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

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

VERIZON'S MOTION TO STRIKE AND FOR A PROTECTIVE ORDER

Defendant Verizon Communications Inc. ("Verizon") hereby moves for a protective order and to strike document number 101-1 from the docket.

For the reasons set forth in the accompanying memorandum, Verizon hereby moves the Court to enter an order requiring counsel for plaintiffs to return or destroy, and to refrain from relying on and/or disseminating, any joint privilege materials produced by Verizon in connection with the action captioned *U.S. Bank, N.A., v. Verizon, et al.*, No. 3:10-cv-01842 (N.D. Tex.). Verizon also respectfully requests that the Court strike document number 101-1, which represents one such joint privilege document, from the docket.

Dated: January 6, 2012

Respectfully submitted,

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

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

Attorneys for the Verizon Defendants

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Verizon requested by letter on December 30, 2011, that plaintiffs' counsel confirm that he would return to Verizon or destroy, and refrain from relying on and/or disseminating, any privileged documents in his possession, custody or control, which is the subject of the instant motion. To date, counsel for plaintiffs has not responded to Verizon's request.

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2012, I caused a true and correct copy of the foregoing to be served on counsel for all other parties via the Court's electronic filing system as set forth in Miscellaneous Order 61 as follows:

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

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

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

<u>/s/ Christopher L. Kurzner</u>
Christopher L. Kurzner

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

VERIZON DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFFS' MOTION TO SUBMIT SUPPLEMENTAL MATERIALS AND IN SUPPORT OF VERIZON'S MOTION TO STRIKE AND FOR A PROTECTIVE ORDER

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

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

Dated: January 6, 2012

Attorneys for the Verizon Defendants

Defendants Verizon Communications Inc., Verizon Corporate Services Group Inc., Verizon Employee Benefits Committee, Verizon Pension Plan for New York and New England Associates, Verizon Pension Plan for Mid-Atlantic Associates, Verizon Enterprises Management Pension Plan, and Verizon Management Pension Plan (collectively, "Verizon") submit this memorandum in response to plaintiffs' motion to submit supplemental materials (Dkt. 100) and in support of Verizon's motion to strike and for a protective order, filed contemporaneously herewith.

BACKGROUND

In late 2006, Verizon spun off its telephone directories business, Verizon Information Services ("VIS"), to a new, publicly traded company known as Idearc. In connection with the spinoff, Verizon transferred the obligations for the pension benefits of former VIS employees to Idearc-sponsored pension plans, along with assets sufficient to fully fund the transferred benefit obligations. (*See generally* Dkt. 78, at 8-15.)

A. The Instant ERISA Litigation

In late 2009, plaintiffs sued Verizon, alleging that the transfer of the obligation to pay their benefits to Idearc-sponsored pension plans violated the Employee Retirement Income Security Act of 1974 ("ERISA"). (*See* Dkt. 1.)

Pursuant to the scheduling order in this case, discovery closed on July 15, 2011. (Dkt. 56.) In response to plaintiffs' document requests, Verizon (i) objected in part on grounds including privilege, relevance, and overbreadth, and (ii) produced nearly 45,000 pages of documents to plaintiffs. At no time did plaintiffs file a motion to compel challenging either the scope of Verizon's objections or the adequacy of its document production.

Pursuant to an amended scheduling order, the parties were required to file any dispositive motions on or before August 26, 2011. (Dkt. 71.) Plaintiffs and Verizon filed cross-motions for summary judgment at that time. Those motions have been fully briefed since October 2011. (*See* Dkts. 98 & 99.)

B. The *U.S. Bank* Action

In 2009, Idearc filed for Chapter 11 bankruptcy protection. In September 2010, U.S. Bank, N.A., as a successor in interest to Idearc, filed suit against Verizon in connection with the VIS spinoff transaction. *See U.S. Bank, N.A., v. Verizon, et al.*, No. 3:10-cv-01842 (N.D. Tex.) (the "*U.S. Bank* Action").

On November 14, 2011, the Court in the *U.S. Bank* Action ordered Verizon to produce various, undisputedly privileged documents relating to the Idearc spinoff on the grounds that Verizon's counsel also represented Idearc in connection with certain aspects of the spinoff. (Defs.' Ex. 1, at 4 ("Defendants have established that the Debevoise, Verizon in house counsel, and Skadden documents are privileged, however, an exception to the privilege -- namely, joint representation as to the subject matter of the documents -- permits the disclosure of the documents to Idearc.").) The Court, however, made clear that "**the attorney-client privilege as to documents produced under the Court's orders in th[e *U.S. Bank*] lawsuit is not deemed waived against third parties**." *Id.* (emphasis in original).

On November 30, 2011, plaintiffs in the *U.S. Bank* Action improperly filed an Amended Complaint, which attached a "joint privilege" document, publicly on PACER. On December 2, 2011, the Court sealed the Amended Complaint pending resolution of Verizon's motion for a protective order; on December 22, 2011, the Court granted Verizon's motion, ordered the *U.S. Bank* plaintiffs to file "any jointly-privileged documents. . . under seal," and

reaffirmed that "neither side may disclose any jointly privileged document to third parties without the express consent of both parties to the privilege." (*See* Defs.' Ex. 2, at 2-3 & n.1.)

