROA.6029. As explained above, Verizon's decision to transfer the obligation to pay class members' benefits to Idearc-sponsored plans was made in a settlor capacity, *not* in a fiduciary capacity. *See* Part I.A, *supra*. Accordingly, the District Court correctly held that ERISA's prohibited transaction rules do not apply here. *See* ROA.6029-32. None of Plaintiffs' arguments to the contrary has merit.

The Supreme Court has made clear that ERISA's prohibited transaction rules apply *only* to acts taken in a fiduciary capacity. *E.g.*, *Spink*, 517 U.S. at 892 ("[T]he Court of Appeals erred in holding that [defendants] violated the prohibited transaction section of ERISA without making the requisite finding of fiduciary status."); *see Hughes Aircraft*, 525 U.S. at 437, 444-46 (holding that amending the terms of a plan is a settlor function that cannot give rise to a claim for breach of ERISA's prohibited transaction rules). For this reason, every circuit to consider the question has held that the decision to spin off an ERISA plan may not be challenged as a prohibited transaction. *See, e.g.*, *Flanigan*, 242 F.3d at 87 ("[P]rohibited transaction rules apply only to decisions by an employer acting in its fiduciary capacity."); *Hunter*, 220 F.3d at 724 (noting that "§ 1106 applies only to those who

act in a fiduciary capacity" and rejecting claim that transfer of retirement plan assets might give rise to a prohibited transaction claim).

In response, Plaintiffs assert that this authority is inapplicable to claims brought under Section 406*(b)* of ERISA. Pls. Br. at 25-27. The District Court, however, appropriately recognized that "plaintiffs' strained argument is foreclosed by the plain language of the statute." ROA.6030. Both Sections 406(a) and 406(b), by their terms, provide that a "*fiduciary* with respect to a plan shall not" engage in, or cause a plan to engage in, specified types of transactions. *See* 29 U.S.C. § 1106 (emphasis added). Plaintiffs' attempt to draw a distinction between these subparts of Section 406 is therefore unavailing.[13]

Plaintiffs' strained reading of the statute is also inconsistent with the overwhelming weight of the case law. Plaintiffs rely heavily on the *dissenting opinion* in *Deluca v. Blue Cross Blue Shield of Michigan*, 628 F.3d 743 (6th Cir. 2010) (Kethledge, J., dissenting). *See* Pls. Br. at 26. But the majority opinion in that case squarely addressed and rejected precisely the argument that Plaintiffs make here:

> DeLuca's argument, as we understand it, is that the terminology 'in any other capacity' imposes liability on a fiduciary even when *not* acting in a fiduciary capacity, at

[13] Plaintiffs also assert that the District Court failed to rule on their claim under Section 406(b)(3) of ERISA. Pls. Br. at 30-31. But the District Court's holding that Section 406(b) applies *only* to actions taken in a fiduciary capacity necessarily disposed of Plaintiffs' claims under both Section 406(b)(2) and Section 406(b)(3).

> least with regard to those activities prohibited by section 1106. Such an interpretation, however, flies in the face of our holding that, by its own terms, § 1106 applies only to those who act in a fiduciary capacity.

Deluca, 628 F.3d at 748 (citations and internal quotation marks omitted). Like the majority opinion in *Deluca*, numerous other courts have applied the Supreme Court's holding in *Spink* to cases under Section 406(b) of ERISA. *See, e.g.*, *AT&T*, 972 F. Supp. at 29 (rejecting as "unpersuasive" the argument "that *Spink* is inapposite" to a claim under Section 406(b)); *see also Flanigan*, 242 F.3d at 87 (holding that "prohibited transaction rules apply only to decisions by an employer acting in its fiduciary capacity" and citing ERISA § 406(b), 29 U.S.C. § 1106(b)); *Chi. Dist. Council of Carpenters Welfare Fund v. Caremark, Inc.*, 474 F.3d 463, 472 n.4 (7th Cir. 2007) ("Carpenters alleged that Caremark violated section 1106(b) when it engaged in certain transactions. . . . Because we find that Caremark was not a fiduciary when it engaged in any of the relevant transactions, we need not address this section further.").[14] This Court should follow these well-reasoned decisions and hold that ERISA's prohibited transaction rules do not apply here.

