

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

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v.

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

VERIZON COMMUNICATIONS, INC., et
al.
Defendants.

**DEFENDANT SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE’S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Defendant SuperMedia Employee Benefits Committee f/k/a Idearc Employee Benefits Committee (“SuperMedia EBC”) moves for summary judgment on each claim against it in Plaintiffs’ Second Amended Complaint (the “Motion”). A Brief in Support of this Motion more fully setting forth SuperMedia EBC’s arguments is filed contemporaneously herewith and incorporated by reference as if fully set forth herein.

Plaintiffs’ Second Amended Complaint includes three claims against SuperMedia EBC. “Claim One” alleges SuperMedia EBC breached its fiduciary duty to Plaintiffs by not affording a full and fair review of their administrative claim. *See* Pls.’ Second Am. Compl. at 28-32 (Docket No. 64). “Claim Five” alleges SuperMedia EBC breached its fiduciary duty to Plaintiffs and Class members by failing to comply with the statutorily prescribed 90-day deadline to provide participants with a copy of the SuperMedia pension plans’ Summary Plan Descriptions (“SPDs”). *See id.* at 50-52. Finally, “Claim Six” seeks equitable relief against SuperMedia EBC in the form of an order (1) directing it to transfer Plaintiffs and Class members back to Verizon’s

plans and (2) removing from serving on SuperMedia EBC those persons who supported, assisted, and acquiesced in and defended the transfer under ERISA § 502(a)(2)-(3) for SuperMedia EBC's violation of ERISA and/or terms of the plans. *See id.* ¶¶ 227, 229, 231.

All three claims fail as a matter of law. First, Plaintiffs have not been denied any benefits. As a result, there was no legal requirement for SuperMedia EBC to conduct a "full and fair review." Second, Plaintiffs/Class members suffered no harm or prejudice—and have not even alleged that they have suffered any harm or prejudice—from receiving summary plan descriptions more than 90 days after becoming participants in the SuperMedia pension plans. The lack of harm is not surprising because the SuperMedia pension plans were mirror image plans of the Verizon pension plans in which the Plaintiffs were formerly participants. Indeed, it is undisputed that the Plaintiffs continued to receive all of the same benefits under the SuperMedia pension plans that they had received under the Verizon pension plans. Accordingly, SuperMedia EBC is entitled to summary judgment on all claims asserted against it.

REQUESTED RELIEF

For the foregoing reasons, and as set out in more detail in the concurrently-filed Brief in Support of this Motion (which is incorporated here by reference), SuperMedia EBC respectfully submits that Plaintiffs' claims against SuperMedia Employee Benefits Committee fail as a matter of law and should be dismissed on summary judgment. SuperMedia EBC further requests such other relief to which it may be justly entitled.

Dated: August 26, 2011

Respectfully submitted,

ANDREWS KURTH LLP

/s/ David P. Whittlesey

David P. Whittlesey
State Bar No. 00791920
Martha M. Hopkins
State Bar No. 24059970
111 Congress, Suite 1700
Austin, Texas 78701
Telephone: (512) 320-9200
Facsimile: (512) 320-9292

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

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

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August 2011, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all counsel of record, each of whom has registered as users of the ECF system. A courtesy copy has also been sent to the following counsel of record via E-Mail:

Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, Colorado 80237-1741

Christopher L. Kurzner
KURZNER PC
1700 Pacific Avenue, Suite 3800
Dallas, Texas 75201

Robert E. Goodman, Jr.
KILGORE & KILGORE
3109 Carlisle St.
Dallas, Texas 75204

Jeffrey G. Huvelle, Esq.
Christian J. Pistilli
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

ATTORNEYS FOR PLAINTIFFS

**ATTORNEYS FOR DEFENDANTS
Verizon COMMUNICATIONS, INC.,
VERIZON EMPLOYEE BENEFITS
COMMITTEE
VERIZON PENSION PLAN FOR NEW
YORK AND
NEW ENGLAND ASSOCIATES;
VERIZON MANAGEMENT
PENSION PLAN**

/s/ David P. Whittlesey
David P. Whittlesey

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**DEFENDANT SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE'S BRIEF IN
SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Respectfully submitted,

ANDREWS KURTH LLP

/s/ David P. Whittlesey

David P. Whittlesey
State Bar No. 00791920
Martha M. Hopkins
State Bar No. 24059970
111 Congress, Suite 1700
Austin, Texas 78701
Telephone: (512) 320-9200
Facsimile: (512) 320-9292

