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

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| SUPERMEDIA, INC., ET AL., | ) | |
| | ) | |
| Plaintiffs, | ) | CIVIL ACTION NO. |
| | ) | |
| VS. | ) | 3:12-CV-2034-G |
| | ) | |
| LINTON BELL, ET AL., | ) | |

**MOTION TO DISMISS**
**DEFENDANTS BELL, FOY, HARVEY, KETZER, KRAFT,**
**LANE, LEYNES, RUSSO, SHAPSES and SULLIVAN**

Defendants Linton Bell ("Bell"), Carol Foy ("Foy"), Christine Harvey ("Harvey"), Margaret Ketzer ("Ketzer"), Joanie Kraft ("Kraft"), Theresa Lane ("Lane"), Sharon Leynes ("Leynes"), Stanley Russo ("Russo"), Howard Shapses ("Shapses") and John Sullivan (Sullivan"), pursuant to Fed. R. Civ. P. 12(b)(2), (3) and (6), file this motion to dismiss the claim asserted against them in the First Amended Complaint, docket entry 23, and, as grounds, they show as follows:

1. First, the claim should be dismissed under Fed. R. Civ. P. 12(b)(2) and (3) for lack of personal jurisdiction and improper venue. This Court lacks personal jurisdiction over Defendants Bell, Foy, Harvey, Ketzer, Kraft, Lane, Leynes, Russo, Shapses and Sullivan (hereinafter "Movants") because they are individuals who are not citizens of and not residing in the State of Texas, and each does not have the requisite minimum contacts with Texas to justify being sued in the Dallas federal court.[1] To the extent that the SuperMedia Plaintiffs would seek to employ the nationwide service

[1] Linton Bell is a resident of California. Carol Foy is a resident of Maine. Christine Harvey is a resident of Arizona. Margaret Ketzer is a resident of New York. Joanie Kraft is a resident of New York. Theresa Lane is a resident of Ohio. Sharon Leynes is a resident of Florida. Stanley Russo is a resident of Massachusetts. Howard Shapses is a resident of California. John Sullivan is a resident of New Hampshire.

provision under ERISA Section 502(e)(2), 29 U.S.C. § 1132(e)(2), this argument should be rejected because the SuperMedia Plaintiffs' cause of action does not arise under ERISA, but rather under the nebulous Declaratory Judgment Act, for which ERISA's national service provision is not available. The declaratory judgment claim asserted against the Movants should be dismissed, pursuant to Fed.R.Civ.P. 12(b)(6) because it is not a cognizable claim under ERISA to which any of the Movants can be made to be a defendant party.[2] In any event, application of ERISA's nationwide service provision against the Movants would fail the requirements of constitutional due process.

2. Second, the claim against the individual retirees should be dismissed because it is not ripe for judicial determination. As the SuperMedia Plaintiffs have conceded, not only the individually named defendants, but over 900 other retirees properly submitted administrative claims for retiree welfare benefits, and none of those claims have been administratively exhausted. Indeed, the SuperMedia Plaintiffs needlessly commenced this civil action within hours after SuperMedia received completed administrative claim forms submitted by Defendants Foy and Russo, which claim forms SuperMedia had specifically solicited from the retirees. Quite simply, SuperMedia ambushed the unsuspecting retirees. This civil action is the very example of totally unnecessary and harassing litigation, and this Court ought to sanction the SuperMedia Plaintiffs by requiring them to pay the individual named defendants' reasonable attorney's fees and costs.

3. This motion to dismiss is supported by a memorandum of law which is contemporaneously submitted herewith.

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[2] The SuperMedia Plaintiffs aver that the declaratory judgment claim centers around one issue: "whether Plaintiffs had the unilateral right to enact the Amendments." (Docket entry 23, ¶ 78).

WHEREFORE, Movants/Defendants Bell, Foy, Harvey, Ketzer, Kraft, Lane, Leynes, Russo, Shapses and Sullivan respectfully request that this Court dismiss with prejudice the claims pending against them and grant such other appropriate equitable relief, along with an award of costs and attorney's fees.

DATED this 12th day of October, 2012.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on the 12TH day of October, 2012, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system causing a copy to be emailed to all counsel of record.

Also, copy of the same was delivered via Internet email to Defendants Bell, Foy, Harvey, Ketzer, Kraft, Lane, Leynes, Mentzer, Noe, Ohnstad, Palmer, Russo, Shapses, Sullivan and Zenus.

*s/ Curtis L. Kennedy*
Curtis L. Kennedy

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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS DEFENDANTS BELL, FOY, HARVEY, KETZER, KRAFT, LANE, LEYNES, RUSSO, SHAPSES and SULLIVAN**

## I. Introduction

Defendants Linton Bell ("Bell"), Carol Foy ("Foy"), Christine Harvey ("Harvey"), Margaret Ketzer ("Ketzer"), Joanie Kraft ("Kraft"), Theresa Lane ("Lane"), Sharon Leynes ("Leynes"), Stanley Russo ("Russo"), Howard Shapses ("Shapses") and John Sullivan (Sullivan"), submit this memorandum brief in support of their motion to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(2), (3) and (6). The single claim asserted against them in the First Amended Complaint should be dismissed for the following reasons.

