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

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

RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Local Rule 56.4, defendants Verizon Pension Plan for New York and New England Associates, Verizon Pension Plan for Mid-Atlantic Associates, Verizon Enterprises Management Pension Plan, Verizon Management Pension Plan, Verizon Communications Inc., Verizon Corporate Services Group Inc., and the Verizon Employee Benefits Committee (the "Verizon Defendants") hereby submit this Response To Plaintiffs' Motion For Partial Summary Judgment (Dkt. 81).

Pursuant to Local Rule 56.4(b), the legal and factual grounds for opposing plaintiffs' motion are set forth in the Verizon Defendants' Brief In Opposition To Plaintiffs' Motion For Partial Summary Judgment, the Memorandum Of Law In Support Of The Verizon Defendants' Motion For Summary Judgment (Dkt. 78), and the appendices thereto.

PRAYER

The Verizon Defendants respectfully request that the Court deny plaintiffs' motion for partial summary judgment in its entirety and grant them such other relief as the Court deems appropriate.

Dated: October 14, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2011, I caused a true and correct copy of the Verizon Defendants' response to plaintiffs' motion for summary judgment, supporting brief and appendix 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:

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BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs face a difficult burden in their summary judgment papers to explain why it was permissible to change the sponsor of their pension plans from NYNEX to Bell Atlantic, and from Bell Atlantic to Verizon, but not from Verizon to Idearc. Plaintiffs' concession that the Idearc transaction satisfied the ERISA and Internal Revenue Code ("IRC") provisions governing pension transfers, and the related Treasury regulations, makes their burden even more difficult. Plaintiffs fall far short of meeting their burden.

Plaintiffs' central argument, that the Idearc pension transfers violated ERISA's fiduciary standards, misses the fundamental point that settlor decisions, such as the decision to transfer pension obligations from one plan to another, or from one sponsor to another, are not subject to those standards. Moreover, plaintiffs' arguments based on their strained and illogical reading of the Verizon Pension Plans ignore the important facts that the plans' fiduciaries have consistently read the relevant plan language to permit pension transfers like those at issue here and that courts are obligated to defer to the reasonable interpretations of plan fiduciaries where, as here, the plans grant them interpretative discretion.

For these reasons, as well as for the reasons set forth below and in defendants' summary judgment papers, *see* Dkt. 78, plaintiffs' claims are without merit and their motion for partial summary judgment should be denied.

BACKGROUND

Defendants incorporate by reference herein the background section of the memorandum in support of their motion for summary judgment. *Id.* at 2-21.

STANDARD OF REVIEW

Plaintiffs, as the parties who bear the ultimate burden of proving their claims, have a "heavy burden" on summary judgment. *Nicholas Acoustics & Specialty Co. v. H & M Constr. Co.*, 695 F.2d 839, 844 (5th Cir. 1983). In order to meet that burden, moreover, plaintiffs may not rely on "conclusory allegations, unsubstantiated assertions, and unsupported speculation." *Crawford v. U.S. Dep't of Homeland Sec.*, 245 Fed. Appx. 369, 379, Nos. 06-11163, 06-11387, 2007 WL 2348661, at *7 (5th Cir. 2007). Rather, plaintiffs must "cit[e] to particular parts of materials in the record," Fed. R. Civ. P. 56(c)(1)(A), that "establish beyond peradventure *all* of the essential elements" of their claims, *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (emphasis in original). Plaintiffs' summary judgment motion falls far short of meeting this burden, and so should be denied.

ARGUMENT

In their Second Amended Complaint ("complaint"), plaintiffs assert six claims against the Verizon Pension Plan for New York and New England Associates (NY/NE Plan), Verizon Pension Plan for Mid-Atlantic Associates (Mid-Atlantic Plan), Verizon Enterprises Management Pension Plan ("VEMPP"), and Verizon Management Pension Plan ("VMPP" and, collectively, the "Verizon Pension Plans"), Verizon Communications Inc. and Verizon Corporate Services Group Inc. ("Verizon"), and/or the Verizon Employee Benefits Committee (the "VEBC" and, collectively, "defendants") under the Employee Retirement Income Security Act of 1974 ("ERISA"). No Verizon defendant is named in Count V of the complaint, and plaintiffs do not seek summary judgment on Counts I or VII. For the reasons explained below, as well as for the reasons set forth in defendants' motion for summary judgment, plaintiffs' request for summary judgment on their summary plan description ("SPD") disclosure claim (Count II),

prohibited transaction claim (Count III), breach of fiduciary duty claim (Count IV), and "equitable relief" claim (Count VI) should be denied.

I. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THEIR BREACH OF FIDUCIARY DUTY CLAIM (COUNT IV).

In Part III.C of their brief, plaintiffs argue that the involuntary transfer of the obligation to pay class members' pension benefits to Idearc's pension plans violated ERISA's fiduciary standards, ERISA § 404, 29 U.S.C. § 1104, and seek summary judgment on Count IV of their complaint. In order to get summary judgment on a claim for breach of ERISA's fiduciary standards, plaintiffs must establish the existence of a fiduciary duty and the absence of any genuine question that a defendant breached that duty. Plaintiffs have failed to make either of these showings, among other reasons, because (i) as demonstrated in Part I.A below, ERISA's standards of fiduciary conduct do not apply to a settlor's decision to transfer pension plan assets and liabilities to another plan and defendants undisputedly complied with ERISA's detailed requirements governing pension plan spinoffs, (ii) as demonstrated in Part I.B below, the Idearc spinoff did not violate the terms of the Verizon Pension Plans, and (iii) as demonstrated in Part I.C below, the pension plan amendments implementing the Idearc spinoff were not impermissibly retroactive.

Plaintiffs' claim in Count IV also fails because the undisputed factual record demonstrates that the decision to spin off class members' pension benefits was made not by the VEBC but by Verizon, in its capacity as settlor of the Verizon Pension Plans, and Verizon is not named as a defendant in Count IV. *E.g.*, Appx. 6-8 (Fitzgerald Dep. at 21:14 - 27:17).[1] Because

[1] References herein to "Appx." are to the Appendix In Support Of The Verizon Defendants' Motion For Summary Judgment (Dkt. 79); references to "Pls. Appx." are to the Appendix In Support Of Plaintiffs' Motion For Partial Summary Judgment (Dkt. 85); and references to "Resp. Appx." are to the Appendix In Support Of Verizon Defendants' Response To Plaintiffs' Motion For Partial Summary Judgment (filed herewith).

plaintiffs have failed to come forward with any evidence that the decision to transfer their pension benefit obligations was made by the VEBC (let alone that it was made by the VEBC acting in a fiduciary capacity), their request for summary judgment on Count IV should be denied.

A. <u>The Idearc Pension Spinoff Did Not Violate ERISA's Fiduciary Standards.</u>

In Part III.C.3 of their brief, plaintiffs assert that the decision to spin off the obligation to pay the pension benefits of "retirees" violated ERISA's fiduciary standards, including the duty of loyalty. *See* Dkt. 83, at 21. This contention has no merit. It is well-settled that (i) ERISA's fiduciary standards do not apply to an employer's business decision to spin off a portion of a pension plan's assets and liabilities, and (ii) ERISA requires only that a pension plan spinoff comply with the funding and benefit-protection requirements of Sections 208 and 204(g) of ERISA (and the regulations thereunder), as plaintiffs concede Verizon did here.

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

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

29 U.S.C. § 1058; *see* 26 U.S.C. § 414(*l*) (parallel provision of the IRC). Thus, Section 208 of ERISA and Section 414(*l*) of the IRC authorize the transfer of pension assets and liabilities from one plan to another, so long as (i) the benefits are "at least as good . . . under the new pension plan as under the old one," and (ii) the employer "transfer[s] sufficient plan 'assets' to pay previously promised benefits to employees." *Koch Indus., Inc. v. Sun Co.*, 918 F.2d 1203, 1206-07 (5th Cir. 1990); *see Sys. Council EM-3 v. AT&T Corp.*, 972 F. Supp. 21, 32 (D.D.C. 1997) (Section 208 "expressly permits transfers of assets and liabilities between pension plans.").