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

**ATTORNEYS FOR DEFENDANT
SUPERMEDIA EMPLOYEE BENEFITS
COMMITTEE**

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I. PRELIMINARY STATEMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant SuperMedia Employee Benefits Committee f/k/a Idearc Employee Benefits Committee (“SuperMedia EBC”) moves for summary judgment on each claim against it in Plaintiffs’ Second Amended Complaint.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs’ Second Amended Complaint includes three claims against SuperMedia EBC. “Claim One” alleges SuperMedia EBC breached its fiduciary duty to Plaintiffs by not affording a full and fair review of their administrative claim. *See* Pls.’ Second Am. Compl. at 28-32 (Docket No. 64). “Claim Five” alleges SuperMedia EBC breached its fiduciary duty to Plaintiffs and Class members by failing to comply with the statutorily prescribed 90-day deadline to provide participants with a copy of the SuperMedia pension plans’ Summary Plan Descriptions (“SPDs”). *See id.* at 50-52. Finally, “Claim Six” seeks equitable relief against SuperMedia EBC in the form of an order (1) directing it to transfer Plaintiffs and Class members back to Verizon’s plans and (2) removing from serving on SuperMedia EBC those persons who supported, assisted, and acquiesced in and defended the transfer under ERISA § 502(a)(2)-(3) for SuperMedia EBC’s violation of ERISA and/or terms of the plans. *See id.* ¶¶ 227, 229, 231.

All three claims fail as a matter of law. First, Plaintiffs have not been denied any benefits. As a result, there was no legal requirement for SuperMedia EBC to conduct a “full and fair review.” Second, Plaintiffs/Class members suffered no harm or prejudice—and have *not even alleged* that they have suffered any harm or prejudice—from receiving summary plan descriptions more than 90 days after the spin-off date. The lack of harm is not surprising because the SuperMedia pension plans were mirror image plans of the Verizon pension plans in which the Plaintiffs were formerly participants. Indeed, it is undisputed that the Plaintiffs continued to receive all of the same benefits under the SuperMedia pension plans that they had

received under the Verizon pension plans. Accordingly, SuperMedia EBC is entitled to summary judgment on all claims asserted against it.

III. STATEMENT OF FACTS

Idearc Inc. was formed as a Delaware corporation in June of 2006 in anticipation of Verizon Communications Inc.'s ("Verizon") spin off of its Verizon Information Services division (hereinafter, "VIS," which included companies associated with Verizon's domestic print and internet yellow pages directories publishing operations). Gist Decl. ¶ 3, attached hereto as Ex. A (App. 2). The spin off transaction between Verizon and Idearc Inc. closed on November 17, 2006 (hereinafter, the "Spin-off" or "Spin-off transaction"). *Id.* ¶ 4.

In connection with the Spin-off, Verizon imposed upon VIS its planned treatment of VIS retirees' pension assets and liabilities, which involved transferring said assets and liabilities to the new Spin-off entity. *Id.* ¶ 5. All current/former VIS employees were participating in Verizon sponsored pension plans at the time of the Spin-off, as VIS had no separate pension plans for either current or former employees. *Id.* ¶ 6.

The Court has defined the Class as:

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

Order for Class Certification (Docket No. 55). Therefore, prior to the date of the Spin-off, Plaintiffs and Class members were retired or terminated from VIS employment and participants in a Verizon sponsored pension plan. Accordingly, they were transferred to Idearc pension plans as a result of the Spin-off.

To facilitate this transfer of Plaintiffs' and Class members' pension benefits, Verizon and Idearc Inc. entered into an Employee Matters Agreement ("EMA"). *See* Gist Decl. ¶ 7 (App. 2) ;

see also Ex. A-1 (EMA) (App. 5-53). The EMA required the creation and adoption of certain Idearc pension plans that mirrored corresponding Verizon pension plans. *Id.* It also provided for the transfer of assets and liabilities associated with most of the inactive employees whose last service was with a VIS business unit to the appropriate mirror Idearc pension plan. *Id.*

Idearc Inc.'s board of directors also adopted a resolution that related to Idearc Inc. assuming certain obligations for payments and benefits to employees of Idearc Inc. and its subsidiaries and certain former employees of Verizon's VIS business who were entitled to receive such payments and benefits at the time or who were covered by the corresponding Verizon employee plans. Gist Decl. ¶ 8 (App. 3); *see also* Ex. A-2 (Board Resolutions) (App. 54-70). This resolution approved and adopted several Idearc pension plans that mirrored the corresponding Verizon pension plans prepared by Verizon as required by the EMA. Gist Decl. ¶ 9 (App. 3); *see also* Ex. A-2 art. XIII (Board Resolutions) (App. 65-68).

