

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PHILIP A. MURPHY, JR.	§	
SANDRA R. NOE, and	§	
CLAIRE M. PALMER, et al.	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 3:09-cv-2262-G
	§	
VERIZON COMMUNICATIONS, INC., et	§	
al.	§	
Defendants.	§	
	§	

DEFENDANTS SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, SUPERMEDIA PENSION PLAN FOR MANAGEMENT EMPLOYEES, AND SUPERMEDIA PENSION PLAN FOR COLLECTIVELY BARGAINED EMPLOYEES’ MOTION TO DISMISS FOR PLAINTIFFS’ FAILURE TO STATE A CLAIM

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants SuperMedia Employee Benefits Committee f/k/a Idearc Employee Benefits Committee (“SuperMedia EBC”), SuperMedia Pension Plan for Management Employees f/k/a Idearc Pension Plan for Management Employees, and SuperMedia Pension Plan for Collectively Bargained Employees f/k/a Idearc Pension Plan for Collectively Bargained Employees (collectively, the “SuperMedia Defendants”)¹ hereby submit this Motion to Dismiss for Failure to State a Claim (the “Motion”). A Brief in Support of this Motion more fully setting forth the SuperMedia Defendants’ arguments is filed contemporaneously herewith and incorporated by reference as if fully set forth herein.

1. Plaintiffs allege in their Amended Complaint they were improperly transferred from the pension rolls of Verizon into the SuperMedia Pension Plan for Management Employees

¹ Plaintiffs’ Amended Complaint is Plaintiffs’ current live pleading; however, the parties agreed to a stipulation voluntarily dismissing Defendant SuperMedia Inc. f/k/a Idearc Inc., which this Court entered on February 9, 2010. See Order Granting Stipulation of Dismissal of Def. Idearc, Inc. n/k/a SuperMedia, Inc. under Federal Rule of Civil Procedure 41(a)(1)(ii) (Docket No. 17).

f/k/a Idearc Pension Plan for Management Employees and the SuperMedia Pension Plan for Collectively Bargained Employees f/k/a Idearc Pension Plan for Collectively Bargained Employees (collectively, the “SuperMedia Pension Plans”) in 2006 when Verizon spun off its Information Services Division. *See generally* Pls.’ Am. Compl. Because Plaintiffs fail to actually assert any claim for relief against the SuperMedia Pension Plans themselves, the SuperMedia Pension Plans should be dismissed from this lawsuit with prejudice.

2. Plaintiffs further contend that the plan administrators failed to comply with document requests made under ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4). These claims fail as a matter of law. It is uncontested that SuperMedia EBC provided many of the documents requested by Plaintiffs. Because ERISA § 104(b)(4) does not require SuperMedia EBC to provide the remaining documents Plaintiffs requested, Plaintiffs’ claims concerning the failure to provide these documents should be dismissed with prejudice.

3. The SuperMedia Defendants file this Motion seeking (1) dismissal of the SuperMedia Pension Plans as parties to this lawsuit because Plaintiffs failed to even attempt to state any claims against them, and (2) dismissal of the claims against SuperMedia EBC because Plaintiffs failed to state claims upon which relief can be granted.

REQUESTED RELIEF

For the foregoing reasons, and as set out in more detail in the concurrently-filed Brief in Support of this Motion (which is incorporated here by reference), the SuperMedia Defendants respectfully request that Plaintiffs’ claims against the SuperMedia Defendants be dismissed with prejudice. The SuperMedia Defendants further request such other relief to which they may be justly entitled.

Dated: March 10, 2010

Respectfully submitted,

ANDREWS KURTH LLP

/s/ David P. Whittlesey

David P. Whittlesey
State Bar No. 00791920
Casey Low
State Bar No. 24041363
111 Congress, Suite 1700
Austin, Texas 78701
Telephone: (512) 320-9200
Facsimile: (512) 320-9292

Marc D. Katz
State Bar No. 00791002
1717 Main Street, Suite 3700
Dallas, Texas 75201
Telephone: (214) 659-4400
Facsimile: (214) 659-4401

**ATTORNEYS FOR DEFENDANTS
SUPERMEDIA EMPLOYEE BENEFITS
COMMITTEE , SUPERMEDIA PENSION PLAN
FOR MANAGEMENT EMPLOYEES, AND
SUPERMEDIA PENSION PLAN FOR
COLLECTIVELY BARGAINED EMPLOYEES**

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March 2010, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all counsel of record, each of whom has registered as users of the ECF system. A courtesy copy has also been sent to counsel of record via United States Mail.