[14] Plaintiffs attempt to distinguish this authority on the ground that "the accused defendant" in these cases was not "a named fiduciary" of the pension plan. *See* Pls. Br. at 26-27. Plaintiffs' assertion is both incorrect and irrelevant. It is incorrect because the defendants in the *AT&T* case included the AT&T Employees' Benefit Committee, which was the administrator of the ERISA plans at issue in that case. *See* 972 F. Supp. at 24 n.1. It is irrelevant because nothing in ERISA distinguishes between the duties owed by named fiduciaries and the duties owed by other fiduciaries. Rather, "ERISA's definition of 'fiduciary' is functional in nature," imposing duties based on that nature of the conduct at issue. *Fisher v. Metro. Life Ins. Co.*, 895 F.2d 1073, 1076 (5th Cir. 1990); *see Deluca*, 628 F.3d at 747 ("[I]n determining liability for an alleged breach of fiduciary duty in an ERISA case, the courts must examine the conduct at issue to determine

B. ERISA Section 406(b)(2) Does Not Apply Because There Is No Evidence Of "Adversity" Within The Meaning Of The Statute.

Plaintiffs' claim under Section 406(b)(2) also fails because (i) there is no record evidence that the interests of Verizon and the Verizon Pension Plan participants were "adverse" within the meaning of the statute, and (ii) ERISA makes clear that members of the Verizon EBC were entitled to act on behalf of Verizon in connection with the Idearc spinoff.

The gravamen of Plaintiffs' prohibited transaction claim is that the Verizon EBC "endeavored to assist and promote the financial interests of Verizon" in connection with the Idearc pension spinoff, purportedly in violation of Section 406(b)(2) of ERISA. *See* Pls. Br. at 28. Section 406(b)(2) of ERISA prohibits a fiduciary from acting "in any transaction involving the plan" on behalf of a party "whose interests are adverse to the interests of the plan." 29 U.S.C. § 1106(b)(2). Section 406(b)(2) has been interpreted narrowly, *see Evans v. Bexley*, 750 F.2d 1498, 1500 n.3 (11th Cir. 1985), to "prohibit[] a fiduciary from engaging in a self-dealing transaction," *Tibble v. Edison Int'l*, 639 F. Supp. 2d 1074, 1093 (C.D. Cal. 2009) (internal quotation marks and citation omitted). Plaintiffs' claim under Section 406(b)(2) is unavailing for at least two reasons.

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whether it constitutes management or administration of the plan, giving rise to fiduciary concerns, or merely a business decision that has an effect on an ERISA plan not subject to fiduciary standards." (citations, internal quotation marks, and emphasis omitted)).

First, Plaintiffs failed to come forward with any evidence of the requisite "self-dealing" on the part of the Verizon EBC to invoke Section 406(b)(2) of ERISA. Nor is there any evidence of "adversity" between Verizon and the transferees in connection with the transaction. To the contrary, the record is clear that (i) the Idearc spin-off transaction fully complied with ERISA's detailed rules regarding the transfer of pension assets and liabilities, and (ii) class members were entitled to receive and did receive exactly the same pension benefits after the transaction as before. *See* ROA.1241, 1342, 1386, 1496-97, 1502-03, 1519, 6004.[15]

Second, the only "party" on whose behalf the members of the Verizon EBC purportedly acted in connection with the Idearc spinoff was Verizon itself. And a statutory exemption to the prohibited transaction rules makes clear that a fiduciary may act on behalf of his or her employer, notwithstanding Section 406 of ERISA. Under the exemption, "[n]othing in section 406 . . . shall be construed to prohibit any fiduciary from . . . serving as . . . an officer, employee, agent, or other representative of a party in interest." ERISA § 408, 29 U.S.C. § 1108(c)(3); *see Evans*, 750 F.2d at 1499 ("Logic demands that if a fiduciary may hold such positions, then he may