Plaintiffs "do not contend that the Verizon Defendants ran afoul" of plan provisions that expressly incorporate the terms of IRC § 414(*l*). Dkt. 83, at 12. And they "make no challenge as to Verizon's transfer and allocation of pension assets and liabilities" to the Idearc plans under ERISA § 208. Dkt. 83, at 25. Thus, it cannot genuinely be disputed that Verizon fully satisfied the requirements of ERISA § 208 and IRC § 414(*l*) in making the pension transfers at issue in this case. *See* Dkt. 78, at 12-13, 23-26 (demonstrating based on record evidence that Verizon complied with ERISA § 208 and IRC § 414(*l*)).[2]

Courts have repeatedly held that satisfaction of Section 208's requirements in effecting a pension plan spinoff preclude a finding of fiduciary liability under ERISA. Rejecting a claim that an employer "breached its fiduciary duty . . . when it sold [corporate divisions] and transferred the associated pension plan," the Third Circuit held that "compliance with ERISA's provisions for the funding of merged, transferred or acquired pension plans as set forth in [Section 208] preclude[s] a finding that a fiduciary breach had occurred." *Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1189-90 (3d Cir. 1993). Similarly, the Eighth Circuit noted that "Section [20]8 provides a specific standard that employers can rely upon in allocating assets to spunoff plans," and rejected the proposition that ERISA's "general standard of fiduciary duty supersedes and imposes a higher standard than section [20]8" in structuring a plan spinoff. *Bigger v. Am. Commercial Lines*, 862 F.2d 1341, 1344 (8th Cir. 1988). And the U.S. District Court for the District of Columbia held that Section 208 of ERISA provides "the specific means by which to challenge a plan spin-off," and rejected the assertion of retired plan participants that "ERISA's fiduciary duties . . . apply to the . . . transfer of assets

[2] Nor can it genuinely be disputed that Verizon satisfied ERISA § 204(g)'s anti-cutback rule, 29 U.S.C. § 1054(g), because class members were entitled to receive (and did receive) exactly the same pension benefits after the spinoff as they did before the spinoff. *See* Dkt. 78, at 18-19, 32.

pursuant to a spin-off." *AT&T*, 972 F. Supp. at 30-31, *aff'd*, 159 F.3d 1376 (D.C. Cir. 1998); *see also Foss v. Lucent Techs. Inc.*, No. 03-CV-5017, 2006 WL 3437586, at *4 (D.N.J. Nov. 26, 2006) ("AT&T's decision to spin-off Lucent and transfer pension assets to Lucent was a nonfiduciary decision."), *aff'd sub nom In re Lucent Death Benefits ERISA Litig.*, 541 F.3d 250, (3rd Cir. 2008). Verizon's undisputed compliance with the specific requirements of Section 208 therefore precludes any claim that the Idearc spinoff violated ERISA's fiduciary standards.[3]

Beginning in 1995, moreover, a trilogy of Supreme Court cases made clear that "an employer's decision to amend a pension plan concerns the composition or design of the plan itself," and "does not implicate the employer's fiduciary duties." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999); *see Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."); *see also Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Under ERISA, "a plan amendment includes any changes to the terms of a plan, including changes resulting from a merger, consolidation, or transfer (as defined in [IRC] section 414(*l*))." 26 C.F.R. § 1.411(d)-3(a).[4] Accordingly, all six courts of appeals to consider the question have held that the decision to undertake a pension plan spinoff is not a fiduciary act. *Paulsen v. CNF Inc.*, 559 F.3d 1061,

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[3] Plaintiffs note in passing that the VEBC "did not have the proposed Spin-off Transaction reviewed and opined [sic] by an independent fiduciary" or counsel. Dkt. 81, at ¶ 19. However, plaintiffs do not (and could not) provide any support for the proposition that the VEBC had any obligation to do so. *See, e.g.*, *Malia v. Gen. Elec. Co.*, 23 F.3d 828, 833 (3d Cir. 1994) (holding that the only "duties borne by [defendants] were the anti-dilution obligations imposed by § [20]8" and so rejecting argument that defendants had a fiduciary duty to appoint an independent manager in connection with a pension plan merger).

[4] The Secretary of the Treasury is responsible for issuing regulations under ERISA's anti-cutback rule, 29 U.S.C. § 1054(g), as well as under the parallel provision of the IRC, 26 U.S.C. § 411(d)(6)(A). *See* 29 U.S.C. § 1202(c); Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978) (available at Appx. 577 *et seq.*); *see also Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 746-47 (2004). This Circuit defers to the Treasury Department's interpretation of these provisions. *See Tulley v. Ethyl Corp.*, 861 F.2d 120, 125 (5th Cir. 1988).

1076 (9th Cir. 2009); *accord Flanigan v. Gen. Elec. Co.*, 242 F.3d 78, 87 (2d Cir. 2001); *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 719 (6th Cir. 2000); *Ames v. Am. Nat'l Can Co.*, 170 F.3d 751, 757 (7th Cir. 1999); *AT&T.*, 159 F.3d at 1379-80; *Blaw Knox Ret. Income Plan*, 998 F.2d at 1189; *see also* Dkt. 78, at 26-27.[5]

Plaintiffs do not address any of this circuit authority, except for the D.C. courts' *AT&T* cases, and their effort to distinguish the *AT&T* decisions fails. While plaintiffs suggest that the retirees in *AT&T* alleged *only* that the pension asset transfer violated ERISA § 208, that is not so. *See* Dkt. 83, at 24-25. Like plaintiffs here, the AT&T retirees urged that ERISA's standards of fiduciary conduct should govern "AT&T's decisions to restructure itself and to spin-off its pension and welfare plans as part of [a corporate] restructuring." 972 F. Supp. at 32. The D.C. courts rejected that argument, explaining that "under prevailing ERISA case law," those "decisions and the actions necessary to implement them are not subject to ERISA's fiduciary standards." *Id.*; *accord AT&T*, 159 F.3d at 1379 ("The District Court found, and we agree, that appellants have failed to state a legally cognizable claim under ERISA's fiduciary provisions, because there has been no showing that AT&T acted in a fiduciary capacity in taking the actions at issue in this case."). Thus, the D.C. Circuit – like the Second, Third, Sixth, Seventh and Ninth Circuits – has rejected the proposition that ERISA's fiduciary standards apply to the decision to spin off pension plan obligations.

Against this overwhelming weight of authority, plaintiffs point to a single Eighth Circuit decision, *Howe v. Varity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994). *See* Dkt. 83, at 22. In *Varity*, the Eighth Circuit held that it was a breach of fiduciary duty under ERISA to transfer the

[5] To the extent plaintiffs mean to distinguish this ample circuit authority on the ground that the cited cases concern only "nonvested contingent benefits," *see* Dkt. 83, at 23, plaintiffs are mistaken because these cases involved vested pension benefits.

welfare benefit obligations for retired employees to a new employer without their knowledge or consent. 36 F.3d at 749, 756. This decision, however, was effectively overruled by the Supreme Court's subsequent holding in *Curtiss-Wright* that employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." 514 U.S. at 78. And, as the Sixth Circuit has noted, "[t]o the extent that the Eighth Circuit's holding is grounded in the retirees' lack of consent to the transfer," the holding is "an anomaly within the case law governing the scope of employer action subject to ERISA's fiduciary standards." *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 668 n.8 (6th Cir. 1998).

The facts of *Varity* are also readily distinguishable from the facts of this case. *First*, unlike the pension benefits at issue here, *Varity* concerned ERISA welfare benefits. In the pension context, every court of appeals to consider the question has concluded that ERISA's fiduciary standards do not apply to the decision to transfer pension plan assets and liabilities to another plan. Indeed, the Eighth Circuit itself has rejected the proposition that ERISA's "general standard of fiduciary duty supersedes and imposes a higher standard than section [208]" of ERISA in the context of a pension plan transfer. *See Bigger*, 862 F.2d at 1344.

Second, the holding in *Varity* was based on the proposition that an employer "cannot free itself of contractually created duties without the consent of the persons to whom it is obligated." 36 F.3d at 756. Here, for the reasons explained in Part I.B, below, Verizon did not have a contractual obligation to refrain from transferring the obligations for class members' pension benefits.

Third, *Varity* is distinguishable because plaintiffs have fallen far short of demonstrating that "the unique and egregious facts of [*Varity*]" are present here. *Sengpiel*, 156 F.3d at 668 n.8. Plaintiffs assert that "there is ample evidence that Verizon was motivated by

self-dealing considerations" in transferring the obligations for class members' benefits to the Idearc plans. Dkt. 83, at 24. However, this assertion may not be credited on summary judgment because it is made without any citation to the record. *See Special Risk Servs. Grp. v. Trumble Steel Erectors, Inc.*, No. 5:04-CV-289-C, 2006 WL 6632286, at *4 (N.D. Tex. Feb. 28, 2006) ("[F]actual assertions must be supported by citations to proper and admissible summary judgment evidence that support [the] assertion."). Nor could plaintiffs support their assertion with any record citations, because there is no evidence that Verizon acted in bad faith in structuring the Idearc pension plan spinoff.

The Treasury Department has issued detailed regulations designed to ensure that, when pension obligations are transferred from a well-funded pension plan, assets sufficient to fund those obligations are also transferred. Those regulations also prescribe the value of the assets that must be transferred from an under-funded pension plan.[6] Here, there is (and could be) no genuine dispute that Verizon fully complied with the statutory and regulatory funding requirements governing spinoffs or that the Idearc pension plans created as a result of the spinoff transaction were fully funded. *See* p. 5, *supra*. Compliance with this detailed regulatory regime designed to protect plan participants necessarily rebuts any assertion that the Idearc spinoff constituted improper self-dealing or bad faith.