/s/ David P. Whittlesey

David P. Whittlesey

Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Facsimile (303) 843-0360

Robert E. Goodman, Jr.
James N. Francis
FRANCIS GOODMAN PLLC
8750 N. Central Expressway, Suite 1000
Dallas, Texas 75231
Facsimile (214) 368-3974

Christopher L. Kurzner
KURZNER PC
1700 Pacific Avenue, Suite 3800
Dallas, Texas 75201
Facsimile (214) 442-0851

Jeffrey G. Huvelle, Esq.
Christian J. Pistilli
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
Telephone: 202-662-5526
Facsimile: 202-778-5526

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

§
§
§
§
§
§
§
§
§
§
§

v.

Civil Action No. 3:09-cv-2262-G

VERIZON COMMUNICATIONS, INC., et
al.
Defendants.

DEFENDANTS SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, SUPERMEDIA PENSION PLAN FOR MANAGEMENT EMPLOYEES, AND SUPERMEDIA PENSION PLAN FOR COLLECTIVELY BARGAINED EMPLOYEES' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS FOR PLAINTIFFS' FAILURE TO STATE A CLAIM

Respectfully submitted,

ANDREWS KURTH LLP

/s/ David P. Whittlesey

David P. Whittlesey
State Bar No. 00791920
Casey Low
State Bar No. 24041363
111 Congress, Suite 1700
Austin, Texas 78701
Telephone: (512) 320-9200
Facsimile: (512) 320-9292

Marc D. Katz
State Bar No. 00791002
1717 Main Street, Suite 3700
Dallas, Texas 75201
Telephone: (214) 659-4400
Facsimile: (214) 659-4401

**ATTORNEYS FOR DEFENDANTS
SUPERMEDIA EMPLOYEE BENEFITS
COMMITTEE , SUPERMEDIA PENSION PLAN
FOR MANAGEMENT EMPLOYEES, AND
SUPERMEDIA PENSION PLAN FOR
COLLECTIVELY BARGAINED EMPLOYEES**

TABLE OF CONTENTS

	Page
I. PRELIMINARY STATEMENT	1
II. INTRODUCTION AND SUMMARY OF ARGUMENT	1
III. ARGUMENT AND AUTHORITIES.....	2
A. Standard of Review.....	2
B. Plaintiffs Have Failed to State Any Claims Against the SuperMedia Pension Plans.	3
C. Plaintiffs Have Failed to State a Claim Against SuperMedia EBC for Violation of ERISA § 104(b)(4).	4
1. The documents allegedly withheld by SuperMedia EBC are not enumerated in ERISA § 104(b)(4) and do not fall within the “other instruments” provision.	4
2. Actuarial reports do not qualify as “other instruments.”	8
3. Notices, agenda, minutes, and the like do not qualify as “other instruments.”	8
4. Communications with the IRS do not qualify as “other instruments.”	9
5. Resolutions, actions, and minutes do not qualify as “other instruments.” ..	9
6. Asset allocation and investment policies/guidelines do not qualify as “other instruments.”	10
D. Plaintiffs Have Failed to State a Claim Against SuperMedia EBC for Breach of Fiduciary Duty.....	10
E. Plaintiffs Have Failed to State a Claim Against SuperMedia EBC for Equitable Relief Under ERISA §§ 502(a)(2) and (a)(3).	11
IV. CONCLUSION AND PRAYER	13

