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 Representatives 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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

Index of Authorities ii

Summary of Argument 1

Argument..2

I. The District Court Erred In Ruling That The Verizon EBC Did Not Violate ERISA Section 406(b)(2), and in Failing to Address Appellant's ERISA Section 406(b)(3) Claim 2

II. The District Court Erred In Ruling That The Involuntary Transfer Of The Verizon Retirees Did Not Violate the Verizon Plan Fiduciaries' Duty Of Loyalty Under ERISA Section 404(a)(1) 13

III. The District Court Erred In Ruling That Verizon Plan Fiduciaries Did Not Breach Their Duty to Disclose in a Summary Plan Description That One Means Whereby Verizon Pension Benefits Could be Lost Was a Corporate Spinoff and Transfer of the Retirees..........20

IV. The District Court Erred In Ruling That ERISA Section 404(a)(1) Does Not Create Document Disclosure Obligations By Plan Administrators Beyond Those Documents Specifically Listed in ERISA Section 104(b)(4) 24

V. The District Court Erred In Ruling That Investment Guidelines Are Not Instruments Dictating the Operation Of A Pension Plan Required Under ERISA Section 104(b)(4) To Be Disclosed to Requesting Plan Participants 29

Conclusion and Prayer 31

Certificate of Service 32

Certificate of Compliance...33

TABLE OF AUTHORITIES

Page(s)

CASES

CIGNA Corp. v. Amara,
__ U.S. __, 131 S. Ct. 1866 (2011) 22

Corley v. United States,
556 U.S. 303, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) 4

Davis v. TXO Prod. Corp.,
929 F.2d 1515 (10th Cir.1991) 25

Donovan v. Bierwith,
680 F.2d 263 (2nd Cir. 1982) 7

Ehlmann v. Kaiser Foundation Health Plan of Texas,
198 F.3d 552 (5th Cir. 2000), *cert. dismissed*, 530 U.S. 1291, 121 S.Ct. 12 (2000) 26

Freund v. Marshall & Ilsley Bank,
485 F.Supp. 629 (W.D. Wis.1979) 10

Frommert v. Conkright,
738 F.3d 522 (2nd Cir. 2013) 23

Grant v. Eaton Disability Long-Term Disability Plan,
2013 WL 485868 at *5 (S.D. Miss. February 6, 2013) 27

Hardt v. Reliance Standard Life Ins. Co.,
560 U.S. 242, 130 S.Ct. 2149 (2010) 4

Henry v. Champlain Enters., Inc.,
445 F.3d 610 (2nd Cir. 2006) (Sotomayor, J.) 23

Howe v. Varity Corp.,
36 F.3d 746 (8th Cir.1994), *aff'd on other grounds*, 516 U.S. 489, 116 S.Ct. 1065 (1996) 14

Hughes Aircraft v. Jacobson,
525 U.S. 432, 119 S.Ct. 755 (1999) 14, 15

Hughes Salaried Retirees Action Comm. v. Adm,
72 F.3d 686, 690 (9th Cir. 1995) 31

International Broth. of Painters and Allied Trades Union and Industry Pension Fund v. Duval.
925 F.Supp. 815 (D. D.C.1996)....................................9

Iron Workers Local # 272 v. Bowen,
624 F.2d 1255 (5th Cir. 1980)....................................11

Koehler v. Aetna Health Inc.,
683 F.3d 182 (5th Cir. 2012) 22

Kujanek v. Houston Poly Bag I, Ltd.,
658 F.3d 483 (5th Cir. 2011) 7, 27

Leigh v. Engle,
727 F.2d 113 (7th Cir. 1984) 8

N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc.,
453 U.S. 322, 101 S.Ct. 2789 (1981) 7

Pegram v. Herdrich,
530 U.S. 211, 120 S.Ct. 2143 (2000) 30

Radiology Associates of San Antonio, P.A. v. Aetna Health, Inc.,
2006 WL 3247353 at *2 (W.D. Tex August 2, 2006)....................................26

Reich v. Compton,
57 F.3d 270 (3rd Cir. 1995) 8, 9

Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.,
506 A.2d 173 (Del. 1986) 19

United States v. Harue Hayashi,
282 F.2d 599 (9th Cir.1960) 25

Statutes

29 U.S.C. Sections 102 – 1031 26

29 U.S.C. Section 1022(b) 21

29 U.S.C. Section 1110(a) 16

1974 U.S.Code 9

ERISA .... passim

ERISA Section 102(b) 21

ERISA Section 1024(b)(4) 27

ERISA Section 104(b) 27, 29

ERISA Section 104(b)(4) .... passim

ERISA Section 203, 29 U.S.C. §1053 23

ERISA Section 204(g), 29 U.S.C. § 1054(g) 18

ERISA Section 208, 29 U.S.C. Section 1108 ....13, 14

ERISA Section 404(a) 26, 27

ERISA Section 404(a)(1) .... passim

ERISA Section 406(b)(2) .... passim

ERISA Section 406(b)(3) .... passim

ERISA Section 410 16

ERISA Section 410(a) 16

ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3) 22, 23

ERISA Section 503(2), 29 U.S.C. § 1133(2) 28

OTHER AUTHORITIES

29 C.F.R. Section 2509.08-2 30

29 C.F.R. Section 2509.94–2 (1994) 30

29 C.F.R. Section 2560.503-1(g)(ii) 28

29 C.F.R. Section 2520.102-3-(*l*)(2) 21, 22

SUMMARY OF ARGUMENT

Appellant's brief anticipated almost all of the Appellees'[1] arguments and factual and legal inaccuracies proffered in their separate briefs. This Reply focuses upon Appellees' new arguments and most egregious inaccuracies.