Moreover, Verizon did not simply comply with these requirements; it caused the value of the pension assets transferred to the Idearc plans to exceed what the statute and regulations require. Generally, when a portion of an underfunded pension plan is spun off, Treasury rules require that an ERISA § 4044 asset allocation be performed on the transferor plan

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[6] *See* 26 C.F.R. § 1.414(*l*)-1; *see also* Dkt. 78, at 4-8. The Secretary of the Treasury is responsible for issuing regulations under Section 414(*l*) of the IRC, as well as the parallel provision of ERISA, Section 208. *See* Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978) (available at Appx. 577 *et seq.*); *see also Malia*, 23 F.3d at 832.

– with the ultimate result that the spun-off plan almost invariably receives assets with a value that is less than the full termination value of the accrued benefits transferred to the spun-off plan. Verizon, however, took steps to qualify for a "de minimis" exception to this requirement, under which two of its plans – the VMPP and the NY/NE Plan – were permitted to transfer assets to the Idearc plans with a value equal to the full termination value of the transferred accrued benefits. As a result, the NY/NE Plan and the VMPP transferred assets with a value exceeding the legally required minimum, the participants whose benefit obligations were transferred from those plans were in better-funded plans after the transfer than before, and the newly created Idearc pension plans were *overfunded* on an accounting basis by more than $160 million in the aggregate. Dkt. 78, at 12-13.

Plaintiffs assert that Verizon's use of the "de minimis" rule permitted Verizon to transfer approximately $400 million less in assets than would otherwise have been the case. *See* Dkt. 81, ¶ 16. This assertion is not supported by the record materials cited by plaintiffs. *See, e.g.*, *Crawford*, 2007 WL 2348661, at *7 ("conclusory allegations, unsubstantiated assertions, and unsupported speculation" should not be credited on summary judgment).[7] It also represents a fundamental misapprehension of the relevant Treasury regulations prescribing the de minimis rule, which are designed to permit a transfer of assets with a value equal to the full termination value of the transferred liabilities in circumstances where doing so would otherwise run afoul of

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[7] Plaintiffs cite an email from an actuary retained by Verizon stating that "if assets and liabilities are spun-off to a plan while part of Verizon, then the spun off plan must receive a proportionate share of surplus assets." Pls. Appx. 209. This statement, however, pertains only to transfers that might occur to a plan *while part of Verizon*. Here, the asset transfers were made to plans outside of Verizon's "controlled group." By statute, there is no requirement to transfer surplus or excess assets where the transfer is made to a company outside the transferor's controlled group. 26 U.S.C. § 414(*l*)(2)(D)(*ii*); *see* Dkt. 78, at 6-7; *see also* Appx. 194. The actuary's statement is also irrelevant to the de minimis rule, properly construed, because that rule applies only in the case of plans that are not fully funded on a termination basis (*i.e.*, plans that do not have "surplus assets").

rules designed to protect participants in the portion of the plan that remains after the spinoff. *See* Dkt. 78, at 24-25.

Plaintiffs also assert that defendants breached their fiduciary duties under ERISA because Verizon "rebuffed" a last-minute request that Verizon retain responsibility for class members' *unfunded welfare benefits* (*i.e.*, "retiree OPEB liability"). Dkt. 83, at 24. As a threshold matter, this is entirely irrelevant to the separate decision by Verizon to transfer *funded pension benefit obligations* to Idearc pension plans, which is the focus of plaintiffs' summary judgment motion. Moreover, as the Supreme Court's decisions in *Curtiss-Wright* and its progeny make clear, ERISA's fiduciary standards do not apply to "settlor" decisions, including the decision to change or terminate welfare benefits. *See Sengpiel*, 156 F.3d at 666 (rejecting argument that the transfer of retiree welfare benefit obligations implicates fiduciary duties under ERISA); *see also* Dkt. 78, at 33-36. In any event, Verizon's decision to transfer retiree welfare benefit obligations to Idearc was entirely appropriate because, historically at Verizon, the "cash flows" generated by the Verizon Information Services ("VIS") business unit were used "to support the employee obligations of that business," including "expenses associated with retirees," and the transfer of OPEB liabilities merely preserved the "alignment between the cash flow generating business and . . . the obligations" of that business. Appx. 19 (Fitzgerald Dep. at 71:3-11), 26, 107 (Hartnett Dep. at 66:15 - 67:15). The fact that a VIS representative made a last-minute request that Verizon retain these liabilities – after it was too late for other aspects of the overall deal to be adjusted – hardly demonstrates that the decision to transfer welfare benefit liabilities to Idearc constituted improper self-dealing or bad faith. *See* Dkt. 78, at 14-15.[8]

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[8] Plaintiffs point to a September 2006 document prepared by a VIS/Idearc actuary stating that "Verizon is in a better [overall] position to continue covering retirees." *See* Dkt. 81, at ¶ 11. This statement, however, concerns "retiree obligations for OPEB," and so is entirely irrelevant to

Finally, plaintiffs suggest that Verizon acted in "bad faith" because the corporate transaction creating Idearc resulted in Idearc's having a "debt to annual cash flow revenue [sic] of 5.8 to 1." Dkt. 83, at 27. As an initial matter, ERISA's fiduciary standards govern the management and administration of employee benefit plans, not the sponsoring employers' capital structure. *See generally Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996) ("We do not hold . . . that [defendant] acted as a fiduciary simply because. . . because 'an ordinary business decision turn[ed] out to have an adverse impact on the plan.'"); *Bakner v. Xerox Corp. Employee Stock Ownership Plan*, No. SA-98-CA-0230-OG, 2000 WL 33348191, at *5 (W.D. Tex. Aug. 28, 2000) ("ERISA does not require that 'day-to-day corporate business transactions . . . be performed solely in the interest of plan participants.'"). Moreover, plaintiffs' motion concerns the transfer of pension benefit obligations to the Idearc pension plans, which have a separate legal existence from Idearc (and which Verizon overfunded on an accounting basis by more than $160 million). *See Stone v. UNOCAL Termination Allowance Plan*, 570 F.3d 252, 262 (5th Cir. 2009) (noting that pension plan and its sponsor are "independent legal entities"). As a result, any relationship between Idearc's financial health and the pension transfers at issue here is attenuated at best.

In any event, there was nothing untoward about the structure of the Idearc transaction. Unlike Verizon, which had "significant capital investment requirements," the VIS

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plaintiffs' pension claims. *See* Pls. Appx. 7-8; *see also* Appx. 308 (Gist Dep. 37:19 - 38:5). Moreover, VIS's own actuary noted that the decision whether to transfer retiree OPEB liability should be "cost neutral" (*i.e.*, that Idearc should have received "less debt or more assets" as a result of its assumption of retiree OPEB liability than would otherwise have been the case). *See* Pls. Appx. 8. By the fall of 2006, however, Idearc's debt level had already become fixed as a practical matter. Accordingly, any change to the planned treatment of retiree OPEB liabilities at this late stage would not have been cost neutral but would instead have resulted in a windfall to Idearc. *See* Appx. 19-21 (Fitzgerald Dep. at 72:11 - 78:9), 26-27, 122 (Hartnett Dep. at 129:6-25).

directories business had "very limited capital requirements and strong current cash flows." Appx. 22 (Fitzgerald Dep. 82:20 - 84:2). It is neither unusual nor a cause for concern that Verizon's debt-to-cash-flow ratio was lower than Idearc's, since as a rule businesses with higher capital investment requirements carry less debt and businesses with lower capital investment requirements (and strong cash flows) carry more. *See id.*

* * *

In sum, three subsequent Supreme Court cases have effectively overruled the Eighth Circuit's decision in *Varity*, and the Eighth Circuit itself has recognized that ERISA's fiduciary duty provisions do not impose a standard that is higher than or different from ERISA § 208 in carrying out a transfer of pension plan assets and liabilities. Accordingly, this Court should hold, consistent with the overwhelming weight of authority from the courts of appeals, that ERISA's fiduciary standards do not apply to the decision to spin off pension plan assets and liabilities. At a minimum, plaintiffs' request for summary judgment should be denied because the undisputed factual record does not "establish beyond peradventure" that the VEBC – which is the only defendant named in Count IV – took any action in connection with the Idearc spinoff that violated any applicable standard of fiduciary conduct. *See Fontenot*, 780 F.2d at 1194.

B. The Idearc Pension Spinoff Did Not Violate The Terms Of The Verizon Pension Plans.

In Part III.C.1 of their brief, plaintiffs assert that defendants breached their fiduciary duty to act in accordance with the documents governing the plans, *see* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Plaintiffs are mistaken. In fact, (i) long-standing provisions of the Verizon Pension Plans expressly authorized the transfer of class members' pension benefit obligations to another plan, and (ii) December 22, 2006 amendments to the

Verizon Pension Plans undisputedly provided for the Idearc pension transfers challenged by plaintiffs.

1. The Pre-Existing Plan Terms Authorized Pension Plan Mergers And Consolidations.

Plaintiffs assert that the Verizon Pension Plans "do not contain any authorization for the plan sponsor to unilaterally and involuntarily remove retirees with rights to vested benefits." Dkt. 83, at 16 (emphasis omitted). Plaintiffs, however, are wrong to suggest that the Idearc pension benefit transfers they seek to challenge were in any way inconsistent with or foreclosed by the terms of the pre-November 2006 plans.