[15] Plaintiffs are wrong to assert that this Court's decision in *Iron Workers Local # 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980) "dictates a reversal of the District Court's ruling." *See* Pls. Br. at 29. In *Bowen*, this Court held that a plan fiduciary's active participation in the decision not to bring a suit on behalf of the plan against himself violated Section 406(b)(2) of ERISA. *See* 624 F.2d at 1261. *Bowen* is distinguishable because (i) the decision whether to bring suit on behalf of an ERISA plan is a fiduciary decision, and (ii) the decision not to sue oneself involves self-dealing that is wholly absent here.

fulfill the concomitant responsibilities."). In light of this statutory exemption, the mere fact that members of the Verizon EBC fulfilled their responsibilities as Verizon employees in connection with the Idearc transaction cannot give rise to a prohibited transaction claim against them. *See Donovan v. Cunningham*, 716 F.2d 1455, 1467 (5th Cir. 1983) (holding that employee fiduciaries were "freed by Section 408 from the prohibited transaction rules" where they allegedly caused the plan to overpay for the purchase of employer stock); *see also United Steelworkers of Am., Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 202-03 (6th Cir. 1988) (rejecting argument that pension plan spinoff violated Section 406(b) of ERISA).[16]

C. ERISA Section 406(b)(3) Does Not Apply Because The Verizon EBC Did Not Receive Any Consideration To Effectuate The Transfer.

Plaintiffs make the highly misleading assertion that members of the Verizon EBC received "valuable consideration in the form of newly issued Idearc shares of stock" as a result of the Idearc transaction, purportedly in violation of Section 406(b)(3) of ERISA, 29 U.S.C. § 1106(b)(3), which prohibits a fiduciary from receiving "consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan." *See* Pls. Br. at 20, 30-31. But the only stock that any member of the Verizon EBC

[16] Contrary to Plaintiffs' unsupported assertion, Verizon EBC members were under no obligation to seek "guidance from either a disinterested independent fiduciary or any neutral legal advisor," Pls. Br. at 24-25. *See, e.g.*, *Malia*, 23 F.3d at 833 (rejecting argument that defendants had a duty to appoint an independent manager in connection with a pension plan merger).

purportedly received in connection with the Idearc spinoff was the Idearc stock that he or she received on exactly the same terms as every other holder of Verizon common stock. *See* ROA.1474, 1551. Plaintiffs' assertion that this constitutes a "prohibited transaction" is frivolous.

Moreover, these shares were distributed as a result of the corporate transaction spinning off VIS as a separate, publicly traded company, *not* the transfer of pension plan assets, and so the shares were not distributed "in connection with a transaction involving the assets of [any] plan." 29 U.S.C. § 1106(b)(3). Receipt of such "incidental" benefits – on precisely the same terms as every other Verizon shareholder – simply does not fall within the scope of ERISA's prohibited transaction rules. *See Hughes Aircraft*, 525 U.S. at 445-46; *Hunter*, 220 F.3d at 724-25.[17]

III. PLAINTIFFS' SPD DISCLOSURE CLAIMS ARE MERITLESS.

Plaintiffs assert that the Verizon EBC violated Section 102(b) of ERISA, 29 U.S.C. § 1022(b), which requires that an SPD describe the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." *See* Pls. Br. at 45-54. The District Court properly rejected this claim, holding that the "Verizon

[17] It is also far from clear that receipt of Idearc shares constitutes "consideration," which is a prerequisite for liability under Section 406(b)(3) of ERISA. A holder of Verizon shares prior to the spinoff already held an interest in the VIS business unit, and the effect of the corporate spin-off transaction was simply to separate out the shareholder's interest in VIS from the shareholder's interest in Verizon's remaining businesses.

pension plans' SPDs contained sufficient disclosure of the circumstances that could result in a denial or loss of benefits." ROA.6036. Moreover, even assuming *arguendo* that Plaintiffs had established a violation of Section 102(b), their claim would still fail because they did not come forward with any evidence that they were harmed as a result of the alleged disclosure violation.