Verizon's brief completely ignores the heart of Appellant's claims against Verizon. Arguments that Verizon advances about ERISA not applying to a decision to alter a plan's design by amendment have no application to this case. Here, plan fiduciaries worked at the behest of an employer and against the best interests of retirees well before the employer adopted any plan amendment. Appellants claim that Verizon plan fiduciaries engaged in conduct prohibited by ERISA, otherwise breached their duty of loyalty and violated the terms of the multiple pension plans and ERISA by facilitating or causing the employer to transfer retirees *before* there was any amendment purportedly effecting plan design changes.

[1] Appellees are referred to separately as "Verizon," referring to Verizon Communications, Inc. ("VCI"), Verizon Employee Benefits Committee ("Verizon EBC") and other Verizon-related appelles, and "SuperMedia EBC," referring to the SuperMedia, Inc. Employee Benefits Committee ("SuperMedia EBC").

SuperMedia EBC's brief wrongly insists that it was not required to make certain disclosures to Appellants. As plan fiduciaries to Appellants and all other retiree class members (hereinafter "Class"), SuperMedia EBC should have disclosed a variety of information requested by Appellants during the pre-litigation claims procedure.

The Court should reverse the judgment of the District Court, direct it to enter partial summary judgment for Appellants, and remand this case for further proceedings.

ARGUMENT

I. The District Court Erred In Ruling The Verizon EBC Did Not Violate ERISA Section 406(b)(2), And In Failing To Address Appellant's ERISA Section 406(b)(3) Claim.

When the spinoff of Idearc, Inc. ("Idearc") occurred and Appellants were removed from Verizon's pension plans and transferred into Idearc's pension plans, there were <u>no</u> plan terms to authorize the removal. Notwithstanding their lack of any authority to do so, Verizon EBC members acted, in secrecy, on VCI's behalf and against the interest of retirees, in order to effectuate the transfer of retirees. In so doing, they acted in their "individual or in any other capacity act in [a] transaction involving the plan on behalf of a party. . . . whose interests are adverse to the

interests of the plan or the interests of its participants or beneficiaries," a violation of ERISA Section 406(b)(2) by its plain terms.

As soon as the spinoff was consummated, each Verizon EBC member received valuable consideration from VCI in the form of newly issued Idearc shares of corporate stock. In doing so, each received "consideration for his own personal account from [a] party dealing with such plan in connection with a transaction involving the assets of the plan." That was a violation of ERISA Section 406(b)(3) by its plain terms.

ERISA Section 406(b)(2), 29 U.S.C. § 1106(b)(2), prohibits a fiduciary, while acting in any capacity, from engaging in a transaction that benefits another party at the expense of the plan's beneficiaries or participants. While not disputing that Verizon EBC members were fiduciaries, Verizon contends that all were acting in a settlor capacity when they secretly included the retirees in the spinoff transaction. The interpretation of ERISA Section 406(b)(2) thereby espoused by Verizon, and adopted by the District Court, is that the statute only prohibits an ERISA fiduciary from being involved in a transaction that is not best for the plan participants and beneficiaries when acting in a fiduciary capacity. This simply ignores the plain language of the provision prohibiting a fiduciary from acting in any capacity in a

transaction involving the plan's assets that is contrary to the best interests of the participants and beneficiaries.

This Court must "assum[e] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251, 130 S.Ct. 2149, 2156 (2010). Verizon's interpretation of ERISA Section 406(b)(2) is also strongly disfavored by the rule that statutes should be read to avoid superfluity. Under this "most basic of interpretative canons, ... '[a] statute should be constructed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009). Verizon's reading renders meaningless the language "in his individual or in any other capacity" within ERISA Section 406(b)(2).

Verizon seeks to misdirect this Court's attention from the issue posed by Appellant's claim under ERISA Section 406(b)(2) by claiming that a spin-off is a not a prohibited transaction under Section 406. That is not the issue. The issue is whether the fiduciaries should have had any involvement in the spinoff transaction once it was readily known that retirees' best interests were not to be satisfied by the transaction. Verizon coyly acknowledges, because it cannot dispute, Appellant's contention that, even though Idearc leadership pleaded with Verizon not to transfer

the retirees, Verizon was determined to move ahead at full-steam. Verizon believed that if Verizon had maintained the retirees that action would have "decreased the combined, post spinoff value of Verizon and Idearc." (Verizon Brief, p. 14, n. 4).

Verizon cannot hide behind the false pretense that plan fiduciaries acted properly because they had the shield of a financial "solvency opinion," that issued by Houlihan Lokey on or before October 18, 2006, the date the VCI board of directors approved the spinoff. (Verizon Brief at p. 11; ROA.1262). The solvency opinion was issued weeks *before* there was a decision and agreement to include the Class in the spinoff transaction and before $700 million in pension assets was transferred.[2] Moreover, a solvency opinion is not the equivalent of an independent fiduciary's decision.[3] Indeed, during this same time period, soon-to-become Idearc leadership had obtained an independent consultant's advice that concluded, "[o]verall, Verizon is in a better overall position to continue covering the retirees under their programs". (ROA.2276; ROA.2713-2714, 37:19-38:10; ROA.2716,

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2 The validity vel non of that solvency opinion, premature as it was in this context, is the subject of a separate appeal pending before this Court, *U.S. Bank National Association v. Verizon Communications, Inc., et al.; Case No. 05-13-10752*.