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

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

Appx. 367, 385. Similarly, Section 11.3 of the two management plans recognized that the plans "may be merged into or consolidated with another plan," and that the plans' "assets or liabilities may be transferred to another plan." Appx. 399-400, 407-08.

Plaintiffs argue that these plan provisions are inapplicable because class members are neither assets nor liabilities. Dkt. 83, at 11-16. This assertion, while true, is irrelevant. Plainly, the obligation to pay class members' benefits were plan liabilities, and these plan provisions unequivocally authorized the transfer of those liabilities to another plan. Under ERISA, class members ceased being participants in Verizon's plans, and became participants in

Idearc's plans, as a result of the transfer of the obligation to pay their benefits to the Idearc plans. *See* ERISA § 3(7), 29 U.S.C. § 1002(7) (defining "participant" in relevant part as a "former employee of an employer . . . who is . . . eligible to receive a benefit of any type from an employee benefit plan"); *see Chastain v. AT&T*, No. CIV-04-0281-F, 2007 WL 3357516, at *4 - *9 (W.D. Okla. Nov. 8, 2007) (plaintiffs no longer participants in plan after the obligation to pay their benefits was transferred to a new plan as part of a spinoff), *aff'd*, 558 F.3d 1177 (10th Cir. 2009); *see also Varity*, 516 U.S. at 515 (noting that employees whose benefit obligations were spun off were "no longer members of" the transferor plan). Thus, the Verizon Pension Plans authorized the transfer of the obligations to pay class members' benefits and, as a result of the Idearc transfers, class members ceased to be participants in the Verizon Pension Plans under ERISA.

Any argument that these plan provisions do not authorize the pension transfers at issue in this litigation would also be flatly inconsistent with ERISA and the IRC. By design, Section 20.6 and Section 11.3 track the language of Section 208 of ERISA and Section 414(*l*) of the IRC. *See* Resp. Appx. 3-4 (Chiffriller Decl., ¶¶ 10-11). Thus, if these plan provisions do not authorize "the transfer of retirees" as part of a pension plan merger or spinoff, neither would these federal statutes. Such a reading would be inconsistent not only with common sense but also with governing Treasury regulations, which recognize that the transfer of plan assets and liabilities necessarily entails the "transfer of . . . employees" from one plan to another. *See* 26 C.F.R. § 1.414(*l*)-1(o).

Moreover, even if the Court were to consider the relevant plan provisions to be ambiguous, the Court must defer to the plan fiduciaries' reasonable interpretations of those provisions. The plan documents vest the fiduciaries with discretionary authority to interpret plan

terms and to resolve any ambiguities therein. *See* Resp. Appx. 1-2 (Chiffriller Decl., ¶¶ 3-5). As the Supreme Court has repeatedly affirmed, "an ERISA plan administrator with discretionary authority to interpret a plan is entitled to deference in exercising that discretion." *Conkright v. Frommert*, 130 S. Ct. 1640, 1644 (2010); *see also Worthy v. New Orleans S.S. Assoc.*, 342 F.3d 422, 427-28 (5th Cir. 2003) (deferring to ERISA trustee's interpretation of trust language in a suit alleging that trust administrators violated their fiduciary duties); *Moench v. Robertson*, 62 F.3d 553, 566 (3d Cir. 1995) (holding that the courts must defer to a fiduciary's reasonable plan interpretation in a case alleging breach of fiduciary duty). Here, the responsible plan fiduciaries have interpreted Sections 20.6 and 11.3 to authorize the pension transfers challenged by plaintiffs. *See* Resp. Appx. 2-4, 9-15 (Chiffriller Decl., ¶¶ 6-11 & Ex. A). These good-faith interpretations of the plans are entitled to deference.

Second, the two union plans also contained a provision entitled "Offset Due To Transfer Of Benefit Obligation," which further authorized a transfer like that at issue here. The NY/NE Plan (at § 5.11) and the Mid-Atlantic Plan (at § 5.12) provided that, where an "Employee['s] . . . entire benefit obligation is assumed . . . by a plan maintained by an entity which is a successor to all or part of a Participating Company, no benefits shall be paid under this Plan." Appx. 363, 380. The term "Participating Company" includes, *inter alia*, "Verizon Directories Services Inc." and "Verizon Yellow Pages Company." *See* Appx. 362, 369, 376, 386. Idearc is a successor to Verizon Directories Services Inc. and Verizon Yellow Pages Company. *See* Appx. 208 (Wiley Dep. at 11:21 - 12:12), 247; Resp. Appx. 4-5 (Chiffriller Decl., ¶ 12). Thus, Idearc is an entity which is a successor to all or part of a Participating Company. *See id.*

Plaintiffs assert that Section 5.11 of the NY/NE Plan and Section 5.12 of the Mid-Atlantic Plan (the "Transfer/Offset" provisions) do not apply to class members because they are "inactives," not "Employees." Dkt. 83, at 18-19. (The term "Employee" is defined as an "individual employed by the Company or an Affiliate." *E.g.*, Pls. Appx. 145.) However, plaintiffs' reading of the Transfer/Offset provisions is inconsistent with their reading of Section 15.1(b) of the plans, discussed below. Plaintiffs argue that they are not "Employees" for purposes of the Transfer/Offset provisions because they are no longer employed by the Company or an Affiliate, but that they are covered by Section 15.1(b) even though Section 15.1(b) by its terms applies only to "Employees." Plaintiffs offer no explanation for their inconsistent reading of these provisions.[9]

Plaintiffs' reading is also inconsistent with the way that the term "Employee" is used in other portions of the plans. For instance, Section 15.1(c) of the union plans, which embodies the requirements of ERISA's anti-cutback rule, uses the term "Employee" and does not otherwise refer to retired or inactive employees, yet there can be no genuine dispute that the protections of ERISA § 204(g) extend equally to former employees under the union plans. *See* Resp. Appx. 5 (Chiffriller Decl., ¶ 14); *see also* Appx. 365-66, 383-84.

In contrast to plaintiffs' strained and inconsistent reading of the union plans, the responsible Verizon plan fiduciaries have consistently interpreted the terms of the relevant provisions as applying to both active and inactive employees. *See* Resp. Appx. 5 (Chiffriller Decl., ¶ 13). This good-faith interpretation is reasonable and is entitled to deference. *See*

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[9] Under plaintiffs' implausible reading of the Transfer/Offset provisions, the plans prevent active employees from reaping duplicative benefits when a successor employer assumes a plan's benefit obligations, but fail to prevent inactive employees from reaping a windfall in the same circumstances. Plaintiffs do not explain why an employer or a union would intend this bizarre result. *See* Resp. Appx. 5 (Chiffriller Decl., ¶ 15).

Conkright, 130 S. Ct. at 1644; *cf. Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 319-20 (5th Cir. 2003) ("employee" is ambiguous as used in the FMLA); *EEOC v. J.M. Huber Corp.*, 927 F.2d 1322, 1331 (5th Cir. 1991) (former employee is treated as an employee for purposes of Title VII); *In re Morse Tool, Inc.*, 148 B.R. 97, 148 (Bankr. D. Mass. 1992) (holding that, in context, the term "employees" as used in pension plan "includes retirees").

In sum, there can be no genuine dispute that the pre-amendment terms of the Verizon Pension Plans authorized a transfer of pension plan obligations like that at issue here.

2. <u>The December 2006 Plan Amendments Expressly Authorized The Idearc Pension Benefit Transfers Challenged By Plaintiffs.</u>

Plaintiffs' argument that the Idearc pension benefit transfers violated the terms of the Verizon Pension Plans also fails because each of the plans was amended, effective November 17, 2006, expressly to provide for the transfer of class members' pension benefit obligations to Idearc-sponsored pension plans. In light of these amendments, the plan terms clearly authorized the Idearc pension transfers at issue in this litigation regardless of whether the pre-amendment plan terms authorized the transfer of pension benefit obligations and assets.[10]

It is undisputed that each of the Verizon Pension Plans reserved Verizon's right to amend the plans at will. Appx. 365, 383, 399, 407. Under applicable Treasury regulations, "a plan amendment includes any changes to the terms of a plan, including changes resulting from a merger . . . or transfer (as defined in section 414(*l*))." 26 C.F.R. § 1.411(d)-3(a). Thus, Verizon was free to amend its plans in order to provide for the transfer of pension assets and liabilities at any time.

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[10] Plaintiffs' argument that these amendments may not be given effect because they were made retroactively is meritless. *See* Part I.C., *infra*.

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

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

Appx. 358, 371. Substantially similar changes were made to the two management plans. *See* Appx. 391-92, 413-14. Pursuant to these duly authorized amendments, there can be no legitimate dispute that the terms of the Verizon Pension Plans authorized the pension transfers at issue here, irrespective of the pre-amendment plan terms.