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Allinder v. Inter-City Products Corp.</i> , 152 F.3d 544 (6th Cir. 1998)	5
<i>Ames v. American National Can Co.</i> , 170 F.3d 751 (7th Cir. 1999)	5, 9
<i>Ashcroft v. Iqbal</i> , 129 S.Ct. 1937 (2009)	2, 3, 13
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007)	2, 3, 13
<i>Board of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein</i> , 107 F.3d 139 (2d Cir. 1997)	5, 8
<i>Brown v. American Life Holdings, Inc.</i> 64 F. Supp. 2d 882, 890 (S.D. Iowa 1998)	9
<i>Brown v. American Life Holdings, Inc.</i> , 190 F.3d 856 (8th Cir. 1999)	8, 9
<i>Hickey v. Pennywitt</i> , No. 3:03cv7307, 2004 WL 1304933 (N.D. Ohio May 20, 2004)	10
<i>Mertens v. Hewitt Associates</i> , 508 U.S. 248 (1993)	12
<i>Rodriguez v. United States</i> , 66 F.3d 95 (5th Cir. 1995)	13
<i>Shaver v. Operating Engineers Local 428 Pension Trust Fund</i> , 332 F.3d 1198 (9th Cir. 2003)	4, 5, 10
<i>VRC LLC v. City of Dallas</i> , 460 F.3d 607 (5th Cir. 2006)	13
FEDERAL STATUTES	
ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4)	2, 4, 5, 6, 7, 8, 9, 10, 11, 13
ERISA § 502(a)(2) - (a)(3), 29 U.S.C. §§ 1132(a)(2)-(a)(3)	3, 11, 12, 13
ERISA § 510	4
ERISA § 502(a)(1)(B)	4
ERISA § 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B)	5
Federal Rule of Civil Procedure 12(b)(6)	1, 4

I. PRELIMINARY STATEMENT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants SuperMedia Employee Benefits Committee f/k/a Idearc Employee Benefits Committee, SuperMedia Pension Plan for Management Employees f/k/a Idearc Pension Plan for Management Employees, and SuperMedia Pension Plan for Collectively Bargained Employees f/k/a Idearc Pension Plan for Collectively Bargained Employees (collectively, the “SuperMedia Defendants”)¹ move to dismiss the claims asserted against them in Plaintiffs’ Amended Complaint.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs filed suit against Verizon Communications, Inc. (“Verizon”), Verizon Employee Benefits Committee (“Verizon EBC”), Verizon Pension Plan for New York and New England Associates, Verizon Management Pension Plan, SuperMedia Employee Benefits Committee f/k/a Idearc Employee Benefits Committee (“SuperMedia EBC”), SuperMedia Pension Plan for Management Employees f/k/a Idearc Pension Plan for Management Employees, and SuperMedia Pension Plan for Collectively Bargained Employees f/k/a Idearc Pension Plan for Collectively Bargained Employees for breaches of fiduciary duties, violations of ERISA, statutory damages, and injunctive relief. Plaintiffs allege they were improperly transferred from the pension rolls of Verizon into the SuperMedia Pension Plan for Management Employees f/k/a Idearc Pension Plan for Management Employees and the SuperMedia Pension Plan for Collectively Bargained Employees f/k/a Idearc Pension Plan for Collectively Bargained Employees (collectively, the “SuperMedia Pension Plans”) in 2006 when Verizon spun off its Information Services Division. *See generally* Pls.’ Am. Compl. Because Plaintiffs fail to

¹ Plaintiffs’ Amended Complaint is Plaintiffs’ current live pleading; however, the parties agreed to a stipulation voluntarily dismissing Defendant SuperMedia Inc. f/k/a Idearc Inc., which this Court entered on February 9, 2010. *See* Order Granting Stipulation of Dismissal of Def. Idearc, Inc. n/k/a SuperMedia, Inc. under Federal Rule of Civil Procedure 41(a)(1)(ii) (Docket No. 17).

actually assert any claim for relief against the SuperMedia Pension Plans themselves, the SuperMedia Pension Plans should be dismissed from this lawsuit with prejudice.

Plaintiffs do attempt to allege claims against the SuperMedia Pension Plans' administrators. Plaintiffs contend that the administrators failed to comply with document requests made under ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4). These claims fail as a matter of law. It is uncontested that SuperMedia EBC provided many of the documents requested by Plaintiffs. Because ERISA § 104(b)(4) does not require SuperMedia EBC to provide the remaining documents Plaintiffs requested, Plaintiffs' claims concerning the failure to provide these documents should be dismissed with prejudice.