3 Verizon EBC did not obtain a written opinion from either independent counsel or an independent fiduciary regarding the advisability of transferring Appellants to the spinoff entity. (ROA.2365, ¶¶ 204 and 206).

40:18-25). That is to say, the soon-to-become Idearc leadership was requesting Verizon not to include the Class in the spinoff transaction.[4]

Verizon's cram-down tactic of shifting to the spinoff entity all of the financial responsibility for Class members' retirement benefits, and related retiree welfare benefits, increased the financial burden of Idearc *after* the solvency opinion had been issued by Houlihan Lokey. The agreement to include the Class in the transaction actually occurred only on the last day before the spinoff, November 17, 2006. (ROA.2271, ¶7; ROA.2312-2313). Inclusion of the Class members was without their knowledge and consent and against the clearly expressed will of the soon-to-become Idearc leadership. The transfer of the huge financial obligation for all of the retirees' retiree welfare benefits in particular significantly contributed to the inevitable financial collapse of Idearc. Indeed, Verizon provided no funding whatsoever to Idearc to pay for the retirees' welfare benefits (health care, life insurance, etc., also known as other post-employment benefits, or "OPEBs"). (ROA.2272, ¶13).

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[4] In response to the request of incoming executives of Idearc that Verizon maintain responsibility for retirement benefits of Class members, VCI chairman and chief executive officer Ivan Seidenberg wrote in an October 7, 2006 email that he spoke with one of them, putative chief executive officer and president Kathy Harless, and told her "this is a dead on arrival;" he "advised her to **stay out of the way**…" (emphasis added) (ROA.2559; ROA.2271, ¶6; ROA.2686-2687, 53:9-54:20).

Verizon does not refute Appellant's contention that, by enacting ERISA Section 406(b)(2), prohibiting any transaction between a pension plan fiduciary and a "party in interest," Congress intended to prevent the fiduciary from "being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries." *N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc.*, 453 U.S. 322, 333–34, 101 S.Ct. 2789, 2796 (1981) (internal quotations omitted). The only correct reading of ERISA Section 406(b)(2) is, thus, that fiduciaries shall simply not take the actions specified in that provision of ERISA, whether or not acting as fiduciaries in doing so, given their status as ERISA fiduciaries.

While not directly interpreting ERISA Section 406(b)(2), this Court has recognized that a fiduciary is required to "refrain from conduct that would involve or create a conflict between its fiduciary duties and personal interests." *Kujanek v. Houston Poly Bag I, Ltd.*, 658 F.3d 483, 488 (5th Cir. 2011). Pension fiduciaries should "avoid placing themselves in a position where their acts as officers and directors of the corporation will prevent their functioning with the complete loyalty demanded of them as trustees of a pension plan." *Donovan v. Bierwith*, 680 F.2d 263, 271 (2nd Cir. 1982) (suggesting that conflicted fiduciaries should conduct an independent investigation before following a course of action that provides

substantial benefits to the employer; *Leigh v. Engle*, 727 F.2d 113, 125-26 (7th Cir. 1984). Accordingly, once the decision was made to conduct a spinoff, Verizon EBC members should have recused themselves from participating in the behind-the-scenes transaction, and advocated that Class members maintain their participation in Verizon's employee benefit plans.

The District Court rejected this conclusion, and instead adopted Verizon's contention that Section 460(b)(2) only applies to plan fiduciaries acting in a fiduciary capacity, and that, when Verizon EBC members were taking action to carry out the spinoff, they were not acting in a fiduciary capacity, but only in a corporate settlor capacity. (ROA.6029-6032).

The District Court erred in so ruling. Clearly, the language of ERISA Section 406(b)(2) "is a blanket prohibition against a fiduciary's 'act[ing] on behalf of' or''represent[ing]' a party with interests 'adverse to the interests of the plan' in relation to a transaction with the plan."[5] *Reich v. Compton*, 57 F.3d 270, 287-88 (3rd Cir. 1995). Both prior to and on the spinoff date, Verizon EBC members facilitated the financial interests of VCI and its shareholders by transferring

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5 The Reich court emphasized the application of Section 406(b)(2) whether or not any issue of fiduciary duty was involved, stating "[t]hus, this provision, like the prohibited transaction provisions of section 406(a)(1), applies regardless of whether the transaction is 'fair' to the plan." *Id.* at 288.

Appellants out of VCI's pension plans so as to eliminate VCI's obligations to the retirees. Their doing do was a per se violation of Section 406(b)(2).

Verizon argues there is no record evidence that the interests of Verizon and the Class were "adverse" within the meaning of ERISA Section 406(b)(2). (Verizon Brief at 39-40). In the District Court, this issue was neither raised nor decided. Under Section 460(b)(2), the term "adverse" does not require that the interests be antithetical, but only that they are different. *International Broth. of Painters and Allied Trades Union and Industry Pension Fund v. Duval*. 925 F.Supp. 815, 825 (D. D.C.1996); *Compton*, 57 F.3d at 287. Concerning the purpose and meaning of ERISA § 406(b)(2), and the breadth of the provision's coverage, ERISA's drafters stated:

> . . . [T]he labor provisions (but not the tax provisions) prohibit a fiduciary from acting in any transaction involving the plan on behalf of a person (or representing a party) whose interests are adverse to the interests of the plan or of its participants or beneficiaries. This prevents a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.

(emphasis added). Joint Explanatory Statement of the Committee on Conference, House Conference Report No. 1280, 93d Cong., 2d Sess., reprinted in, 1974 U.S.Code Cong. & Ad.News 5038, 5089.