A. Defendants Did Not Violate ERISA's SPD Disclosure Rules.

Plaintiffs argue that Verizon's pension SPDs ran afoul of ERISA's disclosure requirements because they "make no mention of the possibility of retirees being involuntarily removed and transferred as a consequence of a splitting-up or spinoff of a pension plan." Pls. Br. 46. This argument is meritless.

Plaintiffs are wrong that the transfer of pension benefit obligations to another plan constitutes a circumstance that results in the denial or loss of pension benefits. Under ERISA, any such transfer must ensure that a participant's benefit immediately after the spinoff is "equal to or greater than" his or her benefit immediately before the spinoff. *See* 29 U.S.C. § 1058; *see also id.* § 1054(g). Here, class members' pension benefits did not change as a result of the Idearc spinoff, and Plaintiffs have continued to receive from an Idearc pension plan 100% of the benefits that they received from a Verizon Pension Plan immediately prior to the spinoff. *See* ROA.1780-82. Plaintiffs have not offered, and could not offer, any

evidence that the transfer of the obligations for class members' pension benefits resulted in a denial or loss of benefits.

The District Court disagreed with this particular argument, reasoning that Idearc's ability to amend the Idearc health and welfare benefit plans after the transfer meant that the "transfer presented a possible circumstance which could result in a loss of benefits . . . ." ROA.6034. The Verizon Defendants, however, respectfully submit that the District Court was incorrect for two separate reasons.

First, Plaintiffs' challenge to Verizon's SPD disclosures relates exclusively to the pension plan SPDs and to Verizon's alleged failure "to disclose *in a pension plan SPD* 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*." ROA.948 (¶ 140) (emphasis added), *see* ROA.946-50 (¶¶ 132-49). There is no dispute that class members' pension benefits were not reduced at the time of the Idearc transfer and that, under ERISA, they could not subsequently be reduced by Idearc through a plan amendment. Accordingly, the District Court's focus on welfare benefits – which were separately described in Verizon SPDs relating to its welfare benefit plans – was misplaced.[18]

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[18] Notably, Verizon's health and welfare plan SPDs advised participants of Verizon's right to amend or terminate those plans at will. *See, e.g.*, ROA.1667 (explaining that Verizon "reserves the right to amend, modify, suspend or terminate the plans at any time, at its discretion, with or without advance notice to participants"). Pursuant to this broad and consistent reservation of its rights, on December 8, 2006, Verizon's "various health and welfare plans and programs" were amended, effective November 17, 2006, "to reflect the termination and/or cessation of benefits

Second, under ERISA, plan administrators are required to disclose in an SPD only the circumstances that might result in a denial or reduction of benefits *under existing plan terms*. *See Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993) ("Section 1022(b) relates to an individual employee's eligibility under then existing, current terms of the Plan and not to the possibility that those terms might later be changed, as ERISA undeniably permits."); *see also* 29 C.F.R. § 2520.102-3 ("The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed."). Plan administrators do not have a "duty of clairvoyance," and ERISA does not require them to anticipate and disclose in an SPD possible future plan amendments that might result in a loss or denial of benefits. *See Fischer v. Phila. Elec. Co.*, 994 F.2d 130, 135 (3d Cir. 1993); *see also Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 406 (6th Cir. 1998) ("[T]here can be no fiduciary duty to disclose the possibility of a future change in benefits."). Here, by disclosing all of the circumstances that could result in a reduction of benefits under the terms of the then-existing Verizon Pension Plans, Verizon's SPDs fully

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under the Verizon health and welfare benefit plans and programs for Idearc Individuals and the assumption of those benefits by [Idearc] as described in the EMA." ROA.1662. Plaintiffs have not disputed, and could not dispute, that the Verizon welfare plan SPDs adequately disclosed the possibility that class members might lose their entitlement to Verizon-sponsored health and welfare benefits.

complied with ERISA's disclosure requirements. *See Flanigan*, 242 F.3d at 84-85 (fiduciaries not required to disclose changes in a plan before they are adopted).