The SuperMedia Defendants file this Motion seeking (1) dismissal of the SuperMedia Pension Plans as parties to this lawsuit because Plaintiffs failed to even attempt to state any claims against them, and (2) dismissal of the claims against SuperMedia EBC because Plaintiffs failed to state claims upon which relief can be granted.

III. ARGUMENT AND AUTHORITIES

A. Standard of Review.

Federal Rule of Civil Procedure 12(b)(6) allows the Court to dismiss claims on the pleadings for failing to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). The U.S. Supreme Court has recently issued two opinions—*Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*—explaining the standard by which motions to dismiss under Rule 12(b)(6) must be decided. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951-52 (2009). In order to survive a Rule 12(b)(6) motion post *Twombly* and *Ashcroft*, a complaint must contain enough factual allegations “to state a claim to relief that is plausible on its face.” *Ashcroft*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility only when the well-pleaded facts allow the court to draw

the reasonable inference, based on its “experience and common sense,” that the defendant is liable as alleged. *Id.* at 1940 (citing *Twombly*, 550 U.S. at 556).

To meet this standard, Plaintiffs’ allegations must cross two thresholds. First, the Court must “identify[] the allegations in the [Amended] [C]omplaint that are not entitled to the assumptions of truth” because of their conclusory nature. *Id.* at 1951. Second, considering only the well-pleaded facts, the Court must determine whether the Amended Complaint “plausibly suggest[s] an entitlement to relief” on the causes of action alleged. *Id.* at 1950; *Twombly*, 550 U.S. at 570.

B. Plaintiffs Have Failed to State Any Claims Against the SuperMedia Pension Plans.

Plaintiffs have not even attempted to assert any claims against the SuperMedia Pension Plans. Plaintiffs’ Complaint simply does not contain allegations of wrongdoing by the plans themselves. Accordingly, the plans should be dismissed from this case with prejudice. Specifically, Plaintiffs allege the following:

1. First claim for relief against both Defendant Verizon EBC and Defendant [SuperMedia] EBC for breach of fiduciary duty for refusal to disclose pension plan related information
2. Second claim for relief against both Defendant Verizon EBC and Defendant [SuperMeida] EBC to recover penalty for failure to provide requested plan documents
3. Third claim for relief against Defendant Verizon EBC for breach of fiduciary duty including failure to comply with plan document rules
4. Fourth claim for relief against Verizon, Verizon EBC, and [SuperMedia] EBC for appropriate equitable relief under ERISA Sections 502(a)(2) and (a)(3)²

² Plaintiffs asserted their Fourth Claim for Relief against SuperMedia Inc. f/k/a Idearc Inc., however, as previously discussed, SuperMedia Inc. f/k/a Idearc Inc. has been voluntarily dismissed through a stipulation among the parties.

5. Fifth claim for relief against Verizon and Verizon EBC for violation of ERISA Section 510
6. Sixth claim for relief against the Verizon Management Pension Plan and the Verizon Pension Plan for New York & New England Associates under ERISA Section 502(a)(1)(B)

See Pls.' Am. Compl. None of Plaintiffs' six claims are asserted against the SuperMedia Pension Plans. Simply put, Plaintiffs have not alleged that the SuperMedia Pension Plans are liable for any of the relief sought in their Amended Complaint. As a result, the SuperMedia Pension Plans should be dismissed from this action with prejudice. *See* Fed. R. Civ. P. 12(b)(6).

C. Plaintiffs Have Failed to State a Claim Against SuperMedia EBC for Violation of ERISA § 104(b)(4).

Plaintiffs claim they requested thirteen categories of documents from SuperMedia EBC to which they are allegedly entitled under ERISA § 104(b)(4). It is uncontested that SuperMedia EBC provided many of the documents Plaintiffs requested. However, Plaintiffs contend that SuperMedia EBC withheld documents in response to five of the requests. Because the documents alleged to have been improperly withheld by SuperMedia EBC do not fall within the categories of documents required to be disclosed by ERISA § 104(b)(4), Plaintiffs have failed to state an actionable claim for violation of the statute. Plaintiffs' Second Claim for Relief should therefore be dismissed as to SuperMedia EBC. *See Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198, 1202 (9th Cir. 2003) (affirming district courts dismissal of claim alleging certain documents were withheld in violation of ERISA § 104(b)(4) when documents requested did not fall within statute).