Here, it is undisputed that, as a result of their transfer to Idearc, Appellants eventually lost welfare benefits tied to Appellant's status as pension plan participants. The record also includes irrefutable evidence that the soon-to-become Idearc leadership did not want the retirees' benefit obligations transferred and that Verizon wanted the retirees transferred in order to enhance shareholder value. Finally, the record also includes Appellant's affidavits attesting to the fact they were transferred without their knowledge and consent. (ROA.2742-2743, ¶9; ROA.2747-2748, ¶¶9-10). Hence, there is sufficient evidence in the record from which a reasonable factfinder could find the presence of adverse interests in this case.

Clearly, Verizon EBC members placed themselves in a position with dual loyalties, but dishonored their primary ERISA duty of loyalty in failing to act exclusively for the benefit of the pension plans' participants and beneficiaries. "At the heart of the [ERISA] fiduciary relationship is the duty of complete and undivided loyalty to the beneficiaries of the trust." *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629, 639 (W.D. Wis.1979). VCI senior executives comprising the Verizon EBC were actively engaging in promoting corporate shareholder value over the interest of retirees. They participated in both the process of implementing the spinoff and implementing the decision regarding the disposition of the retirees and

plan assets on behalf of Verizon, the plan, and the spinoff entity. The latter decision, moreover, was *imposed* upon Idearc. (ROA.2270-2271, ¶4; ROA.2487). Since inclusion of the retirees was thereby not an arms-length transaction, Verizon fiduciaries were necessarily acting on both sides of the transaction and not negotiating the best terms for the retirees.

Verizon EBC fiduciaries should, in the ultimate event, have recused themselves and, at the very least, appointed a neutral independent fiduciary to act on behalf of the retirees. As explained in Appellant's brief, *Iron Workers Local # 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980) dictates a reversal of the District Court's ruling in light of the failure of Verizon EBC members to properly act in that manner. (Appellants Brief, p. 29).

When ruling upon Appellant's Count Three of the Second Amended Complaint, the District Court erred when interpreting ERISA Section 406(b)(2). The erroneous disposition of Count Three was exacerbated by the fact that there was <u>no</u> ruling on Appellant's contention that a violation of ERISA Section 406(b)(3) also occurred when, as a result of the spinoff being consummated, Verizon EBC members received valuable consideration for their own personal account. (See generally, ROA.6028-6032). Verizon contends that since the fiduciaries received the same consideration as did all other Verizon shareholders as a result of the spinoff

transaction – which included the transfer of pension assets, retirees and the responsibility for payment of all retirement benefits – there could be no violation of ERISA Section 406(b)(3). (Verizon Brief, pp. 41-42). However, the issue was simply ignored by the District Court.

It is undisputed that the Appellants and Class members were transferred as part of a scheme to enhance VCI shareholder value and that the transaction resulted in a distribution of Idearc stock to members of the Verizon EBC. The shares distributed to the plan fiduciaries were the direct result of the corporate spinoff transaction involved the transfer of over $700 million of pension plan assets. Had Verizon EBC and plan administrators not involved themselves in the transaction, there would be no basis for Appellants to complain that Verizon EBC members received a distribution of shares of stock after the spinoff. But the fact that they were intimately involved with a major component of the spinoff transaction underscores their exposure under ERISA Section 406(b)(3).

Accordingly, the Court should reverse the District Court's ruling granting Verizon summary judgment on Appellant's Third Claim for Relief in the Second Amended Complaint. The District Court should be directed to enter summary judgment in favor of Appellants on their ERISA Section 406(b)(2) claim and their

ERISA Section 406(b)(3) claim, and the matter should be remanded for further proceedings.

II. The District Court Erred In Ruling That The Involuntary Transfer Of The Verizon Retirees Did Not Violate The Verizon Plan Fiduciaries' Duty Of Loyalty Under ERISA Section 404(a)(1).

When the Idearc spinoff occurred on November 17, 2006, there was no existing plan document that provided for or directed the affected retirees to be removed from Verizon's pension plans and transferred elsewhere. In Count Four of the Second Amended Complaint, Appellants contend that not only was there no basis for the transfer of Appellants to Idearc's pension plan, the transfer, not authorized by the Verizon pension plans, was, as such, violative of the Verizon EBC's fiduciary duties imposed under ERISA Section 404(a)(1).

Verizon's principal argument against Count Four of the Second Amended Complaint is that the transfer and allocation of assets between the Verizon master trust and the Idearc master trust did not run afoul of ERISA Section 208, 29 U.S.C. Section 1108, and the accompanying regulations. (Verizon Brief, pp. 20-22). It is true that compliance with ERISA Section 208 and the regulations ends any inquiry about whether there was a breach of fiduciary duty with respect to the allocation of pension assets in a spinoff. But that has always been an issue irrelevant to this case. Appellants make no challenge as to Verizon's transfer and allocation of pension

assets. Instead, Appellants directly challenge the unauthorized and non-consensual transfer of retirees. No such similar challenge about transferring retirees was made in any of the cases cited by Verizon in support of its arguments that there was compliance with ERISA Section 208 requirements for asset transfers. Indeed, other than the case of *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir.1994), *aff'd on other grounds*, 516 U.S. 489, 116 S.Ct. 1065 (1996), addressed in Appellant's brief, in which the appellate court ruled that the involuntary transfer of retirees to a new entity was a breach of fiduciary duty, there are no other reported cases concerning legal challenges made about transferred retirees.