In any event, as the District Court held, the "reservation of rights" language in the Verizon Pension Plan SPDs gave "sufficient notice to the plan's beneficiaries that a situation like a spinoff" might occur. ROA.6034-35. Here, to the extent Plaintiffs are correct that the transfer of class members' pension assets and liabilities to Idearc plans represents a "denial or loss of benefits," the circumstance resulting in such "denial or loss" was (according to Plaintiffs) the amendment of the Verizon Pension Plans. SPDs relating to the pension plans in which Plaintiffs participated informed them that Verizon reserved "the right to amend, modify, suspend, terminate or partially terminate the [P]lan at any time, at [its] discretion, with or without advance notice to participants." *E.g.*, ROA.1670, 1677. And, under ERISA, a transfer of plan assets and liabilities to another pension plan is treated as a plan amendment. *See* 26 C.F.R. § 1.411(d)-3(a); IRS Private Letter Ruling, 2009 PLR LEXIS 7164 (June 11, 2009). Accordingly, the SPDs properly disclosed the "circumstance" that resulted in the purported loss of benefits at issue here.

B. <u>Plaintiffs Are Not Entitled To A Remedy For Any Alleged Disclosure Violations.</u>

Plaintiffs' SPD disclosure claim also fails for an independent reason: Plaintiffs produced no evidence of any cognizable harm caused by the alleged disclosure violation.

A plan participant may not "obtain relief" for a disclosure violation absent proof, at a minimum, that he or she personally suffered "actual harm" caused by the disclosure violation. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1881 (2011); *see id.* at 1885 (Scalia, J., dissenting) (noting that relief under *Amara* must be limited to "harm stemming from [the plaintiff's] reliance on the SPD"). In the proceedings below, Plaintiffs identified two categories of harm that they purportedly suffered as a result of the alleged deficiencies in Verizon's SPDs. Both fail as a matter of law.[19]

Plaintiffs argued below that, as a result of the alleged deficiencies in the Verizon SPDs, they failed to seek "to cause the[ir] union to make a legal challenge so as to prevent" the Idearc transfer. ROA.1857. But it is simply speculation for Plaintiffs to assert that they would have actually succeeded in causing the union to bring a lawsuit, let alone that any such lawsuit would have prevented the transfer of class members' pension benefit obligations. The Court should not credit Plaintiffs' efforts to "build inference upon inference" in order to create a genuine question of fact regarding the required elements of causation and actual harm. *See Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1288 (5th Cir. 1981).

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[19] To the extent that Plaintiffs seek to "estop" Verizon from exercising its right under the plans to transfer the obligations for class members' pension benefits to the Idearc plans, moreover, they were required to prove "(1) a material misrepresentation; (2) reasonable and detrimental reliance upon the representation; and (3) extraordinary circumstances." *Mello v. Sara Lee Corp.*, 431 F.3d 440, 444-45 (5th Cir. 2005); *see CIGNA Corp.*, 131 S. Ct. at 1881 (["W]hen a court exercises its authority under § 502(a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made."). Plaintiffs made no such showing.

Moreover, Plaintiffs' speculation that their "influence" would have caused their unions to sue Verizon to stop the Idearc spin-off transaction is contradicted by the facts: the relevant union officials were informed by Verizon as early as August 2006 that the contemplated spinoff would entail "the transfer of VIS employees and former employees to the VIS plans," *see* ROA.3062-73, and the unions made no objection to the proposed spinoff or its treatment of retiree pension benefits. Thus, Plaintiffs' assertions are far too speculative and attenuated to satisfy the "actual harm" and causation requirements of *Amara*. *See Slaughter-Cooper v. Kelsey Seybold Med. Grp. P.A.*, 379 F.3d 285, 292 (5th Cir. 2004) (affirming grant of summary judgment on the ground that plaintiffs' evidence "on the element of actual harm" was "too speculative"); *see also Pearson v. Voith Paper Rolls, Inc.*, 656 F.3d 504, 511 (7th Cir. 2011) (rejecting argument that ERISA plan participant suffered harm as a result of a miscalculation of his benefits because the participant's claim that he would have negotiated better severance terms had he been aware of the correct calculation was "entirely speculative").