- 1. The documents allegedly withheld by SuperMedia EBC are not enumerated in ERISA § 104(b)(4) and do not fall within the "other instruments" provision.**

ERISA § 104(b)(4) outlines specific documents a plan administrator must provide upon the written request of a participant. It states:

The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

Id., 294 S.C. § 1024(b)(4). ERISA § 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), in turn, provides for penalties of up to \$110 a day for a plan administrator’s “failure or refusal” to provide the documents contemplated in ERISA § 104(b)(4).

Courts traditionally interpret ERISA § 104(b)(4) narrowly. *See, e.g., Shaver*, 332 F.3d at 1202 (agreeing with district court’s narrow construction of the statute); *Allinder v. Inter-City Prods. Corp.*, 152 F.3d 544, 549 (6th Cir. 1998) (applying the construction principle of *ejusdem generis* to the term “other documents” in Section 1024(b)(4)); *Board of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 142 (2d Cir. 1997) (holding “other instruments” clause refers to formal or legal documents that govern the plan). The Seventh Circuit stated the reasons for doing so in *Ames v. Am. Nat’l Can Co.*, 170 F.3d 751, 758-59 (7th Cir. 1999):

Plaintiffs argue that this interpretation of the requirement is too narrow, and that they should have a right to all documents that provide information about a plan and its benefits. We agree with our sister circuits that the latter interpretation would make hash out of the statutory language, which on its face refers to a specific set of documents: those under which a plan is established or operated. If it had meant to require production of all documents relevant to a plan, Congress could have said so.

Id. “Baring indicia to the contrary, the broad term, ‘other instruments’ should be limited to the class of objects that specifically precedes it.” *Shaver*, 332 F.3d at 1202. With these guiding principles in mind, the law does not require SuperMedia EBC to provide the documents allegedly withheld.

Plaintiffs allege on August 13, 2008, Sandra Noe and Claire Palmer requested from SuperMedia EBC—the SuperMedia Pension Plans’ administrators—Form 5500s and “[a]ll other documents created *since January 2006* under which the pension plans and the master trust are established and operated within the meaning of ERISA Section 104(b)(4).” Pls.’ Am. Compl. ¶ 51. Plaintiffs further allege that SuperMedia EBC failed to timely produce “some responsive documents and some responsive documents have not yet been produced.” *Id.*

Plaintiffs further allege on February 4, 2009 they made several document requests to Verizon pension plans’ administrators and SuperMedia Pension Plans’ administrators under ERISA § 104(b)(4). *See* Pls.’ Am. Compl. ¶¶ 53-57. In the February 4 letter, Plaintiffs requested the following thirteen categories of documents from SuperMedia EBC:

Plaintiffs requested said defendants to produce “all documents related to the establishment and operation of the [SuperMedia] pension plans, including:

1. summaries and estimates of costs of providing benefits for transferred retirees;
2. summaries and estimates of savings to Verizon by transferring retirees;
3. summaries and estimates of administrative costs associated with administering pension benefits for all transferred retirees;
4. actuarial studies, funding projections, estimates and final reports concerning pension assets expected to be transferred and confirming the transfer of assets to [SuperMedia] for payment of pension liabilities.”

Plaintiffs requested both Defendant Verizon EBC and Defendant [SuperMedia] EBC to disclose the identities of the plan administrators who met and made the decisions to transfer Plaintiffs and other retirees over to [SuperMedia], and they requested said defendant to produce the following documents concerning those meetings and decisions:

5. “notices, agenda, documents presented or distributed at or in preparation for such meetings, and minutes of such meetings, including any summaries or notes of such meetings;

6. all employee matters agreements;
7. reports discussing, explaining and describing any curtailment gain or settlement gain on Verizon's financial statements as a result of the transfer or retirees;
8. legal opinions with respect to Verizon plan administrators' decisions to transfer retirees, including all related communications from legal counsel advising plan fiduciaries and plan administrators;
9. reports, opinions by independent fiduciaries and consultants with respect to Verizon plan administrators' decision to transfer retirees.”