While compliance with ERISA Section 208 suffices for fiduciary correctness with regard to allocating pension assets, it does not foreclose consideration of the propriety, under ERISA Section 404(a)(1), of other conduct. That being the case, the transfer of retirees is subject to examination as a breach of fiduciary duty. Verizon claims retirees could be transferred because assets were transferrable. Verizon fails to explain how retirees, plan participants and their beneficiaries can be equated with assets. (Verizon Brief, pp. 38-30).

Verizon has not and cannot seriously contend that the assets transferred to Idearc were those to which the retirees had rights or were connected. *Hughes Aircraft v. Jacobson*, 525 U.S. 432, 439-440, 119 S.Ct. 755, 761 (1999) ("no plan

member has a claim to any particular asset that composes a part of the plan's general asset pool."). Verizon nevertheless claims to have decided that the $700 million of transferred master trust assets were connected only to Appellants and the Class of retirees, and not connected to any other Verizon retirees. That argument is precluded by *Hughes*.

Furthermore, the facts set forth in Appellant's brief, none of which are disputed by any of the Appellees, demonstrate that Verizon EBC transferred retirees to Idearc at a time it had no authority to do so. Specifically, on November 1, 2006, Verizon transferred to Idearc 584 retirees, together with $471 million of Verizon Management Pension Plan assets. (Appellant's Brief, p. 9, ¶ 14; ROA.2757; ROA.2952). On November 17, 2006, 1,278 retirees and beneficiaries in annuity pay status, and 743 retirees with deferred vested pensions, together with $286 million of union pension plan assets, were transferred from Verizon's union plans over to Idearc. (Appellant's opening brief, p. 9, ¶21; ROA.2757; ROA.2952). Only on December 22, 2006 did VCI amend the pension plans to include new terms so as to permit the transfer of retirees to Idearc. The pension plan amendments were made retroactive to November 17, 2006. However, no pension plan amendment was ever made retroactive to November 1, 2006, when Verizon fiduciaries first jumped the gun and transferred the first 584 retirees. Therefore, no

plan authority existed to authorize Verizon EBC and plan fiduciaries to transfer retirees on November 1, 2006. Verizon does not point to any terms of Verizon pension plans, as they existed on the dates during November 2006 when Appellants and Class members were transferred, that permitted the plan sponsor to either remove, sell, trade, barter, or involuntarily transfer a select group of retirees.

The District Court erred by not addressing Appellant's argument that Verizon wrongly retroactively applied plan amendments adopted weeks after the spinoff, after the retirees were transferred, to justify their transfer.

When the first wave of retirees were transferred on November 1, 2006 and the final wave of retirees and assets were transferred on November 17, 2006, existing Verizon pension plan terms permitted only the transfer of assets or liabilities. There were no existing terms or provisions allowing Verizon to involuntarily remove retirees and transfer them to Idearc. Accordingly, the transfers of retirees amounted to a breach of the plans, and as such, a breach of fiduciary duty when the occurred. In light of ERISA Section 410, this breach of fiduciary duty could not be subsequently excused. ERISA Section 410(a), states in relevant part ". . . any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a).

By applying the post-spinoff amendments retroactively to November 17, 2006, Verizon unlawfully sought to cover fiduciary misconduct under both Section 404(a)(1) and 406(b)(2). Because it could not do so, no part of the transfer of retirees to Idearc pension plans can stand. Appellants simply could not properly be denied the a valuable right they had earned - - the right to continue to receive their vested pensions from Verizon's pension plans until such time as there was another merger or termination of the plans.[6]

When Verizon EBC removed Appellants from Verizon's plans, Verizon fiduciaries breached both their duty of loyalty to the retirees and their duty to continue administering benefits in strict accordance with existing plan terms. Those breaches were compounded by Verizon EBC is improper participation in Verizon's retroactive application of pension plan amendments adopted after the retirees had been surreptitiously transferred to Idearc. All such breaches violated ERISA Section 404(a)(1).

In their brief, Appellants correctly anticipated and thoroughly addressed Verizon's inapplicable argument that Appellants cannot challenge under ERISA the *decision* to amend the pension plans. Verizon, nevertheless, reiterates the

[6] Even if the District Court were to decree that the December 22, 2006 plan amendments were allowed to be retroactively effective as of November 17, 2006, Verizon is still on the hook, at least in part, since the plan amendments were not made retroactive to November 1, 2006. (ROA.1580, 1593, 1613-14, 1635-46).

anticipated and defeated arguments and even posits issues which form no part of Appellant's legal challenge in this case.[7] It is not the decision to amend the pension plans that is challenged by the Second Amended Complaint, but *conduct* which took place well before the pension plans were formally altered and amended.

This conduct included: 1) failing to communicate to the retirees about the decision Verizon was imposing upon Idearc despite the request made by soon-to-become Idearc leadership that the retirees not be transferred; 2) failing to communicate to the retirees that they would be transferred against the will of soon-to-become Idearc leadership because Verizon determined there would be an enhancement to corporate shareholder value; 3) discriminatorily selecting management retirees receiving annuities, nonmanagement retirees receiving annuities and nonmanagement retirees with deferred vested pensions to be transferred to Idearc's pension plans, but maintaining and protecting in Verizon's pension plans all management retirees with deferred vested pensions; 4) failing to inform retirees that Idearc might not be a reliable source of pension and welfare benefits and that, since Verizon was not giving any funding to Idearc for the retirees' welfare benefits, the retirees may need to make alternative arrangements for the

[7] On pages 32-33 of their brief, Verizon needlessly proffers arguments about ERISA's anti-cutback provision, ERISA Section 204(g), 29 U.S.C. § 1054(g), when no such legal issue was either raised in the Second Amended Complaint or argued in Appellants' Brief.

welfare benefits they had become accustomed to receiving; 5) failing to inform the retirees that Idearc was totally unprepared to attend to the administrative needs of the retirees and, therefore, Verizon would be providing administrative services; 6) failing to appoint an independent fiduciary, since the Verizon pension fiduciaries were clearly faced with a most troubling conflict of interest;[8] and 7) failing to seek an advisory opinion from the United States Department of Labor ("DOL") regarding the planned transfer of retirees.