Verizon instructed its trustee to transfer the pension assets associated with Plaintiffs and Class members to the newly formed Idearc Inc. Master Trust on November 20, 2006. Gist Decl. ¶ 10 (App. 3); *see also* Ex. A-3 (Nov. 20, 2006 Letter) (App. 71-73).

On January 25, 2007, Verizon notified management retirees that, as a result of the Spin-off, Idearc assumed both the responsibility and obligations for the benefits plans of its employees as well as retirees and other former employees whose final Verizon service was with VIS or an associated company. Gist Decl. ¶ 12 (App. 3); *see also* Larson Decl. ¶ 7, attached hereto as Ex. B (App. 75); Ex. B-1 (Jan. 25, 2007 Letter) (App. 77-78). On February 15, 2007, Verizon sent the same notification to non-management retirees. Gist Decl. ¶ 13 (App. 3); *see also* Larson Decl. ¶ 7 (App. 75); Ex. B-2 (Feb. 15, 2007 Letter) (App. 79-80). These letters specifically notified the participants that "Idearc has established plans that mirror the Verizon

Plans and you will continue to participate in those mirror plans.” Exs. B-1 & B-2 (App. 77-80).

Idearc EBC followed-up Verizon’s January and February letters with a letter of its own informing participants, including Plaintiffs and Class members, that Idearc had assumed responsibility for recipients’ benefit plan. Gist Decl. ¶ 15 (App. 3); Larson Decl. ¶ 9 (App. 76); Ex. B-5 (March 26, 2007 Letter) (App. 333-34) ; Ex. B-6 (March 28, 2007) (App. 335-36). Again, Idearc EBC explained to participants that the Idearc benefit plans “mirror the plans that Verizon offers.” Exs. B-5 & B-6 (App. 333-36).

Approximately two years later, Plaintiffs’ counsel sent a letter to the plan administrators of both the Verizon pension plans and the Idearc pension plans asserting “both an administrative claim *and* a request for ERISA documents” on behalf of Plaintiffs. Garza Decl. ¶ 3, attached hereto as Ex. C (App. 338); Ex. C-1 (Feb. 4, 2009 Letter) (App. 340-49) (emphasis in original). The lengthy letter explained that Plaintiffs were unhappy with their transfer from Verizon pension plans to Idearc pension plans. *See* Ex. C-1. (Feb. 4, 2009 Letter) (App. 340-49). Plaintiffs had concerns over the transfer process and whether Verizon transferred funds sufficient to support Idearc’s pension obligations to the transferred retirees. *See id.* Plaintiffs requested multiple categories of documents they believed necessary to determine whether Verizon had in fact transferred sufficient funds. *See id.* Finally, despite admitting they did not have sufficient information, Plaintiffs concluded that the transfer was not in their best interest and demanded that their status as transferred retirees into Idearc pension plans be rescinded and the administrators agree that Plaintiffs and all other transferred retirees be restored to their former status as participants in Verizon’s pension plans. *See id.* at 8 (App. 348).

Idearc EBC, the Idearc pension plans’ administrator, timely responded to Plaintiffs’ February 4 letter with certain requested documents and an explanation as to why the remaining

documents were not being provided. Garza Decl. ¶¶ 4-5 (App. 338); Ex. C-2 (March 3, 2009 Letter) (App. 350-354). It also sought clarification on the “claim” aspect of Plaintiffs’ letter:

[Y]ou ask that your letter be treated as a “claim.” Please call me to discuss this aspect of your letter because it is my understanding that *your clients have been receiving their monthly pension distributions.*

Ex. C-2 (March 3, 2009 Letter) (emphasis added) (App. 350-54).