Plaintiffs requested both Defendant Verizon EBC and Defendant [SuperMedia] EBC to disclose whether the [SuperMedia] pension plans have been qualified under the Internal Revenue Code and applicable Treasury Department regulations and they requested said defendants to produce:

10. “documents reflecting application made to the IRS for approval of the transfer of retirees and pension assets and qualification of the pension plans, as well as letters and responses by the IRS.”

Plaintiffs requested both Defendant Verizon EBC and Defendant [SuperMedia] EBC to disclose additional information with respect to the administration of the [SuperMedia] pension plans, and they requested said defendant produce:

11. “all amendments and appendices created and adopted since September 2008 to the controlling/governing plan documents for the pension plans and the master trust, together with all summary of material modifications from September 2008 to the present;
12. all resolutions and actions since September 2008 by the [SuperMedia] Board of Directors, the [SuperMedia] Plan Design Committee, the [SuperMedia] Employee Benefits Committee and [SuperMedia] Pension Plan administrators concerning the pension plans and the trusts; and
13. all other documents created since September 2008 under which the pension plans and the master trust are established and operated within the meaning of ERISA Section 104(b)(4), including asset allocation policy/guidelines and investment policy/guidelines and proxy voting guidelines.”

Id. ¶¶ 54-57.

Plaintiffs' Amended Complaint specifically alleges that SuperMedia EBC, as opposed to Verizon EBC, did not provide requested documents falling within the fourth, fifth, tenth, twelfth, and thirteenth categories listed above. See *id.* ¶ 86. Because none of these documents are among the documents enumerated in ERISA § 104(b)(4), Plaintiffs must rely on the "other instruments" provision. None of the documents Plaintiffs allege SuperMedia EBC failed to disclose, however, fall within "other instruments" as interpreted by courts throughout the country.

2. Actuarial reports do not qualify as "other instruments."

With respect to category four of their requests, Plaintiffs allege SuperMedia EBC failed to provide its final actuarial report. See Pls.' Am. Compl. ¶ 86. Actuarial reports do not qualify as "other instruments under which the plan is established or operated." See *Weinstein*, 107 F.3d at 146 (holding that plan administrators are not required to disclose actuarial valuation reports under ERISA 104(b)(4)).

3. Notices, agenda, minutes, and the like do not qualify as "other instruments."

With respect to category five, Plaintiffs allege that SuperMedia EBC failed to provide notices, agenda, documents presented or distributed at or in preparation for meetings of the plan administrators who made the decisions to transfer Plaintiffs to SuperMedia, and minutes of such meetings, including any summaries or notes. See Pls.' Am. Compl. ¶ 86. Notices, agenda, documents presented or distributed at or in preparation for plan administrator meetings, and minutes of such meetings, including any summaries or notes, do not qualify as "other instruments under which the plan is established or operated." See *Brown v. Am. Life Holdings, Inc.* 190 F.3d 856, 862 (8th Cir. 1999) (holding corporate actions replacing members of the Administrative Committee, minutes of Administrative Committee meetings, and written

communications with bank evidenced the day-to-day operations of the ESOP and were not governing documents that had to be disclosed).

4. Communications with the IRS do not qualify as “other instruments.”

With respect to category ten, Plaintiffs allege documents reflecting application made to the IRS for approval of the transfer of retirees and pension assets and qualification of the pension plans, as well as letters and responses by the IRS were not withheld by SuperMedia EBC, but are missing. *See* Pls.’ Am. Compl. ¶ 86. Communications between the SuperMedia Defendants and the IRS do not qualify as “other instruments under which the plan is established or operated.” *See Brown v. Am. Life Holdings, Inc.*, 64 F. Supp. 2d 882, 890 (S.D. Iowa 1998) (holding administrator was not required to provide employee with copies of tax forms).

5. Resolutions, actions, and minutes do not qualify as “other instruments.”

With respect to category twelve, Plaintiffs allege SuperMedia EBC improperly withheld all resolutions and actions since September 2008 by the SuperMedia Board of Directors, the SuperMedia Plan Design Committee, the SuperMedia Employee Benefits Committee and the SuperMedia Pension Plan administrators concerning the pension plans and the trusts. *See* Pls.’ Am. Compl. ¶ 86. Resolutions, actions, and minutes of the plan administrators and board of directors are not among the documents enumerated in ERISA § 104(b)(4) and do not qualify as “other instruments under which the plan is established or operated.” *See Ames*, 170 F.3d at 758-59 (holding plan administrator not required to disclose a severance plan and sales agreement or the related board resolutions); *Brown*, 190 F.3d at 862 (holding administrator was not required to provide minutes of administrative meetings, resolutions, written communications, and explanations concerning administrator’s maintenance of plan).