Contrary to plaintiffs' suggestion, Section 15.1(b) of the Mid-Atlantic Plan and the NY/NE Plan in no way alters this conclusion. That section provides that a "change or termination shall not affect the rights of any Employee, without his or her consent, to any benefit or pension to which he may have previously become entitled hereunder." Appx. 365, 383. According to plaintiffs, this provision of the two union plans prohibits pension plan spinoffs in the absence of the "consent" of every affected plan participant. Dkt. 83, at 15. This argument is deeply flawed.

Under plaintiffs' reading of Section 15.1(b), a plan merger or transfer could be effected only with the unanimous consent of every plan participant. (The *unanimous* consent of plan participants would be required because, under plaintiffs' theory, any transfer would "affect the rights" of both transferees and non-transferees.) This reading is inconsistent with Section

20.6 of the union plans, which authorizes plan mergers and spinoffs without reference to any consent requirement, and with ERISA, which was designed to accommodate pension plan mergers and transfers, subject only to the protections provided by Sections 204(g) and 208. Plaintiffs' reading is also inconsistent with any plausible motive an employer might have in establishing an ERISA plan, since no rational employer would make its ability to merge or bifurcate a plan contingent on obtaining the unanimous consent of plan participants. *Cf. Chastain*, 2007 WL 3357516, at *9 ("[A]s a practical matter, plaintiffs' theory suggests that liability for . . . benefit plans could never, or almost never, be completely transferable to another plan or entity, because all participants might not consent to a complete transfer of plan liability."). The Court should reject plaintiffs' nonsensical reading of Section 15.1(b).

In reality, Section 15.1(b) simply provides that a change or termination of the two union plans may not affect employees' rights to a benefit or pension under the terms of those plans. When Section 15.1(b) is read in conjunction with Section 20.6, which expressly provides that the plan responsible for employees' benefits could change as a result of a plan merger or spinoff, it is clear that Section 15.1(b) prohibits only a change to employees' pension or benefit rights, not a change to the identity of the plan responsible for providing those pensions or benefits or a change to the identity of the plan's sponsor. Here, because class members' pension or benefit rights were not changed or terminated as a result of the Idearc spinoff, the requirements of Section 15.1(b) were not violated. *Cf. Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1189 (7th Cir. 1994) ("A defined benefit plan gives current and former employees

property interests in their pension benefits but not in the assets held by the trust."); *Malia v. Gen. Elec. Co.*, 23 F.3d 828, 832-33 (3d Cir. 1994) (same); *Flanigan*, 242 F.3d at 88-89 (same).[11]

Notably, a plan provision materially identical to Section 15.1(b) has been present in numerous Bell System pension plans for decades. *See, e.g.*, *In re Lucent Death Benefits ERISA Litig.*, 541 F.3d at 252; *Kerber v. Qwest Pension Plan*, No. 05-cv-00478, 2008 WL 4377562, at *3 (D. Colo. Sept. 19, 2008), *aff'd* 572 F.3d 1135 (10th Cir. 2009); *Chastain*, 2007 WL 3357516, at *11; *Hurd v. Ill. Bell Tel. Co.*, 136 F. Supp. 125, 129 (D.C. Ill. 1955). Despite the numerous pension plan mergers and spinoffs that have occurred in the telecommunications industry (and been the subject of litigation) since the 1980s, *see* Resp. Appx. 6 (Chiffriller Decl., ¶ 18), defendants are not aware of anyone ever before asserting that this plan language prohibits the transfer of pension plan assets and liabilities absent the consent of all plan participants. And courts have ruled that this same language does not bar plan sponsors from eliminating non-vested benefits without any suggestion that participant consent is required. *E.g.*, *In re Lucent Death Benefits ERISA Litig.*, 541 F.3d at 256-57.

In essence, plaintiffs ask this Court to hold that Section 15.1(b) provides plan participants with a contractually vested right *not* to be subject to a plan merger or spinoff, absent their consent. It is well-established, however, that the courts will not, in the absence of "clear and express language," infer an intent on the part of an ERISA plan to vest benefits contractually. *E.g.*, *Hargrave v. Commonwealth Gen. Corp.'s Long Term Disability Plan*, No.

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[11] Under ERISA and the IRC, moreover, "a transferee plan is a continuation of the transferor plan with regard to transferred assets and liabilities." *See* Rev. Rul. 2008-40, 2008-2 C.B. 166; *see also Pieseski v. Northrop Grumman Corp.*, No. Civ.A. 01-993, 2002 WL 977449, at *8 (W.D. Pa. 2002) (spun-off plan is a continuation of pre-spinoff plan); *cf. Beck v. PACE Int'l Union*, 551 U.S. 96, 106 (2007) (noting that a plan merger "represents a *continuation* rather than a *cessation* of the ERISA regime"). Thus, insofar as concerns class members, the new Idearc union plan is treated as a continuation of the prior Mid-Atlantic and NY/NE Plans.

10-30720, 2011 WL 1834490, at *4 (5th Cir. May 13, 2011) (internal quotation marks and citation omitted). This rule applies equally in the pension context. *Spacek v. Mar. Ass'n ILA Pension Plan*, 134 F.3d 283, 294 (5th Cir.1998), *overruled on other grounds by Heinz*, 541 U.S. 739. Indeed, the Fifth Circuit has held, in light of the fact that "Congress has chosen to protect pensioners' expectations of retirement security statutorily," that the courts "have no justification for endeavoring[] to safeguard pensioners' interests by liberally applying equity-based theories of contract construction." *Spacek*, 134 F.3d at 295. Here, the language of the union plans does not "clearly and expressly" impose a participant consent requirement for the transfer of plan assets and liabilities. The Court should therefore reject plaintiffs' efforts to read such a requirement into the plans.

Even if the Court were to consider the terms of the plans to be ambiguous regarding whether the consent of participants is required before a portion of the plans may be spun off, plaintiffs' motion for summary judgment should be denied. Here, the plans' fiduciaries have interpreted Section 15.1(b) as not applying to plan mergers or spinoffs that meet the requirements of IRC § 414(*l*) and the regulations thereunder. *See* Resp. Appx. 6-7 (Chiffriller Decl., ¶¶ 16-19). That interpretation is entitled to deference, and there is no warrant to impose plaintiffs' far-fetched interpretation on defendants or plan participants. *See Conkright*, 130 S. Ct. at 1649 (noting that the ERISA interest in predictability would be undermined by "unexpected and inaccurate plan interpretations that might result from de novo judicial review" of pension plan provisions).

In sum, the union plans do not contain a participant consent requirement for plan amendments implementing a pension plan spinoff, and each of the four Verizon Pension Plans was amended in December 2006 expressly to provide for the transfer of class members' pension

benefit obligations to Idearc's pension plans, effective November 17, 2006. Accordingly, plaintiffs' assertion that the Idearc spinoff violated the terms of the Verizon Pension Plans fails as a matter of law.

C. The Idearc Pension Spin-Off Was Not Impermissibly Retroactive.

In Part III.C.2 of their brief, plaintiffs assert that the plan amendments providing for the transfer of assets and liabilities to Idearc's pension plans may not be given effect because ERISA and the terms of the Verizon Pension Plans prohibit "retroactive amendment." Dkt. 83, at 16-20. This assertion is both incorrect and irrelevant. Plaintiffs have not identified, and could not identify, any compelling basis in ERISA or the terms of the Verizon Pension Plans to impose an extraordinarily impractical, unnecessary, burdensome and unexpected requirement on pension plan sponsors to enact plan amendments implementing the terms of corporate transactions on the very day that those corporate transactions close. *See generally Varity*, 516 U.S. at 497 (noting that Congress sought in enacting ERISA to avoid creating a system "so complex that administrative costs[] or litigation expenses" would discourage employers from offering employee benefit plans at all).

First, the Fifth Circuit has made clear that the terms of a merger agreement may amend an ERISA plan. *See Halliburton Co. Benefits Comm. v. Graves*, 463 F.3d 360 (5th Cir. 2006). Here, the Court could construe the October 2006 board resolution authorizing the Idearc spinoff, together with the documents executed on November 17, 2006 implementing the transaction, as amending the Verizon Pension Plans to authorize the Idearc pension plan spinoff. *See* Dkt. 78, at 31-32. If the Court were to do so, the plan amendments implementing the Idearc spinoff were not retroactive.

Second, as the Fifth Circuit has recognized, "nothing in ERISA prohibits retroactive application of" pension plan amendments that do not result in the reduction of

accrued benefits. *Spacek*, 134 F.3d at 293. Here, it is undisputed that plaintiffs and class members were entitled to receive (and in fact received) exactly the same pension benefits after the Idearc spinoff as before. *See* Appx. 274-75, 559-60. Because retroactive application of the December 2006 plan amendments did not reduce class members' accrued benefits, retroactive application of those amendments was permissible. *See* Dkt. 78, at 32-33.