This Court should reverse the District Court's ruling determining Verizon EBC's conduct did not violate the fiduciary duty of loyalty imposed by ERISA Section 404(a)(1). This Court should further direct the District Court to enter summary judgment in favor of Appellants on their Fourth Claim for Relief in the Second Amended Complaint and remand the claim for further proceedings.

[8] Directors that are corporate insiders considering a merger, sale or similar transaction avoid liability for breach of the duty of loyalty only by appointment of a committee of independent directors to consider the decision in question. *See Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). The parallel to the *Revlon* duties of corporate directors under Delaware law is instructive.

III. The District Court Erred In Ruling That the Verizon Plan Fiduciaries Did Not Breach Their Duty to Disclose in a Summary Plan Description That One Means Whereby Verizon Pension Benefits Could be Lost Was a Corporate Spinoff and Transfer of the Retirees.

As explained in Appellant's brief, Class members, because they were service pension-eligible and participants in Verizon's pension plans, were made eligible for a panoply of retirement-related welfare benefits. The SPDs issued to retirees informed them of their expected benefits as participants in the Verizon pension plans included eligibility rights to annuity pensions *and* welfare benefits provided by Verizon. (ROA.1668; ROA.2163 "Retiree pension, healthcare and insurance eligibility"; ROA.2915). Further, the SPDs issued to retirees informed them that Verizon was obligated to continue paying their monthly pension benefits for life. (ROA.2394; ROA.2421 "your benefit will continue to be paid by Verizon without change."). Before the spinoff, the SPDs informed the retirees that Verizon had the right to transfer assets or liabilities. There was no mention within any of the SPDs that, under the same existing plan terms, Verizon had an at-will right to transfer Appellants and Class members and make them no longer eligible for Verizon retirement and retiree welfare benefits. (ROA.2395-2397; ROA.2423-2425;

ROA.2453-2454). Verizon conceded "the SPDs' silence on the subject." (ROA.3027).[9]

ERISA Section 102(b) requires, in part, that a pension plan administrator provide each plan participant with an SPD which describes the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b). The implementing regulation of the Department of Labor expands on the statutory obligation. 29 C.F.R. Section 2520.102-3-(*l*)(2). In Count Two of the Second Amended Complaint, Appellants contend Verizon did not comply with either the statutory provision or the DOL regulation.

When granting summary judgment favorable to Verizon, the District Court agreed with Appellants that the spinoff "transfer presented a possible circumstance which could result in a loss of benefits. . . ." (ROA.6034). However, the District Court erroneously ruled that the statute and regulation did not specifically require Verizon and the Verizon pension plan fiduciaries to disclose within the SPDs that a select group of retirees could, someday, be removed from an ongoing Verizon pension plan and transferred into another employer's pension plan. The District Court reasoned that in the District Court ". . . the mere fact that the plaintiffs here

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[9] In the lower court, Verizon did not present any evidence to dispute Appellants' testimony proving that there was no disclosure of the fact that a corporate spinoff and consequential transfer of pension obligations could result in the retirees' loss of Verizon pension benefits. (ROA.2741-2742, ¶¶ 3-5; ROA.2746-2747, ¶¶ 3-5; ROA.2751, ¶¶ 3-5).

were participants in a Fortune 50 pension plan should have been enough to put them on notice. . ." (ROA.6035). The District Court also erroneously ruled that, since Verizon had disclosed in a reservation of rights clause set forth within the SPDs that the corporation retained the right to make future plan changes, Verizon had the *implicit* right to <u>selectively</u> remove some retirees. (ROA.6017-6018).

Verizon's brief does not adequately address either Appellants' argument that the retirees were not fully informed or their argument insertion of a generic reservation of rights clause into an SPD does not fulfill applicable statutory and regulatory requirements. Verizon has no retort to Appellant's contention that, even if Verizon disclosed there might be changes made to the pension plans, 29 C.F.R. Section 2520.102-3-(*l*)(2) and other "regulations require considerably greater clarity." *Koehler v. Aetna Health Inc*., 683 F.3d 182, 189-190, and fn14 (5th Cir. 2012). Rather, Verizon tries to focus on whether Appellants showed sufficient harm due to the disclosure violation. (Verizon Brief at pp. 46-49). The factual and legal issue concerning whether retirees were harmed was not addressed by the District Court. It should have been. Appellant's disclosure violation claim seeks relief pursuant to ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), under which a district court may invoke its equitable powers. *CIGNA Corp. v. Amara*, __ U.S. __, 131 S. Ct. 1866, 1878-80 (2011). In order to impose an equitable remedy, the

District Court should consider two questions: (1) what remedy is appropriate; and (2) whether Appellants have established the requisite level of harm as a result of the notice violation. *Frommert v. Conkright,* 738 F.3d 522, 534 (2nd Cir. 2013). This Court should, accordingly, remand with instructions for the District Court to consider the issue of harm to retirees from the disclosure violation.