6. Asset allocation and investment policies/guidelines do not qualify as “other instruments.”

With respect to category thirteen, Plaintiffs allege SuperMedia EBC improperly withheld all “other documents created since September 2008 under which the pension plans and the master trust are established and operated within the meaning of ERISA Section 104(b)(4), including asset allocation policy/guidelines and investment policy/guidelines and proxy voting guidelines.” *See* Pls.’ Compl. ¶ 86. The asset allocation policy/guidelines, investment policy/guidelines, and proxy voting guidelines do not fall within the “other instruments” clause. *See Hickey v. Pennywitt*, No. 3:03cv7307, 2004 WL 1304933, at * 7 (N.D. Ohio May 20, 2004) (holding investment guidelines, among other related documents, did fall with the “other instruments” clause and need not be provided).

Because ERISA § 104(b)(4) does not require SuperMedia EBC to provide the documents Plaintiffs claim were withheld, Plaintiffs have failed to state a claim against SuperMedia EBC in their Second Claim for Relief. Accordingly, the claim should be dismissed. *See Shaver*, 332 F.3d at 1202 (affirming district court’s dismissal of claims on 12(b)(6) motion).

D. Plaintiffs Have Failed to State a Claim Against SuperMedia EBC for Breach of Fiduciary Duty.

Plaintiffs’ only allegations against SuperMedia EBC supporting a breach of fiduciary duty in Plaintiffs’ First Claim for Relief are for failing to provide the same documents described above under ERISA § 104(b)(4). *See* Pls.’ Am. Compl. ¶ 86. While the SuperMedia Defendants vigorously contest failing to provide documents under ERISA § 104(b)(4) amounts to a breach of the administrator’s fiduciary duty, it is a nonissue because, as established above, ERISA § 104(b)(4) does not obligate SuperMedia EBC to provide the documents complained of by Plaintiffs. *See Shaver*, 332 F.3d at 1202 (affirming district court’s dismissal on 12(b)(6) motion of breach of fiduciary duty claim based on withheld documents where court determined ERISA

§ 104(b)(4) did not compel same documents to be provided). Because SuperMedia EBC did not violate ERISA § 104(b)(4), Plaintiffs have failed to state a claim for relief that is plausible on its face. Plaintiffs' First Claim for Relief should, therefore, be dismissed as to SuperMedia EBC as well.

E. Plaintiffs Have Failed to State a Claim Against SuperMedia EBC for Equitable Relief Under ERISA §§ 502(a)(2) and (a)(3).

Plaintiffs' Amended Complaint completely lacks allegations supporting a claim against SuperMedia EBC under ERISA §§ 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3).

These provisions state:

A civil action may be brought

- (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate equitable relief under section 1109 of this title;
- (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Id. In their Fourth Claim for Relief, Plaintiffs assert certain actions by Verizon and Verizon EBC violated the terms of the Verizon pensions plans and other actions by Verizon and Verizon EBC were "illegal." *See* Pls.' Am. Compl. ¶¶ 137-40. Based on these actions, Plaintiffs seek equitable relief from Verizon and Verizon EBC under ERISA §§ 502(a)(2) and (a)(3), including declarations and injunctive relief. *See id.* For example, Plaintiffs allege that Verizon's "reclassification of Plaintiffs and purported transfer of the retirees from participation in Verizon's pension plans violated the terms of the Verizon pensions plans." *Id.* ¶ 140. They seek from the Court injunctive relief under these provisions, ordering "Verizon's reclassification of Plaintiffs and other retirees be rescinded and that all Plaintiffs and putative class members be

restored to their former status as participants in Verizon's pension and welfare plans and that they be made whole." *Id.*