Shortly thereafter, Idearc Inc. commenced Chapter 11 bankruptcy proceedings within the Dallas Division of this District. Garza Decl. ¶ 7 (App. 338). Notably, the Idearc Inc. Master Trust is a separately maintained and independently managed entity, which was not a part of Idearc Inc.’s bankruptcy. Gist Decl. ¶ 10 (App. 3); Garza Decl. ¶ 7 (App. 338). While Idearc Inc. was in bankruptcy, the Idearc pension plans continued to pay Plaintiffs and Class members their monthly distributions out of the Idearc Inc. Master Trust. Gist Decl. ¶ 11 (App. 3).

Plaintiffs again sent a lengthy letter to Verizon and Idearc pension plan administrators on September 15, 2009 purporting to be an appeal of their “class-wide administrative claim” of February 4, 2009. Garza Decl. ¶ 8 (App. 339); Ex. C-3 (Sept. 15, 2009 Letter) (App. 355-67). In a letter dated October 29, 2009, Idearc EBC once again tried to ascertain what exactly Plaintiffs were claiming:

[Y]ou have provided no evidence or allegation that the Idearc Pension plan has failed to make any payment required under the plan. If you have such a claim, please provide the information necessary for us to deal with the claim.

Ex. C-4 (Oct. 29, 2009 Letter) (emphasis added) (App. 368-69); *see also* Garza Decl. ¶ 9 (App. 339). Instead of providing evidence or allegation that the Idearc pension plans failed to make a payment, Plaintiffs filed the instant suit on November 25, 2009. Garza Decl. ¶ 10 (App. 339).

Idearc Inc. emerged from Chapter 11 bankruptcy proceedings on December 31, 2009 and announced it had changed its name to SuperMedia Inc. The Idearc pension plans, Idearc EBC, and Idearc Inc. Master Trust, were renamed to the SuperMedia pension plans, SuperMedia EBC,

and SuperMedia Inc. Master Trust, respectively. *See* Garza Decl. ¶ 11 (App. 339); Gist Decl. ¶ 17 (App. 4). Defendant will use the current SuperMedia names throughout this Motion when referring to either Idearc or SuperMedia entities for convenience and clarity. SuperMedia EBC is the plan administrator of Plaintiffs and Class members' current SuperMedia pension plans. These plans have paid and continue to pay all required monthly distributions to the plan participants. Gist Decl. ¶ 11 (App. 3); *see also* Ex. D-1 (Plaintiffs' Responses to Verizon's Requests for Admissions) (App. 372-79) (admitting that Plaintiffs have received a monthly annuity pension payment from November 2006 to the present in an amount equal to the pension benefits Verizon pension plans allegedly failed to provide during that time).

IV. ARGUMENT AND AUTHORITIES

A. Standard of Review.

Summary judgment is appropriate when the pleadings, affidavits, and other evidence taken together establish that there are no genuine issues of material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

B. Plaintiffs and Class Members Are Not Entitled to Equitable Relief Under ERISA § 502(a)(3).

In each of the three claims asserted against SuperMedia EBC (One, Five, and Six), Plaintiffs and/or Class members seek equitable relief under ERISA § 502(a)(3). For Plaintiffs/Class members to be entitled to such relief, they must establish that SuperMedia EBC is "(a) a plan fiduciary, (b) has breached its fiduciary duties under ERISA, (c) that such a breach caused the plaintiff injury and (d) that the equitable relief sought is indeed appropriate." *Hobbs v. Baker Hughes Oilfield Operations*, 2007 WL 4223666, at *5 (S.D. Tex. Nov. 28, 2007), *aff'd* 294 Fed. Appx. 156 (5th Cir. 2008). SuperMedia EBC does not dispute the satisfaction of element one because SuperMedia EBC, as the SuperMedia pension plans' administrator, is the

relevant plan fiduciary. Plaintiffs, however, cannot meet the other elements for each claim as a matter of law, and summary judgment is appropriate on all claims.

1. Claim One: SuperMedia EBC was not required to provide a “full and fair review” because no benefits were denied.

As to Claim One, Plaintiffs cannot satisfy the second element for relief under ERISA § 502(a)(3) because SuperMedia EBC had no duty to provide a full and fair review of Plaintiffs’ alleged “administrative claim.” Plaintiffs¹ allege in Claim One that even though they were not seeking payment of additional benefits from the SuperMedia pension plans, Plaintiffs’ “attempted class-wide administrative claim should have been treated by SuperMedia EBC as one arising under ERISA [§] 502(a)(1)(B), 29 U.S.C. § 502(a)(1)(B).” Pls.’ Second Am. Compl. ¶ 117. Plaintiffs further allege that because SuperMedia EBC did not provide Plaintiffs a full and fair review of their “class-wide administrative claim,” SuperMedia EBC breached its fiduciary duty to Plaintiffs. *See id.* at 28-32.