Plaintiffs also argued below that they suffered "actual harm" as a result of the purported disclosure violation because they were "were stripped of their ERISA-protected right to receive accurate information." ROA.2838-39. This assertion proves far too much. In every case where a disclosure violation is found, the plaintiffs will have been deprived of their right to receive an SPD that fully

complies with ERISA's disclosure requirements. In other words, under Plaintiffs' theory, the actual harm requirement of *Amara* would be entirely superfluous because by definition it would be satisfied in every case finding a disclosure violation. Plainly, that is not what the Supreme Court intended.

C. Plaintiffs' Assertion That They Were Promised Lifetime Benefits Paid From Verizon-Sponsored Plans Is Meritless.

Plaintiffs assert in passing that certain Verizon SPDs included a commitment by Verizon to continue "paying their monthly pension benefits for life." Pls. Br. at 49. To the extent Plaintiffs mean to suggest that these union plan SPDs gave (non-management) class members a vested, contractual right to have their pension benefits paid by a Verizon-sponsored pension plan, they are mistaken.

In support of their argument, Plaintiffs point solely to the following language in a NY/NE Plan and a Mid-Atlantic Plan SPD:

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

Pls. Br. at 49 (quoting ROA.2394, 2421). This isolated sentence, however, cannot bear the weight that Plaintiffs place on it, especially when viewed in light of the SPDs' unambiguous reservation of rights provisions.

The Fifth Circuit has considered similar SPD language and held that it does not give rise to a vested, contractual right to "lifetime" benefits. In *Wise*, the

plaintiffs relied on SPD language stating that, "[u]pon retirement, you . . . are automatically insured for retirement health care benefits and the Company pays the entire cost." 986 F.2d at 937-38. This Court, however, had little difficulty rejecting the retirees' claim for vested, free lifetime coverage, explaining that the quoted language "discussed what the Plan then provided, not whether it would be offered in perpetuity." *Id.* Similarly here, the language in the Verizon SPDs informed plan participants – "[i]n general" – what the existing union plans currently provided; it did not promise that the existing plan provisions would remain in place indefinitely.

Indeed, the case against Plaintiffs' reliance on this isolated sentence is even stronger here, since the relevant SPDs in *Wise* did not contain a reservation of rights clause. *See id.* at 932-33. Here, both of the SPDs cited by Plaintiffs contained unequivocal language reserving Verizon's "right to amend, modify, suspend, terminate or partially terminate the Plan[s] at any time, at [its] discretion, with or without advance notice to participants." ROA.1677, 3060. Faced with comparable reservation of rights clauses in SPDs, the courts have repeatedly rejected claims for vested or lifetime benefits. *See, e.g.*, *Sprague*, 133 F.3d at 394, 401 (no vested right to employer-provided medical benefits despite SPD language stating that "health care coverages will be provided at GM's expense for your lifetime"); *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 58 F.3d 896, 900, 907 (3d Cir. 1995) (no

vested right to retiree medical coverage despite SPD language stating that "when you retire, your medical benefit will be continued for the rest of your life").

IV. PLAINTIFFS ABANDONED THEIR DOCUMENT DISCLOSURE CLAIMS AGAINST VERIZON AND SO THEY ARE NOT PROPERLY BEFORE THIS COURT.

Plaintiffs argue that the Verizon EBC violated Sections 404(a)(1) and 104(b)(4) of ERISA by purportedly failing to provide them with certain requested documents. *See* Pls. Br. at 54-61. Plaintiffs, however, voluntarily abandoned these claims as against the Verizon Defendants when they filed their Second Amended Complaint.