Plaintiffs, however, assert that class members' "accrued benefits" were "reduced to zero percent and nullified" by the Idearc pension transfers, apparently because the amendments deprived class members of a purported right to receive benefits *from Verizon pension plans*. Dkt. 83, at 20. This assertion reflects a fundamental misunderstanding of ERISA's "accrued benefits" provision. If a participant's "accrued benefit" under ERISA encompassed the right to receive payment from a particular plan, or from a plan sponsored by a particular employer, *every* pension plan merger or spinoff – at least where the transferee and transferor plans do not have the same sponsor – would necessarily violate ERISA's anti-cutback provision, 29 U.S.C. § 1054(g). Because ERISA, the IRC, and applicable Treasury regulations expressly authorize mergers and spinoffs (so long as equivalent benefits are provided before and after the merger or spinoff), it is clear that a participant's "accrued benefits" are not reduced merely because the obligation to pay those benefits is transferred from one plan to another. *See* 29 U.S.C. § 1058; 26 U.S.C. § 414(*l*)(2)(D)(ii); 26 C.F.R. § 1.411(d)-3(a); *id.* § 1.411(d)-4 A-2(a)(3) & A-3; *see also* note 11, *supra.*[12]

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[12] Plaintiffs also cite a handful of cases for the proposition that "attempts to backdate plan amendments and apply them retroactively . . . are ineffective to amend the plan." Dkt. 83, at 17. Of course, there is (and could be) no allegation here that defendants backdated anything. Moreover, each of the cases cited by plaintiffs is readily distinguishable. For instance, *Confer v. Custom Eng'g Co.*, 952 F.2d 41 (3d Cir. 1991), involved an attempt to amend a welfare benefit plan to exclude coverage for motorcycle accidents after a participant had already had a motorcycle accident, and to deny coverage based on the amendment. At most, the three cases

Third, plaintiffs are wrong to assert that a provision of the NY/NE Plan and the Mid-Atlantic Plan somehow prohibits the retroactive amendment of those plans. Both plans clearly and unequivocally reserve Verizon's right to amend the plans. Appx. 365, 383. Nevertheless, plaintiffs assert that Section 1.2(b) of the union plans "preclud[es] retroactive effect to" the Idearc plan amendments "except with respect to persons actively employed by Verizon." *See* Dkt. 83, at 17-18. Section 1.2(b) does no such thing.

Section 1.2 of the two union plans states, in relevant part:

> **1.2 Applicability Of This Restatement**
>
> (a) **General Effective Date.**
>
> Except as otherwise indicated in the text, ***the provisions of this restated Plan document*** are effective January 1, 1999, and apply only with respect to Employees who perform services for the Company or an Affiliate on or after such date.
>
> (b) **Other Effective Dates.**
>
> In the case of a provision with a stated effective date earlier or later than January 1, 1999, the provision shall apply (if otherwise applicable) only to Employees who perform services for the Company or an Affiliate on or after the stated effective date. . . . The provisions of section [5.10 or 5.11] and Articles X, XIII, XIV, XV, XVI, XIX and XX shall apply to all Participants, regardless of the date of separation from service.

Pls. Appx. 116, 144 (emphasis added). In context, it is clear that the "effective date" provisions of Section 1.2 are not intended in any way to limit Verizon's ability to amend the terms of the plans in the future, including its ability to amend the plans with respect to inactive employees. Rather, the plain purpose of this provision is simply to identify which "provisions of th[e]

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cited by plaintiffs stand for the uncontroversial proposition that vested benefits may not be reduced or eliminated by a plan amendment. For the reasons discussed above, those cases are inapplicable here because the Idearc plan amendments did not reduce or eliminate any benefits.

restated Plan document[s]" apply to all participants, and which apply only to active employees. *See* Resp. Appx. 7 (Chiffriller Decl., ¶ 20).[13]

Notably, under plaintiffs' strained reading, Section 1.2(b) would not prohibit all retroactive plan amendments affecting inactive employees. Rather, according to plaintiffs, Verizon could amend numerous portions of the plans – *e.g.*, Articles X, XIII, XIV, XV, XVI, XIX and XX – and apply those amendments retroactively to inactive plan participants. For instance, if Verizon had simply inserted the December 22 Idearc amendments in Article XX ("Miscellaneous Provisions"), then under plaintiffs' reading the amendments could be given retroactive effect. Defendants respectfully submit that the Court should not credit a reading of the union plans under which the permissibility of a retroactive amendment turns on the particular article of the plan into which the amendment is inserted.

Finally, plaintiffs' retroactivity argument is irrelevant because, even if the amendments to the Verizon Pension Plans could not be given retroactive effect, plaintiffs still would not be entitled to any relief. It is undisputed that plan amendments prescribing the transfer of assets and liabilities to the Idearc plans were adopted no later than December 22, 2006. Plaintiffs have not identified, and could not identify, any reason that these pension plan amendments should not be given effect *prospectively*. And at all times prior to December 31, 2006, class members in fact received all of the pension benefits to which they were entitled, and they received them *from a Verizon Pension Plan* as a transition service provided to Idearc and the Idearc pension plans. *E.g.*, Resp. Appx. 2, 11-12 (Chiffriller Decl., ¶ 6 & Ex. A, at 3-4). Thus, during November and December of 2006 – the only two months between the effective date

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[13] At worst for defendants, the relevant plan language is ambiguous. Accordingly, the Court should defer to the responsible plan fiduciaries' reasonable interpretation of these plan provisions. *E.g.*, *Conkright*, 130 S. Ct. at 1644.

of the spinoff and the date on which plaintiffs concede that the plan amendments were adopted – plaintiffs suffered no legally cognizable harm.

II. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THEIR PROHIBITED TRANSACTION CLAIM (COUNT III).

In Part III.D of their brief, plaintiffs assert that members of the VEBC violated ERISA's prohibited transaction requirements, ERISA § 406(b), 29 U.S.C. § 1106(b), in connection with Verizon's decision to spin off the obligation for class members' pension benefits to Idearc pension plans. Dkt. 83, at 28. Plaintiffs are mistaken, and their request for summary judgment on Count III should be denied.

As the text of Section 406 makes evident, ERISA's prohibited transaction rules apply *only* to acts taken in a fiduciary capacity. *See* ERISA § 406(b), 29 U.S.C. § 1106(b) ("A fiduciary with respect to a plan shall not. . . ."); *Spink*, 517 U.S. at 892 ("[T]he Court of Appeals erred in holding that [defendants] violated the prohibited transaction section of ERISA without making the requisite finding of fiduciary status."); *AT&T*, 972 F. Supp. at 29 ("For liability to attach, Defendants must have acted in a fiduciary capacity as to each count which charges a violation of . . . § 406[]."). For this reason, every circuit to consider the question has rejected the proposition that the decision to spin off a pension plan may be challenged under ERISA's prohibited transaction rules.[14] Here, because the decision to transfer the obligation for class

[14] *See, e.g.*, *Flanigan*, 242 F.3d at 87 ("[P]rohibited transaction rules apply only to decisions by an employer acting in its fiduciary capacity."); *Hunter*, 220 F.3d at 724 ("[B]y its own terms, § 1106 applies only to those who act in a fiduciary capacity. Therefore, our prior conclusion that Caliber was not acting in a fiduciary capacity when it transferred assets to the 401(k) Plan bars any such claim."); *see also Blaw Knox Ret. Income Plan*, 998 F.2d at 1191 ("29 U.S.C. § 1058 specifically provides procedures to properly effect mergers or transfers of pension plans. Since [plaintiffs] do not allege that [defendant] in making the transfer, did not follow the regulations, their [prohibited transaction] claim is inadequate.").

members' benefits to Idearc was made by Verizon in its settlor capacity, that decision is not subject to ERISA's prohibited transaction rules. *See* Part I.A, *supra*.

In response, plaintiffs assert that Section 406 of ERISA "extends the scope of liability beyond fiduciaries." Dkt. 83, at 29 (citing *Reich v. Compton*, 57 F.3d 270, 286-87 (3d Cir. 1995)). To be sure, ERISA authorizes suit against nonfiduciaries who knowingly participate in a violation of ERISA's prohibited transaction requirements. *E.g.*, *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245-46 (2000); *Reich*, 57 F.3d at 286-87. To the extent that plaintiffs mean to suggest that Section 406(b) gives rise to a cause of action for non-fiduciary acts, however, they are mistaken. Rather, the line of cases cited above stands only for the more limited and entirely inapposite proposition that redress for a fiduciary's violation of Section 406 may in certain circumstances be sought from nonfiduciary parties to the prohibited transaction. *See id.*; *see also DeLuca v. Blue Cross Blue Shield of Mich.*, 628 F.3d 743, 748 (6th Cir. 2010) (rejecting argument that Section 406 "imposes liability on a fiduciary even when *not* acting in a fiduciary capacity" (emphasis in original)). Here, because the decision to spin off the obligation for class members' pension benefits was not a fiduciary act (and in any event was not made by the VEBC), plaintiffs' prohibited transaction claim against the VEBC fails as a matter of law.