C. The Instant Dispute

On December 14, 2011, counsel for plaintiffs emailed counsel for Verizon, attaching a copy of the Amended Complaint in the *U.S. Bank* Action. Plaintiffs' counsel stated that he obtained the Amended Complaint "via PACER . . . on November 30, 2011" and sought Verizon's consent to submit the Amended Complaint to the Court for consideration in connection with the parties' pending cross-motions for summary judgment. Verizon declined to give its consent (among other reasons, because the Amended Complaint plainly is not evidence).

On December 23, 2011, plaintiffs filed a "motion to submit supplemental materials." (Dkt. 100.) Rather than submit the Amended Complaint in the *U.S. Bank* Action, however, plaintiff sought leave to supplement the record with two documents that were attached to the Amended Complaint. One of the two documents submitted by plaintiffs (Pls.' Ex. 2) bears a "Joint Privilege" legend and was the subject of the *U.S. Bank* Court's December 22 Order. (*See* Dkt. 101-1.)

Verizon has requested that counsel for plaintiffs "return to Verizon or destroy, and refrain from relying on and/or disseminating, any joint privilege materials produced by Verizon in the *U.S. Bank* Action in [his] possession, custody or control, including any documents that were attached to the now-sealed Amended Complaint." (Defs.' Ex. 3.) To date, however, plaintiffs' counsel has not responded to Verizon's request.

ARGUMENT

I. The Court Should Prohibit Plaintiffs From Relying On Or Disseminating Joint Privilege Documents,

There is no dispute that Plaintiffs' Exhibit 2, on which plaintiffs seek to rely, is privileged. Neither Verizon's disclosure of Plaintiffs' Exhibit 2 to U.S. Bank nor U.S. Bank's subsequent, unauthorized public disclosure of Plaintiffs' Exhibit 2 constitutes a waiver of Verizon's privilege. Accordingly, the Court should not permit plaintiff to retain, disclose or rely on Plaintiffs' Exhibit 2.[1]

A federal court may order that the attorney-client privilege "is not waived by disclosure connected with the litigation pending before the court," in which case "the disclosure is also not a waiver in any other" proceeding. FED. R. EVID. 502(d); *see also* FED. R. EVID. 502(d) advisory committee's note (confirming that such orders are enforceable against third parties). Here, the *U.S. Bank* Court specifically invoked this rule and ordered that "the attorney-client privilege . . . is not deemed waived against third parties" as a result of Verizon's production of joint privilege documents to U.S. Bank. Ex. 1, at 4 (citing FED. R. EVID. 502(d)). Thus, it is clear that Verizon's disclosure of attorney-client communications to U.S. Bank did not waive Verizon's privilege with respect to third parties, such as plaintiffs.

Nor can there be any argument that U.S. Bank's public disclosure of Plaintiffs' Exhibit 2 waived the privilege. This is because the unauthorized disclosure of privileged materials does not result in a waiver of the privilege. *See In re Parmalat Secs. Litig.*, No. 04 MD 1653, 2006 WL 3592936, at *4 (S.D.N.Y. Dec. 1, 2006) ("Unauthorized disclosure of privileged documents by an adversary does not automatically result in a waiver of the privilege immediately

[1] In the unlikely event that the Court permits plaintiffs to rely on Plaintiffs' Exhibit 2, Verizon respectfully requests the opportunity to explain why that document is not material to the parties' pending motions for summary judgment.

upon dissemination to third parties."); *see also Alexander v. FBI*, 198 F.R.D. 306, 315 (D.D.C. 2000) (unauthorized disclosure of privileged information by lower-level corporate employee does not waive the corporation's privilege); *Procter & Gamble Co. v. Bankers Trust Co.*, 909 F. Supp. 525, 527-28 (S.D. Ohio 1995) ("unauthorized disclosure of privileged information by a third party does not constitute waiver of a privilege"); *Resolution Trust Corp. v. Dean*, 813 F. Supp. 1426, 1428-29 (D. Ariz. 1993) (similar). Here, after U.S. Bank disclosed joint privilege information, the Court promptly (i) entered a confidentiality order "to protect [Verizon's and Idearc's] jointly held attorney-client privilege from disclosure to third parties," (ii) clarified that U.S. Trust did not have the right "unilaterally to waive the privilege," (iii) prohibited U.S. Trust from publicly disclosing joint privilege documents in the future, and (iv) sealed the improperly filed Amended Complaint "until substituted with an amended complaint that does not contain jointly-privileged information." (Defs.' Ex. 2, at 3.) Because U.S. Bank's public disclosure of joint privilege materials plainly was unauthorized and improper, the privilege has not been waived.

While this case involves the unauthorized disclosure of privileged materials, rather than an inadvertent disclosure by Verizon, Fifth Circuit law regarding waiver in the context of inadvertent disclosures confirms that Verizon should be permitted to "claw back" from plaintiffs the privileged document at issue here. In this Circuit, the factors governing whether an inadvertent disclosure waives the privilege include the "reasonableness of precautions taken to prevent disclosure," the "amount of time taken to remedy the error," and the "overriding issue of fairness." *See Alldread v. City of Grenada*, 988 F.2d 1425, 1433 (5th Cir. 1993).