Counts I and II of the First Amended Complaint alleged that both the Verizon EBC and the Idearc EBC failed to provide Plaintiffs with documents requested in a February 4, 2009 letter. *See* ROA.107-13 (¶¶ 85-112). Thereafter, the Idearc defendants – but not the Verizon Defendants – moved to dismiss these counts as against the Idearc EBC, and the District Court granted the motion in relevant part. *See* ROA.445-46, 457, 460-64. But the District Court had no opportunity to address – and did not address – the claims brought by Plaintiffs against the Verizon EBC in Counts I and II of the First Amended Complaint. *See generally* ROA.445, *et seq.*

On June 21, 2011, Plaintiffs filed the operative, Second Amended Complaint, which omitted any claims against the Verizon Defendants relating to their allegedly improper failure to provide documents to Plaintiffs. *See generally* ROA.915, *et seq*.

Under well-established law, Plaintiffs' failure to renew these claims against the Verizon Defendants in the Second Amended Complaint constitutes abandonment. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) ("An amended complaint supersedes the original complaint and renders it of no legal effect unless the amended complaint specifically refers to and adopts or incorporates by reference the earlier pleading."); *see Young v. City of Mount Ranier*, 238 F.3d 567, 573 (4th Cir. 2001) ("[I]f an amended complaint omits claims raised in the original complaint, the plaintiff has waived those omitted claims.").[20] Accordingly, the arguments made in Parts V and VI of Plaintiffs' brief have been waived as against the Verizon Defendants and are "not properly before this Court." *Fisher*, 895 F.2d at 1078 n.3; *accord Martco Ltd. P'ship v. Wellons, Inc.*, 588 F.3d 864, 877 (5th Cir. 2009) (arguments "not raised before the district court are waived"); *Cathey v. Guenther*, 47 F.3d 162, 163 n. 2 (5th Cir. 1995) (same).

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[20] To be sure, a number of courts recognize an exception to the general rule of waiver where the district court previously dismissed the claims in question. *See, e.g.*, *Young*, 238 F.3d at 573. The cases, however, hold that failure to re-allege claims dismissed as to some defendants results in a waiver as to the non-moving defendants. *Id.* ("The appeals process exists to correct errors by the judge or jury; it cannot be used to correct strategic decisions made by a party's attorney. While the court almost certainly would have dismissed the claims against [the non-moving defendants], the fact remains that the court did not dismiss the claims.").

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the decisions of the District Court should be affirmed.

Respectfully submitted,

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March 13, 2014

CERTIFICATE OF SERVICE

It is hereby certified that on March 13, 2014, the foregoing brief was electronically filed with the Clerk of the Court by using the Court's ECF system. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

s/ Christian J. Pistilli
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,003 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fifth Cir. R. 32.1 and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Professional Plus 2010 in fourteen-point Times New Roman font with twelve-point Times New Roman font footnotes.

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It is hereby certified that (i) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; (ii) the electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; (iii) the document has been scanned for viruses using Symantec End Point Protection with the virus, malware, spyware definitions that were released on March 13, 2014 and is free of viruses; and (iv) the paper document will be maintained for three years after the mandate or order closing the case issues, pursuant to 5th Cir. R. 25.2.9.

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ADDENDUM

Pursuant to Federal Rule of Appellate Procedure 28(f), the relevant parts of the statutes necessary for the Court's determination of this appeal are set forth below:

29 U.S.C. § 1104. Fiduciary duties [ERISA Section 404]

(a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044 [29 U.S.C. §§ 1103(c), (d), 1342, 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

29 U.S.C. § 1106. Prohibited transactions [ERISA Section 406]

(a) Transactions between plan and party in interest. Except as provided in section 408 [29 U.S.C. § 1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect--

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 U.S.C. § 1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 U.S.C. § 1107(a)].

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not--

(1) deal with the assets of the plan in his own interest or for his own account,

(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.

* * *

29 U.S.C. § 1058. Mergers and consolidations of plans or transfers of plan assets [ERISA Section 208]

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after the date of the enactment of this Act [enacted Sept. 2, 1974], 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, consolidation, or transfer (if the plan had then terminated). The preceding sentence shall not apply to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of this Act applies.