Plaintiffs' request for summary judgment on Count III also fails because plaintiffs have not come forward with any record evidence that the interests of Verizon and the pension plans' participants in connection with the Idearc spinoff were "adverse" within the meaning of Section 406(b)(2). *See Corrado v. Life Investors Owners Participation Trust & Plan*, No. DKC 08-0015, 2011 WL 886635, at *10 (D. Md. Mar. 11, 2011) ("Without any evidence that the Plan's division benefitted [the plan sponsor] or another party-in-interest or that it harmed the

Plan's participants, Plaintiffs have not established a breach of [Section 406(b)(2)]."); *see also United Steelworkers of Am., Local 2116 v. Cyclops Corp.*, 860 F.2d 189, 202-03 (6th Cir. 1988) (rejecting argument that pension plan spinoff violated Section 406(b) of ERISA). It is undisputed that, following the Idearc spinoff, class members were entitled to receive (and in fact have received) all of the benefits to which they were entitled prior to the spinoff. Appx. 558-60. Furthermore, while plaintiffs conclusorily assert that defendants were "acting to promote the financial interests of Verizon when they included [class members] in the Spin-off transaction," Dkt. 83, at 29, this assertion is not supported by any citations to the record, as is required by Local Rule 56.5(c). *See Special Risk Servs. Grp.*, 2006 WL 6632286, at *4. Contrary to plaintiffs' suggestion, Verizon fully funded the newly created Idearc pension plans on a termination basis, and overfunded those plans on an accounting basis by more than $160 million, as part of the spinoff transaction. Appx. 19 (Fitzgerald Dep. at 72:3-5), 120 (Hartnett Dep. at 121:15-21), 164, 177. Moreover, Verizon estimated that $41.4 million of this overfunding was attributable to the transfer of the benefit obligations for inactive employees. *See, e.g.*, Pls. Appx. 233. In other words, according to Verizon's pre-spinoff estimates, retaining responsibility for the pension benefits of former VIS employees would have increased the net funding level of the Verizon Pension Plans (and so decreased Verizon's future contribution obligations to the Verizon Pension Plans) by more than $40 million. Thus, class members were not harmed by, and Verizon did not benefit financially from, the Idearc pension plan spinoff or its treatment of inactive employees.

Plaintiffs' prohibited transaction claim also fails because Section 406(b)(2) has been construed by the courts to require "'a transaction between the plan and a party having an adverse interest.'" *Tibble v. Edison Int'l*, 639 F. Supp. 2d 1074, 1094 (C.D. Cal. 2009) (quoting

Donovan v. Bierwirth, 680 F.2d 263, 270 (2d Cir. 1982)). Here, while plaintiffs assert that several plan fiduciaries represented or acted on behalf of Verizon, they have failed to identify any transaction *between* Verizon and a pension plan. Thus, the undisputed record evidence fails to support plaintiffs' assertion that any defendant's conduct violated Section 406(b)(2) of ERISA. *See also Blaw Knox Ret. Income Plan*, 998 F.2d at 1191 ("[S]ection 406 is not implicated by [defendant]'s transfer of the pension plans. . . .").

Finally, plaintiffs assert that members of the VEBC received Idearc stock in connection with the Idearc transaction, and suggest that this violated ERISA's prohibition against a fiduciary receiving "consideration . . . from any party dealing with [a] plan in connection with a transaction involving the assets of the plan," ERISA § 406(b)(3), 29 U.S.C. § 1106(b)(3). *See* Dkt. 83, at 30-31. The only stock that any member of the VEBC purportedly received in connection with the Idearc spinoff, however, was the Idearc stock that he or she received on exactly the same basis as every other holder of Verizon common stock. *See* Appx. 252, 329; *see also* Dkt. 81, ¶ 29 (citing Pls. Appx. 91, ¶¶ 171, 173). Plaintiffs' assertion that this constitutes a "prohibited transaction" borders on the frivolous.

As a threshold matter, it is far from clear that receipt of Idearc shares constitutes "consideration." This is so because a holder of Verizon shares prior to the spinoff already held an interest in the VIS business unit, and the effect of the spinoff was simply to separate out the shareholder's interest in VIS from the shareholder's interest in Verizon's remaining businesses. In any event, these shares were distributed as a result of the corporate transaction spinning off VIS as a separate, publicly traded company, *not* the transfer of pension plan assets, and so the shares were not distributed "in connection with a transaction involving the assets of [any] plan." Lastly, receipt of such "incidental" benefits – on precisely the same terms as every other Verizon

shareholder – simply does not fall within the scope of ERISA's prohibited transaction rules. *See Hughes Aircraft*, 525 U.S. at 445-46; *Hunter*, 220 F.3d at 724-25.

For the foregoing reasons, as well as the reasons set forth in defendants' motion for summary judgment, *see* Dkt. 78, at 36-39, plaintiffs' request for summary judgment on Count III should be denied.

III. PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON THEIR SPD DISCLOSURE CLAIM (COUNT II).

In Part III.B of their brief, plaintiffs argue that defendants violated ERISA's statutory disclosure requirements for SPDs, and seek as a remedy "reinstatement" in the Verizon Pension Plans. This argument fails, first and foremost, because there was no SPD disclosure violation. Moreover, to the extent plaintiffs argue that the SPDs promised them that their pension benefits would be paid by Verizon-sponsored plans "for life," they are mistaken. Finally, even assuming that the Verizon Pension Plan SPDs were in any way deficient, plaintiffs have failed to establish that they are entitled to the remedy they seek, or to any remedy at all. Plaintiffs are not entitled to summary judgment on Count II of their complaint.

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

Plaintiffs argue that Verizon's SPDs ran afoul of ERISA Section 102(b), 29 U.S.C. § 1022(b), which requires that an SPD describe the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits," because the SPDs did not disclose "the fact that a corporate spin-off and consequential transfer of pension obligations could result in the retirees' loss of Verizon sponsored pension benefits." Dkt. 83, at 5. This argument misses the mark for three separate reasons.

First, plaintiffs are wrong in claiming that the transfer of pension benefit obligations to another plan constitutes a circumstance that results in the denial or loss of benefits.

Under ERISA, any such transfer must ensure that a participant's benefit immediately after the spinoff is "equal to or greater than" his or her benefit immediately before the spinoff. *See* 29 U.S.C. § 1058; *see also id.* § 1054(g). Here, class members' pension benefits did not change as a result of the Idearc spinoff, and plaintiffs have continued to receive from an Idearc pension plan 100% of the benefits that they received from a Verizon Pension Plan immediately prior to the spinoff. *See* Appx. 558-60. Plaintiffs have not offered, and could not offer, any evidence that the transfer of the obligations for class members' pension benefits resulted in any denial or loss of benefits. *See also* pp. 23-24, *supra* (explaining that the transfer of pension benefit obligations does not violate ERISA's anti-cutback rule).

Second, ERISA requires only that plan administrators disclose to participants the circumstances that might result in a denial or reduction of benefits *under existing plan terms*. *See Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993) ("Section 1022(b) relates to an individual employee's eligibility under then existing, current terms of the Plan and not to the possibility that those terms might later be changed, as ERISA undeniably permits."); 29 C.F.R. § 2520.102-3 ("The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed."). Here, by disclosing all of the circumstances that could result in a reduction or loss of benefits under the terms of the then-existing Verizon Pension Plans, Verizon's SPDs fully complied with ERISA's disclosure requirements.

Third, to the extent plaintiffs are correct that the transfer of class members' pension liabilities to the Idearc plans represents a "denial or loss of benefits," the circumstance resulting in such "denial or loss" was (according to plaintiffs) the amendment of the Verizon Pension Plans. Verizon's SPDs informed participants that Verizon reserved "the right to amend,

modify, suspend, terminate or partially terminate the [plans] at any time, at [its] discretion, with or without advance notice to participants." *E.g.*, Appx. 448, 455; Resp. Appx. 25. And, under ERISA, a transfer of plan assets and liabilities to another pension plan is treated as a plan amendment. *See* 26 C.F.R. § 1.411(d)-3(a). Accordingly, the SPDs did disclose the "circumstance" that resulted in the purported "loss" of benefits at issue here.

In sum, defendants fully complied with ERISA's statutory disclosure requirements. Under these circumstances, defendants were entitled to rely on plan terms authorizing the Idearc spinoff, notwithstanding the SPDs' silence on the subject. *See, e.g.*, *Mers v. Marriott Int'l Grp. Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1023 (7th Cir. 1998) ("[A]n SPD's silence on an issue does not estop a plan from relying on the more detailed policy terms when no direct conflict exist.").

B. <u>Plaintiffs' Assertion That They Were Promised Lifetime Benefits Paid From Verizon-Sponsored Plans Is Meritless.</u>

Plaintiffs also assert in passing that two Verizon SPDs contained "a commitment by Verizon to continue paying monthly pension benefits for life." Dkt. 83, at 5. To the extent plaintiffs mean to suggest that the union plan SPDs gave (non-management) class members a vested, contractual right to have their pension benefits paid by a Verizon-sponsored pension plan, they are mistaken.

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

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

Pls. Appx. 126, 153. This isolated sentence, however, cannot bear the weight that plaintiffs place on it, especially when viewed in light of the SPDs' unambiguous reservation of rights provisions.