Here, Verizon provided joint privilege materials to U.S. Bank pursuant to a court order specifically requiring disclosure of those materials. *See* Ex. 1. Moreover, Verizon sought a protective order to prevent U.S. Bank's unilateral disclosure of joint privilege materials on November 23, 2011 -- one week *prior* to the November 30, 2011 public disclosure. (*See* Defs.' Ex. 4.) Verizon likewise requested that plaintiffs' counsel return or destroy any joint privileged documents in his possession just five business days after entry of the *U.S. Bank* Court's December 22, 2011 Order. (*See* Defs.' Ex. 3.) Thus, Verizon plainly has acted diligently to prevent the disclosure of joint privilege materials and to remedy the effects of U.S. Bank's improper disclosures.

The "overriding issue of fairness" likewise counsels in favor of permitting Verizon to claw back its privileged documents from plaintiffs. Here, the public disclosure of privileged communications between Verizon and its counsel was not the result of any negligence or inadvertence on the part of Verizon, but the wrongdoing of a third party. It would be fundamentally unfair to hold that Verizon's privilege has been waived solely as a result of the unauthorized actions of its litigation adversary.

For the foregoing reasons, Verizon respectfully requests that the Court (i) deny plaintiffs' motion to supplement the record insofar as concerns Exhibit 2, (ii) strike document number 101-1 from the docket, and (iii) order counsel for plaintiffs to return to Verizon or destroy, and to refrain from relying on and/or disseminating, any joint privilege materials produced in connection with the *US Bank* Action, including any documents that were attached to the now-sealed Amended Complaint in the *U.S. Bank* Action.

II. The Non-Privileged Document Relied On By Plaintiff Is Immaterial To The Parties' Pending Summary Judgment Motions.

The remaining document that plaintiffs seek to add to the summary judgment record (Pls.' Ex. 1) is a short email from Verizon's CEO, Ivan Seidenberg, to two Verizon executives regarding the proposal to spin off VIS as a free-standing company. (*See* Dkt. 100-1.) Plaintiffs' motion does not (i) address the fact that the summary judgment record in this case has been closed for months, (ii) assert that Verizon should have produced Plaintiffs' Exhibit 1 to plaintiffs in discovery, (iii) provide any basis for the admissibility of the email into evidence, or (iv) attempt to explain why it is material to any question of fact on which summary judgment in this case turns. Nevertheless, Verizon does not object to the inclusion of this document in the record. For the reasons explained below, however, Plaintiffs' Exhibit 1 does nothing to disturb Verizon's entitlement to summary judgment.

First, contrary to plaintiffs' insinuation, there is nothing in this email even remotely suggesting bad faith on the part of Verizon in spinning off its directories business. In the email, Mr. Seidenberg merely states his "assumption" that VIS was "going through a major secular change," and explains:

> What we [VIS] need is a new business model separate from [Verizon] that will be competitive with other print businesses[.] An independent owner would slash costs big time, sell markets, probably reduce or curtail the electronic activity and focus on cash. . . . I would hope [the consultants] can develop an aggressive business model that would appeal to a different type of investor. . . .

(Dkt. 100-1.) This email is entirely consistent with the wholly appropriate business reasons offered by Verizon for the spinoff in both its public statements and in its motion for summary judgment (*e.g.*, differences between the business models of Verizon and VIS, the different investor profiles that the two stand-alone companies would attract, and the need for VIS to have

focused management separate from Verizon). (*See* Dkt. 78, at 9-10.) Thus, this innocuous email in no way alters the existing record or undermines Verizon's entitlement to summary judgment.

Second, the sole issue raised by plaintiffs' lawsuit is whether Verizon violated ERISA by transferring the obligations for their pension benefits to Idearc-sponsored pension plans. As explained in Verizon's motion for summary judgment, business decisions -- like Verizon's decision to spin off VIS -- are settlor functions that do not implicate ERISA's fiduciary standards. (*E.g.*, Dkt. 99, at 4-7.) Thus, this email is entirely irrelevant to plaintiffs' claims under ERISA, and so has no bearing on any fact material to the parties' cross-motions for summary judgment.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Verizon's summary judgment papers, the Court should (i) deny plaintiffs' motion to supplement the record insofar as concerns Plaintiffs' Exhibit 2, (ii) strike document number 101-1 from the docket, (iii) order counsel for plaintiffs to return or destroy, and to refrain from relying on and/or disseminating, any joint privilege materials produced by Verizon in connection with the *U.S. Bank* Action, (iv) grant Verizon's motion for summary judgment, and (v) deny plaintiffs' motion for partial summary judgment.

Dated: January 6, 2012

Respectfully submitted,

/s/ Christopher L. Kurzner

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

Jeffrey G. Huvelle (admitted pro hac vice)
Christian J. Pistilli (admitted pro hac vice)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
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Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, CO 80237-1741
Fax: (303) 843-0360

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

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

/s/ Christopher L. Kurzner
Christopher L. Kurzner