26 U.S.C. § 414. Definitions and special rules.

* * *

(l) Merger and consolidations of plans or transfers of plan assets.

(1) In general. A trust which forms a part of a plan shall not constitute a qualified trust under section 401 [26 U.S.C. § 401] and a plan shall be treated as not described in section 403(a) [26 U.S.C. § 403(a)] unless in the case of any merger or consolidation of the plan with, or in the case of any transfer of assets or liabilities of such plan to, any other trust plan after September 2, 1974, 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, consolidation, or transfer (if the plan had then terminated). The preceding sentence does not apply to any multiemployer plan with respect to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 [29 U.S.C. §§ 1301 et seq.] applies.

(2) Allocation of assets in plan spin-offs, etc.

(A) In general. In the case of a plan spin-off of a defined benefit plan, a trust which forms part of--

(i) the original plan, or

(ii) any plan spun off from such plan, shall not constitute a qualified trust under this section unless the applicable percentage of excess assets are allocated to each of such plans.

(B) Applicable percentage. For purposes of subparagraph (A), the term 'applicable percentage' means, with respect to each of the plans described in clauses (i) and (ii) of subparagraph (A), the percentage determined by dividing--

(i) the excess (if any) of--

(I) the sum of the funding target and target normal cost determined under section 430 [26 U.S.C. § 430], over

(II) the amount of the assets required to be allocated to the plan after the spin-off (without regard to this paragraph), by

(ii) the sum of the excess amounts determined separately under clause (i) for all such plans.

(C) Excess assets. For purposes of subparagraph (A), the term 'excess assets' means an amount equal to the excess (if any) of--

(i) the fair market value of the assets of the original plan immediately before the spin-off, over

(ii) the amount of assets required to be allocated after the spin-off to all plans (determined without regard to this paragraph).

(D) Certain spun-off plans not taken into account.

(i) In general. A plan involved in a spin-off which is described in clause (ii), (iii), or (iv) shall not be taken into account for purposes of this paragraph, except that the amount determined under subparagraph (C)(ii) shall be increased by the amount of assets allocated to such plan.

(ii) Plans transferred out of controlled groups. A plan is described in this clause if, after such spin-off, such plan is maintained by an employer who is not a member of the same controlled group as the employer maintaining the original plan.

(iii) Plans transferred out of multiple employer plans. A plan as described in this clause if, after the spin-off, any employer maintaining such plan (and any member of the same controlled group as such employer) does not maintain any other plan remaining after the spin-off which is also maintained by another employer (or member of the same controlled group as such other employer) which maintained the plan in existence before the spin-off.

(iv) Terminated plans. A plan is described in this clause if, pursuant to the transaction involving the spin-off, the plan is terminated.

(v) Controlled group. For purposes of this subparagraph, the term 'controlled group' means any group treated as a single employer under subsection (b), (c), (m), or (o).

* * *

29 U.S.C. § 1022. Summary plan description [ERISA Section 102]

* * *

(b) The summary plan description shall contain the following information: The name and type of administration of the plan; in the case of a group health plan (as defined in section 733(a)(1) [29 U.S.C. § 1191b(a)(1)]), whether a health insurance issuer (as defined in section 733(b)(2) [29 U.S.C. § 1191b(b)(2)]) is responsible for the financing or administration (including payment of claims) of the plan and (if so) the name and address of such issuer; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan including the office at the Department of Labor through which participants and beneficiaries may seek assistance or information regarding their rights under this Act and the Health Insurance Portability and Accountability Act of 1996 with respect to health benefits that are

offered through a group health plan (as defined in section 733(a)(1) [29 U.S.C. § 1191b(a)(1)]), the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 U.S.C. § 1133]), and if the employer so elects for purposes of complying with section 701(f)(3)(B)(i) [29 U.S.C. § 1181(f)(3)(B)(i)], the model notice applicable to the State in which the participants and beneficiaries reside.