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

Indeed, the case against plaintiffs' reliance on this isolated sentence is even stronger in this case than in *Wise*, since the relevant SPDs in *Wise* did not contain a reservation of rights clause. *See id.* at 932-33. Here, both of the SPDs cited by plaintiffs contained unequivocal language reserving Verizon's "right to amend, modify, suspend, terminate or partially terminate the Plan[s] at any time, at [its] discretion, with or without advance notice to participants." Appx. 455; Resp. Appx. 25. Faced with comparable reservation of rights clauses in SPDs, the courts have repeatedly rejected claims for vested or lifetime benefits. *See, e.g.*, *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 394, 401 (6th Cir. 1998) (no vested right to employer-provided medical benefits despite SPD language stating that "health care coverages will be provided at GM's expense for your lifetime"); *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 58 F.3d 896, 900, 907 (3d Cir. 1995) (no vested right to retiree medical coverage

despite SPD language stating that "when you retire, your medical benefit will be continued for the rest of your life"). In light of the clear and unambiguous reservation of rights contained in the Verizon SPDs, the Court should reject plaintiffs' assertion that they were promised pension benefits *from Verizon-sponsored pension plans* "for life."

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

Even assuming *arguendo* that Verizon's SPDs were somehow infirm, plaintiffs' request for summary judgment on Count II still should be denied for two separate reasons.

First, the mere failure to comply with the technical requirements of Section 102(b) of ERISA does not state a cause of action absent "exceptional circumstances, such as bad faith, active concealment, or fraud." *Watson v. Deaconess Waltham Hosp.*, 298 F.3d 102, 113 (1st Cir. 2002); *accord Andersen v. Chrysler Corp.*, 99 F.3d 846, 859 (7th Cir. 1996) ("[T]echnical violations of ERISA's notification requirements, without a showing of bad faith, active concealment or detrimental reliance, do not state a cause of action"); *Ackerman v. Warnaco, Inc.*, 55 F.3d 117, 124 (3d Cir. 1995) ("[U]nder ordinary circumstances defects in fulfilling the reporting and disclosure requirements of ERISA do not give rise to a substantive remedy.").[15] Moreover, to the extent that plaintiffs seek to "estop" Verizon from exercising its

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[15] The D.C. Circuit's decision in *Eddy v. Colonial Life Insurance Co. of America*, 919 F.2d 747 (D.C. Cir. 1990), is not to the contrary. *Eddy* concerned a fiduciary's responsibilities in responding to a participant's affirmative inquiries regarding plan terms, not a fiduciary's SPD disclosure obligations. In that case, after an HIV-positive insured learned that his employer-provided health insurance was being terminated, he called his insurance company regarding the fact that his insurance was ending, but was not informed of his right to convert his coverage to an individual policy. *See id.* at 748-51 (noting insured's testimony that the insurer erroneously informed him that he could not convert his coverage). On those facts, the court concluded that the insurer had an affirmative obligation to inform the insured of his conversion rights. *See id.* at 751 ("[O]nce a beneficiary makes known his predicament, the fiduciary 'is under a duty to communicate . . . all material facts in connection with the transaction which the trustee knows or should know.'").

right under the plans to transfer the obligations for class members' pension benefits to the Idearc plans, *see* Dkt. 83, at 9, plaintiffs must prove "(1) a material misrepresentation; (2) reasonable and detrimental reliance upon the representation; and (3) extraordinary circumstances." *Mello v. Sara Lee Corp.*, 431 F.3d 440, 444-45 (5th Cir. 2005); *see CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1881 (2011) (["W]hen a court exercises its authority under § 502(a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made."). Here, plaintiffs have not come forward with *any* evidence of fraud, material misrepresentation, bad faith or active concealment on the part of defendants in preparing the SPDs for Verizon's pension plans.[16] Thus, even assuming that Verizon's pre-2007 SPDs were somehow deficient, plaintiffs' motion for summary judgment should be denied.

Second, a plan participant may not "obtain relief" for a disclosure violation absent proof, at a minimum, that he or she personally suffered "actual harm" caused by the disclosure violation. *Amara*, 131 S. Ct. at 1881; *see id.* at 1885 (Scalia, J., dissenting) (noting that relief under *Amara* must be limited to "harm stemming from [the plaintiff's] reliance on the SPD"). Here, the only purported harm identified by plaintiffs in their brief as stemming from the alleged disclosure violation is that they failed to seek "to cause the union to make a legal challenge so as to prevent" the transfer of retirees. Dkt. 83, at 7. But plaintiffs fail to offer any evidence that they would have actually succeeded in causing the union to bring a lawsuit, let alone that any such lawsuit would have prevented the transfer of class members' pension benefit obligations.

[16] Plaintiffs assert that a member of the VEBC "put a hold on a mailing of notices to retirees." Dkt. 81, at ¶ 41. However, there was nothing untoward about that decision, which was designed "to avoid confusion . . . in the middle of 2007 enrollment." *See* Pls. Appx. 313. As plaintiffs acknowledge, this mailing was sent to class members in January 2007, Dkt. 81, at ¶ 42, shortly after the open enrollment period ended. (A number of class members did not receive the notice mailing until February 2007, but only because they had not been identified as former VIS employees until that time. *See* Appx. 239-40 (Wiley Dep. at 135:19 - 138:21).) In any event, this assertion is entirely irrelevant to plaintiffs' separate claim regarding the Verizon SPDs.

The court should not credit plaintiffs' efforts to "build inference upon inference" in order to create a genuine question of fact regarding the required elements of causation and actual harm (or detrimental reliance). *See Church of Scientology of Cal. v. Cazares*, 638 F.2d 1272, 1288 (5th Cir. 1981) (granting defendant's motion for summary judgment).

Here, moreover, it is particularly unlikely that plaintiffs' "influence" would have caused their unions to sue Verizon to stop the Idearc spinoff transaction, since the relevant union officials were informed by Verizon that the contemplated spinoff would entail "the transfer of VIS employees and former employees to the VIS plans" as early as August 2006, *see* Resp. Appx. 27-38, and the unions never objected to the proposed spinoff or its treatment of retiree pension benefits. Under these circumstances, plaintiffs' assertions are far too speculative and attenuated to satisfy the "actual harm" and causation requirements of *Amara*. *See Slaughter-Cooper v. Kelsey Seybold Med. Grp. P.A.*, 379 F.3d 285, 292 (5th Cir. 2004) (affirming grant of summary judgment on the ground that plaintiffs' evidence "on the element of actual harm" was "too speculative"); *see also Pearson v. Voith Paper Rolls, Inc.*, __ F.3d __, No. 09-3884, 2011 WL 3773343, at *2 (7th Cir. Aug. 25, 2011) (rejecting argument that ERISA plan participant suffered harm as a result of a miscalculation of his benefits because the participant's claim that he would have negotiated better severance terms had he been aware of the correct calculation was "entirely speculative"); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) ("[T]here must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" (alterations in original)).

At a minimum, plaintiffs' declarations fail to "establish beyond peradventure" the absence of a genuine factual dispute regarding whether they were personally harmed as a result of the alleged deficiencies in the Verizon SPDs (or whether they relied to their detriment on those SPDs). *See Fontenot*, 780 F.2d at 1194. For that reason alone, plaintiffs' request for summary judgment on Count II should be denied.

IV. <u>PLAINTIFFS' FREE-STANDING EQUITABLE RELIEF CLAIM DOES NOT STATE AN INDEPENDENT CAUSE OF ACTION (COUNT VI).</u>

In Part III.E of their brief, plaintiffs make clear that their request in Count VI for "appropriate equitable relief" is premised entirely upon the substantive violations of ERISA alleged in Counts II through IV of their complaint. Dkt. 83, at 31. Because plaintiffs are not entitled to summary judgment on those counts for the reasons set forth herein, plaintiffs' request for summary judgment on Count VI should also be denied. *See also* Dkt. 78, at 47-48.

Moreover, even assuming *arguendo* that plaintiffs have established an ERISA violation, they are entitled under ERISA only to relief that is both "appropriate" and "equitable." *See* ERISA §§ 409, 502(a)(2) & (3), 29 U.S.C. §§ 1109, 1132(a)(2) & (3). Here, plaintiffs have not even attempted to satisfy their burden on summary judgment of establishing that their requested remedy –*i.e.*, "reinstatement" in the Verizon Pension Plans – would be either appropriate or equitable. Nor could they possibly make this showing, given that defendants undisputedly complied with detailed regulations governing the transfer of pension benefit obligations, that class members' accrued pension benefits were fully protected as a result of that transfer, that the newly created Idearc pension plans were overfunded on an accounting basis as of the time of the transfer, and that a reinstatement order would be enormously complex and disruptive. Thus, plaintiffs are not entitled to their requested relief of reinstatement on the summary judgment record before the Court.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in the Verizon Defendants' motion for summary judgment, the Court should deny plaintiffs' motion for partial summary judgment in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2011, 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:

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