On the other hand, Plaintiffs completely fail to assert any actions on the part of SuperMedia EBC that would entitle them to relief under these provisions. *See id.* ¶¶ 137-40. Specifically, Plaintiffs do not allege that SuperMedia EBC somehow violated the terms of the SuperMedia Pension Plans or another ERISA provision, unlike their allegations against Verizon and Verizon EBC. *See id.* They just tack on to the end of paragraph 140, almost as an afterthought, "Plaintiffs request an order requiring SuperMedia EBC to transfer back to Verizon all Plaintiffs and putative class members." *Id.* ¶ 140. Even if the Court looks to other factual allegations contained in Plaintiffs' Amended Complaint against SuperMedia EBC for possible grounds for relief under ERISA §§ 502(a)(2) and (a)(3), it will come up short. As discussed in parts C and D *supra*, the only allegations of wrongdoing against SuperMedia EBC are for failing to provide certain requested documents. Because these assertions fail to state a claim upon which relief can be granted as previously established, they cannot support equitable relief from this Court.

The U.S. Supreme Court has held that "appropriate equitable relief" under ERISA § 502(a)(3) authorizes only "those categories of relief that were typically available in equity," such as injunction, mandamus, and restitution. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). Plaintiffs ask that the Court order SuperMedia EBC to transfer back to Verizon all Plaintiffs and putative class members—a mandatory injunction. Pls.' Am. Compl. ¶ 140. For the Court to order such relief, Plaintiffs must show:

- (1) a substantial likelihood that [they] will prevail on the merits, (2) a substantial threat that irreparable injury will result if the injunction is not granted, (3) that the threatened injury out-weighs the threatened harm to [SuperMedia EBC], and (4) that granting the preliminary injunction will not disserve the public interest.

Rodriguez v. United States, 66 F.3d 95, 97 (5th Cir. 1995). First, Plaintiffs have completely failed to allege a claim upon which they might prevail, warranting preliminary injunctive relief, i.e. violation of the terms of the SuperMedia Pension Plans, much less the higher standard necessary for a permanent injunction of *actual* success on the merits. See *VRC LLC v. City of Dallas*, 460 F.3d 607, 611 (5th Cir. 2006) (outlining elements of permanent injunction). Second, Plaintiffs failed to allege any other facts supporting the remaining elements listed above, such as irreparable injury. More importantly, however, Plaintiffs cannot show a likelihood of success on the merits of the claims they have asserted—violation of ERISA § 104(b)(4) and breach of fiduciary duty based on said alleged violation—so no injunctive relief is available. Plaintiffs have failed to state a claim for equitable relief under ERISA §§ 502(a)(2) and (a)(3). Plaintiffs’ Fourth Claim for Relief should be dismissed as to SuperMedia EBC.

IV. CONCLUSION AND PRAYER

Plaintiffs’ Amended Complaint is devoid of any claims for relief against Defendants SuperMedia Pension Plan for Management Employees and SuperMedia Pension Plan for Collectively Bargained Employees. The SuperMedia Defendants respectfully request the Court dismiss these Defendants from the instant lawsuit. Plaintiffs’ Amended Complaint is also missing any factual allegations that plausibly suggest entitlement to relief from Defendant SuperMedia Employee Benefits Committee. In accordance with *Twombly* and *Ashcroft*, the SuperMedia Defendants respectfully submit that Plaintiffs have failed to state claims for relief against the SuperMedia Employee Benefits Committee and request that claims one, two, and four be dismissed as to SuperMedia Employee Benefits Committee.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March 2010, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all counsel of record, each of whom has registered as users of the ECF system. A courtesy copy has also been sent to counsel of record via United States Mail.

/s/ David P. Whittlesey

David P. Whittlesey

Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Facsimile (303) 843-0360

Robert E. Goodman, Jr.
James N. Francis
FRANCIS GOODMAN PLLC
8750 N. Central Expressway, Suite 1000
Dallas, Texas 75231
Facsimile (214) 368-3974

Christopher L. Kurzner
KURZNER PC
1700 Pacific Avenue, Suite 3800
Dallas, Texas 75201
Facsimile (214) 442-0851

Jeffrey G. Huvelle, Esq.
Christian J. Pistilli
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
Telephone: 202-662-5526
Facsimile: 202-778-5526