With respect to the reservation of rights issue, Verizon only points out that when such a clause is present in plan documents, retiree welfare benefits are not benefits vested for life. Verizon brief, pp. 49-50. As Verizon well knows, that is not the case for pension benefits. ERISA Section 203, 29 U.S.C. §1053. What Appellants have contended all along is that the retirees, entitled to pension benefits, should have received such pension benefits under Verizon's pension plans, and only so long as provided to non-transferred retirees, concomitantly promised retiree welfare benefits. Appellants and the other members of the Class were provided with neither. The retirees are accordingly entitled to receive equitable relief, pursuant to ERISA Section 502(a)(3), in the form of reinstatement into Verizon's plans with restoration of all pension benefits, and all associated welfare benefits as continue to be provided to Verizon retirees, in order to make them whole so as to be treated the same as all other non-transferred retirees. See *Henry v. Champlain*

Enters., Inc., 445 F.3d 610, 624 (2nd Cir. 2006) (Sotomayor, J.) ("The aim of ERISA is to make the plaintiffs whole, but not to give them a windfall.").

Accordingly, the Court should reverse the District Court's ruling granting Verizon summary judgment on Appellant's Second Claim for Relief in the Second Amended Complaint. The District Court should be directed to enter summary judgment in favor of Appellants on that claim, and the claim remanded for further proceedings.

IV. The District Court Erred In Ruling That ERISA Section 404(a)(1) Does Not Create Document Disclosure Obligations By Plan Administrators Beyond Those Documents Specifically Listed in ERISA Section 104(b)(4).

In Count One of their Amended Complaint, Appellants asserted an ERISA Section 404(a)(1) claim against both the Verizon EBC and the SuperMedia EBC contending that they breached a duty of loyalty by not disclosing requested plan documentation and information during a pre-litigation administrative claims process. As set forth in paragraphs 85 through 103 of the Amended Complaint, there was a plethora of requested plan related information that the Appellees refused to give to Appellants. (ROA.107-111). Appellees' refusal to reveal the requested information was simply a display of contumacious effrontery despite their obligation to act as a fiduciary in the best interests of plan participants and beneficiaries.

The District Court erroneously ruled in its Rule 12(b)(6) dismissal order that "ERISA section 404(a)(1), however, does not create additional disclosure obligations beyond those found in ERISA section 104(b)(4)," citing *Ehlmann v. Kaiser Foundation Health Plan of Texas,* 198 F.3d 552, 555 (5th Cir. 2000), *cert. dismissed*, 530 U.S. 1291, 121 S.Ct. 12 (2000). (ROA. 463-464).

While the dismissal order was issued in response to SuperMedia EBC's motion to dismiss, it became the law of the case and, effectively, served to dismiss the same claim which had been asserted against the Verizon EBC. The District Court had quite clearly given its view of the viability of this claim, a view which would not have been made any clear or more final by requiring the Appellants to re-allege the already rejected claim. Therefore, Appellants did not waive or abandon the claim by acting in compliance with the law of the case and not reasserting the dismissed claim in the subsequently filed Second Amended Complaint. (Verizon Brief, pp. 51-52). "In federal practice any question which has been presented to the trial court for a ruling and not thereafter waived or withdrawn is preserved for review." *United States v. Harue Hayashi*, 282 F.2d 599, 601 (9th Cir.1960); *Davis v. TXO Prod. Corp.*, 929 F.2d 1515, 1518 (10th Cir.1991) ("We believe that a rule requiring plaintiffs who file amended complaints to replead claims previously dismissed on their merits in order to preserve those claims merely

sets a trap for unsuspecting plaintiffs with no concomitant benefit to the opposing party.... The district court's dismissal of the claim made clear that any attempt by appellant to re-allege that claim would be futile." (footnotes and internal citations omitted)); *Radiology Associates of San Antonio, P.A. v. Aetna Health, Inc.*, Not Reported in F.Supp.2d, 2006 WL 3247353 at *2 (W.D. Tex August 2, 2006).

SuperMedia EBC defends the District Court's ruling by arguing that this Court has ruled "[i]t would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed." *Id.* SuperMedia EBC overreads and takes out of context this Court's ruling in *Ehlmann*, which ruling only pertained to *reporting* disclosures, i.e., what must be published in handbooks and SPDs distributed to plan participants and beneficiaries. This Court ruled, "ERISA imposes no reporting requirements outside those specifically enumerated at 29 U.S.C. §§ 102 – 1031. (emphasis added). *Id.* at 556, n.4. This Court reserved, however, any more expansive ruling, stating "[w]e do not pass on what sort of disclosure, if any, that Section 404 might require given a specific inquiry from a plan member or given some other special circumstance." *Id.* at 556.

As contemplated by the panel of judges in *Ehlmann*, this case presents the very situation where specific inquiries were made by Appellants during

pre-litigation administrative proceedings and circumstances dictated disclosure being made by the plan administrators. Here, Appellants made special inquiry on behalf of a class of retirees, and they clearly sought information related to their involuntary removal from Verizon's plans and their transfer into Idearc's plans.[10] An ERISA fiduciary has a duty to disclose "material facts affecting the interest of the beneficiary which the fiduciary knows the beneficiary does not know but needs to know for his protection." *Kujanek, supra,* 658 F.3d at 488 (quoting *Martinez v. Schlumberger, Ltd*., 338 F.3d 407, 412 (5th Cir. 2003)). The plan administrator's duty to disclose is not confined to those documents specifically listed within ERISA Section 104(b), which imposes per diem penalties when there is non-disclosure. Courts have recognized the obvious: "Many items that do not qualify as documents that govern the establishment or operation of a plan for purposes of section 1024(b)(4) may qualify as documents that are relevant to a plan participant's claim for benefits" and, therefore, should be disclosed to the requesting participant. *Grant v. Eaton Disability Long-Term Disability Plan*, Not Reported in F.Supp.2d, 2013 WL 485868 at *5 (S.D. Miss. February 6, 2013) (quoting *Mondry v. American Family Mut. Ins. Co*., 557 F.3d 781, 798-99 (7th Cir. 2009). SuperMedia EBC

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10 Contrary to SuperMedia EBC's argument, the retirees' claim asserted under ERISA Section 404(a) is not limited to the fiduciaries' failure to produce investment guidelines. (Appellee SuperMedia EBC's Brief at pp. 4).

breached its fiduciary duty to Appellants since the requested information and documents withheld were "pertinent documents," pursuant to ERISA Section 503(2), 29 U.S.C. § 1133(2), and 29 C.F.R. § 2560.503-1(g)(ii).