ERISA requires plans to “afford a reasonable opportunity to any participant whose *claim for benefits has been denied* for a full and fair review by the appropriate named fiduciary of the decision denying the claim.” ERISA § 503(2), 29 U.S.C. 1133(2) (emphasis added). There does not exist so much as a scintilla of evidence Plaintiffs’ benefits have been denied; in fact, Plaintiffs do not even contend this to be the case. *See generally* Pls.’ Second Am. Compl. Furthermore, the evidence attached conclusively proves that SuperMedia EBC has never denied Plaintiffs the right to receive their substantive benefits due under the plans and that Plaintiffs have been and continue to receive their rightful due in monthly distributions. Gist Decl. ¶ 11 (App. 3); *see also* Ex. D-1 (Plaintiffs’ Responses to Verizon’s Requests for Admissions) (App. 372-79) (admitting that Plaintiffs have received a monthly annuity pension payment form

¹ Claim One is not asserted on behalf of the Class.

November 2006 to the present in an amount equal to the pension benefits Verizon pension plans allegedly failed to provide during that time).

In the absence of a denial of benefits, there simply is no “claim for benefits” under ERISA § 503 to review fully and fairly. *See Pompano v. Schiavone & Sons, Inc.*, 680 F.2d 911, 916 (2d Cir. 1982) (holding because appellant was receiving rightful due in monthly distributions, denial of requested method of payment did not constitute a denial of a “claim for benefits” and thus did not necessitate fair review under ERISA § 503); *Gardner v. Central States, Se. and Sw. Areas Pension Fund*, No. 93-3070, 1993 WL 533540, at *3 (6th Cir. Dec. 21, 1993) (holding ERISA § 503 does not apply where claim for pension benefits were granted); *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452 (10th Cir. 1991) (holding ERISA § 503 does not apply to denial of request to receive portion of benefits in employer’s stock); *Challenger v. Local Union No. 1 of the Int’l Bridge, Structural, and Ornamental Ironworkers, AFL-CIO*, 619 F.3d 645, 648 (7th Cir. 1980) (noting “it is not at all clear that [appellant’s] request for information” about his pension plan was a claim within the meaning of ERISA § 503); *Clarke v. Bank of N.Y.*, 698 F. Supp. 863, 870-71 (S.D.N.Y. 1988) (holding ERISA § 503 does not apply to denial of a specific rate of return on his investment and noting defendant never “denied plaintiff’s right to receive his substantive benefits due him under the plan”); *McBride v. Chesebrough-Ponds, Inc.*, No Civ. B-86-329(JAC), 1988 WL 121922, at *4 n. 1 (D. Conn. Nov. 1, 1988) (“As plaintiff admittedly did receive the proper amount of severance pay, he received the benefits to which he was entitled under defendant’s ERISA plan,” and even if requested relief was encompassed by plan, it likely did not constitute a benefit under ERISA § 503).

SuperMedia EBC could not have breached its fiduciary duty by failing to provide a full and fair review of Plaintiffs’ attempted “class-wide administrative claim” because there was no

denial of benefits that required review. Because the undisputed evidence establishes SuperMedia EBC did not breach its fiduciary duty by failing to provide a full and fair review of Plaintiffs' alleged administrative claim, Plaintiffs cannot prove a breach, and Claim One should be dismissed.

2. *Claim Five: Plaintiffs/Class members were not prejudiced—and allege no prejudice—by receiving SPDs more than 90 days after the spin off date.*

In Claim Five, Plaintiffs and Class members² allege SuperMedia EBC breached its fiduciary duty by failing to provide Plaintiffs and Class members with an appropriate SPD within 90 days of becoming participants in the SuperMedia pension plans. *See* Pls.' Second Am. Compl. at 52. ERISA § 104(b)(1) provides: "The administrator shall furnish to each participant...a copy of the summary plan description...within 90 days after he becomes a participant...." 29 U.S.C. § 1024(b)(1).