During Appellant's administrative claims proceedings, the fiduciaries had a duty "to deal fairly" and "to communicate ... all material facts the trustee kn[ew] or should know in connection with the matter." Restatement (Third) of Trusts § 78 (2007). Instead of being transparent and informing the Appellants, the plan administrators chose to be uncooperative, stonewalled Appellants and kept them uninformed about the spinoff transaction and withheld requested information that would explain Appellant's predicament. Plan administrators made the internal claims process futile and Appellant's only avenue by which to acquire the requested information was to conduct formal discovery within this civil action, a prolonged, tortuous and needlessly expensive process.

Accordingly, this Court should reverse the District Court's dismissal of that portion of Appellant's First Claim for Relief of the Amended Complaint that plan administrators breached ERISA Section 404(a)(1) duties to provide requested information during the internal administrative claims proceeding and remand for further proceedings.

V. The District Court Erred In Ruling That Investment Guidelines Are Not Instruments Dictating the Operation Of A Pension Plan Required Under ERISA Section 104(b)(4) To Be Disclosed To Requesting Plan Participants.

In Count Two of the Amended Complaint, Appellants asserted that both Verizon EBC and SuperMedia EBC violated ERISA Section 104(b)(4) when refusing to produce certain requested documents under which the pension plans are operated, including investment guidelines. (ROA.111-113, ¶¶104-112). Appellants specifically alleged they had made written request for production of the pension plan's investment policy guidelines because those documents constitute an "instrument" under which the pension plan is "established or operated," within the meaning of ERISA Section 104(b)(4). (ROA.112, ¶¶106-07). The District Court erroneously held that, since Appellants had not specifically alleged that SuperMedia's pension plans were required to comply with investment guidelines, there was no claim stated upon which relief could be granted. (ROA.463). This contention was not even raised by any of the Appellees. (ROA.333).

Now, SuperMedia EBC defends the District Court's ruling by contending that neither Congress nor the DOL have indicated investment guidelines are required to be disclosed since they are instruments under which a pension plan is operated. False. SuperMedia EBC pays no homage to the fact that the DOL has clearly interpreted ERISA Section 104(b) to mean that investment guidelines are

instruments under which a pension plan is operated. Under the DOL's guidance, an investment policy is a governing plan document:

> Statements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the 'documents and instruments **governing** the plan' within the meaning of ERISA § 404(a)(1)(D).

(emphasis added). 29 C.F.R. § 2509.94–2 (1994) (superseded in 2008 by 29 C.F.R. § 2509.08-2).

SuperMedia EBC does not even acknowledge the DOL's addressing the issue. SuperMedia EBC, likewise, does not contest the case law holding that investment policy statements are governing plan documents. (Appellant's Opening Brief, p. 61).

The Supreme Court has said that "[a fiduciary] is obligated to disclose characteristics of the plan and of those who provide services to a plan, if that information affects beneficiaries' material interests." *Pegram v. Herdrich*, 530 U.S. 211, 228 n. 8, 120 S.Ct. 2143, 2154 n. 8 (2000). The DOL has correctly reasoned that investment policy guidelines are the very type of documents contemplated by ERISA Section 104(b)(4). Such documents, upon disclosure, would allow "the individual participant [to] know [] exactly. . . who are the persons to whom the management and investment of his plan funds have been entrusted." *Hughes Salaried Retirees Action Comm. v. Adm'r of the Hughes Non-Bargaining Ret. Plan*,

72 F.3d 686, 690 (9th Cir. 1995) (quoting S.Rep. No. 127, 93rd Cong., 2d Sess. (1974), reprinted in 1974 U.S.C.C.A.N. 4838, 4863).

Accordingly, this Court should reverse the District Court's dismissal of Appellant's Second Claim for Relief of the Amended Complaint that plan administrators failed to comply with ERISA Section 104(b)(4) when they failed to produce requested pension plan investment guidelines, and remand for further proceedings.

CONCLUSION AND PRAYER

For the foregoing reasons, the Court should reverse the judgment of the District Court; award Appellants their costs and attorney's fees; and remand this case for further proceedings.

Dated: April 7, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2014, I electronically transmitted the attached document to the Clerk of the Court of the 5th Circuit Court of Appeals using the ECF System of the Court. Counsel for the Appellees are registered in this case and will be served with the brief via the ECF system. The electronic case filing system will send 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/ *Curtis L. Kennedy*
Curtis L. Kennedy

CERTIFICATE OF COMPLIANCE

This reply-brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and (C) because:

1. This reply-brief contains 6,782 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This reply-brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the text of this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point font, and the footnotes of this brief are in Microsoft Word in Times New Roman 12 point font.

I hereby certify that: A) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; B) the electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; C) the document has been scanned for viruses suing Symantec Internet Protection active scan and is free of viruses; and D) 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.

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