Plaintiffs/Class members do not dispute that SuperMedia EBC furnished them a summary plan description. *See* Pls.' Second Am. Comp. ¶¶ 216-217. Rather, they allege it was furnished untimely and that it did not otherwise meet statutory requirements because it was a *Verizon* document as opposed to a *SuperMedia* document.

Plaintiffs claims are without merit. First, the Verizon versus SuperMedia document distinction is a red herring. As explained above, the SuperMedia pension plans were mirror images of the Verizon pension plans as required by the EMA and as adopted by the Board. *See* Gist Decl. ¶¶ 7-8 (App. 2-3); Ex. A-1 (App. 6-53); Ex. A-2 (App. 65-68). Consequently, the identical terms contained in the Verizon plans were to be used and were in fact used in the SuperMedia plans, and likewise, SuperMedia EBC utilized the identical summary plan description from Verizon. Specifically, the March 19, 2007 letter to participants stated, "Taken

² Claim Five is asserted on behalf of the Class although it has not been class certified by the Court.

together, Verizon's SPD, Verizon's SMMs, and this letter will serve as your Idearc SPD until a new SPD is prepared." Exs. B-3 & B-4 (App. 81-332). Simply put, the documents furnished to participants by SuperMedia EBC were those in effect for the SuperMedia pension plans at the time they were furnished. *See* Gist Decl. ¶ 14 (App. 3). It makes no difference that the SPDs referred in places to "Verizon" as opposed to "Idearc" as the plan sponsor. The Plaintiffs *knew* SuperMedia was the new plan sponsor because the March 19, 2007 letters told them that, and because they had previously received a letter from Verizon advising them of that fact. *See* Exs. B-1; B-2; B-3; B-4 (App. 77-332). And they also knew that the SuperMedia plans were mirror image plans of the Verizon plans. *See id.*

Second, it appears that Plaintiffs are relying on the wrong section of ERISA to compute deadlines for providing SPDs in the case of a spin off transaction such as this. *See Colin v. Marconi Commerce Sys. Emps. Retirement Plan*, 335 F. Supp. 2d 590 at 595, 605-606 (M.D.N.C. 2004) (applying the 210 day deadline under ERISA Section 104(b)(1)(B) in the circumstances of a spin off transaction in which the only change with respect to the Plaintiffs' benefit plans was the assignment of assets and liabilities under the former plan to the new plan). The deadline to provide documents under a 210 day deadline could have been *no earlier than June 15, 2007* (210 days from the spin off date). And there is no dispute that the SPDs were provided prior to that date. *See* Pls.' Second Am. Comp. ¶¶ 216-217; *see also* Larson Decl. ¶ 8 (App. 76). Because SuperMedia EBC complied with the 210 day deadline found in ERISA Section 104(b)(1)(B), Plaintiffs' claims fail as a matter of law.

Finally, even if the 90 day deadline were to apply, Plaintiffs' claims are still barred because they have not suffered—or even alleged that they suffered—any prejudice. SuperMedia EBC does not dispute that it furnished copies of the SuperMedia pension plans' SPDs to

Plaintiffs/Class members more than 90 days after the spin off date.³ However, a technical and/or procedural violation of ERISA § 104(b)(1) does not present a viable claim without detrimental reliance by or prejudice to the Plaintiffs/Class members. *See Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 569 (7th Cir. 1995) (“[T]echnical violations of ERISA requirements do not justify relief absent a showing of bad faith, active concealment, or detrimental reliance.”); *Risch v. Waukesh Title Co., Inc.*, 588 F. Supp. 69, 72 (E.D. Wis. 1984) (holding despite defendant’s procedural violation, the forfeiture clause was enforceable because defendant’s failure to provide SPD within 90 days did not prejudice plaintiffs); *Carder-Cowin v Unum Life Ins. Co. of Am.*, 560 F. Supp. 2d 1006, 1015 (W.D. Wash. 2008) (holding equitable relief inappropriate where alleged procedural violation of not providing SPD was not tantamount to a failure to exercise discretion).

Plaintiffs have not even alleged any type of prejudice or likely harm as a result of SuperMedia EBC not furnishing the SPDs within 90 days, much less presented any evidence to that effect. To the contrary, the attached evidence shows that Plaintiffs/Class members have not been denied any benefits. *See* Gist Decl. ¶¶ 11 (App. 3); *see also* Ex. D-1 (Plaintiffs’ Responses to Verizon’s Requests for Admissions) (App. 372-79) (admitting that Plaintiffs have received a monthly annuity pension payment from November 2006 to the present in an amount equal to the pension benefits Verizon pension plans allegedly failed to provide during that time). Detrimental reliance/prejudice is further undermined by the letters to participants from Verizon, which notified Plaintiffs/Class members that the new SuperMedia pension plans were identical mirror images to the Verizon pension plans in which they were formerly participants. *See* Exs. B-1 &

³ In Defendant SuperMedia EBC’s Brief in Support of Its Motion to Dismiss for Failure to State a Claim (Docket No. 69) Section V.D., SuperMedia EBC assumed for purposes of the Motion that the 90 day deadline applied, and argued that it had complied with that purported 90 day deadline by providing the SPDs on March 19, 2007. After further investigation, however, SuperMedia EBC has determined that the SuperMedia SPDs were not furnished to participants until April 26, 2007. *See* Larson Decl. ¶ 8 (App. 76). Consequently, SuperMedia EBC hereby abandons the argument in Section V.D.2.

B-2 (App. 77-80). Thus, Plaintiffs/Class members needed only look at the Verizon SPDs *already in their possession* for guidance. Notably, these letters were sent to Plaintiffs/Class members on January 25, 2007 and February 15, 2007—within 90 days of the Spin-off. As a result, Plaintiffs *were already in possession of the Verizon SPDs as adopted by SuperMedia and in force at the time within the 90 day period*. Furthermore, Plaintiffs/Class members failed to assert this claim until their third pleading and even then could not articulate any harm.

Even if the Plaintiffs were to contend that SuperMedia EBC's conduct was more than a technical violation, an *injury* is still a necessary element for a Section 502(a)(3) claim as outlined in *Hobbs*. *See Hobbs*, 2007 WL 4223666, at *5. For the same reasons outlined above, Plaintiffs/Class members were not injured by receiving the SPDs more than 90 days after the Spin-off. As a result, summary judgment is appropriate. *Robbins v. N.Y. State Elec. & Gas*, 2010 WL 1038495, at *5 (N.D.N.Y. Mar. 19, 2010) (dismissing on summary judgment claim that defendant violated ERISA by failing to provide him with SPD because there was no evidence of (1) bad faith on the part of the defendant, (2) that plaintiff ever made any requests that were ignored, and (3) that plaintiff suffered any prejudice); *Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst.*, 303 F.3d 167, 172 (2d Cir. 2005) (upholding district court's dismissal on summary judgment ERISA claim premised on complete absence of a SPD because plaintiff failed to raise any material issue of fact demonstrating likely prejudice). Accordingly, Claim Five should be dismissed.

3. *Claim Six: Without Claims One and Five, Claim Six is not viable.*

Claim Six seeks equitable relief under ERISA § 502(a)(3) yet does not allege a separate breach of fiduciary duty upon which such relief could be granted. Because Plaintiffs/Class members cannot maintain a claim for equitable relief in the abstract, they must rely on the alleged breaches discussed in Claims One and Five. For the reasons detailed above,

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Plaintiffs/Class members cannot establish all necessary elements of Claims One and Five. Therefore, Claim Six must be dismissed as well.

V. PRAYER

SuperMedia EBC respectfully submits that Plaintiffs' claims against SuperMedia Employee Benefits Committee fail as a matter of law and should be dismissed on summary judgment.

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August 2011, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to all counsel of record, each of whom has registered as a user of the ECF system. A courtesy copy has also been sent to the following counsel of record via E-Mail:

Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, Colorado 80237-1741

Christopher L. Kurzner
KURZNER PC
1700 Pacific Avenue, Suite 3800
Dallas, Texas 75201

Robert E. Goodman, Jr.
KILGORE & KILGORE
3109 Carlisle St.
Dallas, Texas 75204

Jeffrey G. Huvelle, Esq.
Christian J. Pistilli
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

ATTORNEYS FOR PLAINTIFFS

**ATTORNEYS FOR DEFENDANTS
VERIZON COMMUNICATIONS, INC.,
VERIZON EMPLOYEE BENEFITS
COMMITTEE
VERIZON PENSION PLAN FOR NEW
YORK AND
NEW ENGLAND ASSOCIATES;
VERIZON MANAGEMENT
PENSION PLAN**

/s/ Martha Hopkins

Martha Hopkins