First, the single claim should be dismissed under Fed. R. Civ. P. 12(b)(2) and (3) for lack of personal jurisdiction and improper venue. This Court lacks personal jurisdiction over Defendants Bell, Foy, Harvey, Ketzer, Kraft, Lane, Leynes, Russo, Shapses and Sullivan (hereinafter "Movants") because they are individuals who are not citizens of and not residing in the State of Texas, and each does not have the requisite minimum contacts with Texas to justify being sued in the Dallas federal court. To the extent that the SuperMedia Plaintiffs would seek to employ the nationwide service provision under ERISA Section 502(e)(2), 29 U.S.C. § 1132(e)(2), this argument should be rejected because the SuperMedia Plaintiffs' cause of action

does not arise under ERISA, but rather under the nebulous Declaratory Judgment Act, for which ERISA's national service provision is not available. The declaratory judgment claim asserted against the Movants should be dismissed, pursuant to Fed.R.Civ.P. 12(b)(6) because it is not a cognizable claim under ERISA to which any of the Movants can be made to be a defendant party.[1] In any event, application of ERISA's nationwide service provision against the Movants would fail the requirements of constitutional due process.

Second, the claim against the individual retirees should be dismissed because it is not ripe for judicial determination. As the SuperMedia Plaintiffs have conceded, not only the individually named defendants, but over 900 other retirees properly submitted administrative claims for retiree welfare benefits, and none of those claims have been administratively exhausted. Indeed, the SuperMedia Plaintiffs needlessly commenced this civil action within hours after SuperMedia received completed administrative claim forms submitted by Defendants Foy and Russo, which claim forms SuperMedia had specifically solicited from the retirees. Quite simply, SuperMedia ambushed the unsuspecting retirees. This civil action is the very example of totally unnecessary and harassing litigation, and this Court ought to sanction the SuperMedia Plaintiffs by requiring them to pay the individual named defendants' reasonable attorney's fees and costs.

## II. <u>Factual Overview</u>

The following facts are taken from the First Amended Complaint, docket entry 23, and are presented as undisputed for the purpose of this motion only. See, e.g., *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 869 (5th Cir. 2000).

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[1] The SuperMedia Plaintiffs aver that the declaratory judgment claim centers around one issue: "whether Plaintiffs had the unilateral right to enact the Amendments." (Docket entry 23, ¶ 78).

The Plaintiffs are six entities that have collectively referred to themselves as "SuperMedia." (Docket entry 23, intro. para.) (hereinafter referred to as "SuperMedia"). SuperMedia provides health and welfare benefits to its eligible retired employees (and eligible retired employees of its predecessors). (*Id.*, ¶ 42). The retiree welfare benefits are provided pursuant to various health and welfare benefit plans and various collective bargaining agreements. (*Id.*, ¶¶ 41, 44).

None of the retirees pursuing this motion dismiss are residents of the State of Texas.[2] Other than the fact that these retirees (collectively referred to as "Movants") receive retiree welfare benefits paid for by SuperMedia, there are no allegations that any of the Movants has had any other contacts with Texas.[3]

On June 25, 2012, the Employee Benefits Committee of the SuperMedia Board of Directors voted to amend three of its retiree welfare benefits plans to the substantial detriment of the retirees, including Movants. (*Id.*, ¶ 52). For example, SuperMedia has declared it will reduce or eliminate contributions to retirees' health insurance premiums and that it will increase co-pays and deductibles. (*Id.*, ¶ 62). On June 26, 2012, SuperMedia sent notice of the plan amendments to those retirees who are potentially affected, including each of the Movants. (*Id.*, ¶ 64). With

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[2] Linton Bell is a resident of California. (*Id.*, ¶ 8). Carol Foy is a resident of Maine. (*Id.*, ¶ 13). Christine Harvey is a resident of Arizona. (*Id.*, ¶ 17). Margaret Ketzer is a resident of New York. (*Id.*, ¶ 18). Joanie Kraft is a resident of New York. (*Id.*, ¶ 19). Theresa Lane is a resident of Ohio. (*Id.*, ¶ 27). Sharon Leynes is a resident of Florida. (*Id.*, ¶ 21). Stanley Russo is a resident of Massachusetts. (*Id.*, ¶ 27). Howard Shapses is a resident of California. (*Id.*, ¶ 28). John Sullivan is a resident of New Hampshire. (*Id.*, ¶ 29).

[3] Each Movant is a member of a Class of 2,750 retirees in the case of *Murphy, et al, v. Verizon Communications, Inc., et al*, Civil Action No. 3:09-CV-2262-G, which is pending before this Court. Each Movant is a mandatory Class member, pursuant to Fed.R.Civ.Proc Rule 23(b)(2), and no one was given notice with an option to opt-out. (See Docket entry 55 , March 3, 2011 Order efiled in *Murphy*). Therefore, Movants have never given affirmative consent to this Court's jurisdiction.

its notice, SuperMedia included a "Claim Form" that allowed plan beneficiaries to "make a claim for benefits, raise questions, voice concerns, or make objections regarding the Amendments and SuperMedia's legal right to amend, modify, revoke, or terminate the Plans at any time." (*Id.).* Super Media received replies from more than 900 retirees, including those submitted by the Movants. (*Id.*, ¶ 65; see also docket entry 23-46, Exs. Y-AM, sample collection of claim forms submitted by retirees, including Movants). SuperMedia's Claim Form states that the "purpose ... is to provide you with a procedure to object to SuperMedia's right to amend" the plans. (*Id.*).

However, quite simply, SuperMedia ambushed the unsuspecting retirees. Within hours of receiving the Claim Forms that Defendant Carol Foy and Defendant Stanley Russo faxed back to SuperMedia, rather than review and respond to the objections made, SuperMedia commenced this lawsuit. (Docket entry 1, ¶ 42).[4] For the original complaint, SuperMedia named as defendant parties Foy, Russo, and Locals 1301 and 1302 of the Communication Workers of America, AFL-CIO. On August 2, 2012, SuperMedia filed the First Amended Complaint, adding twenty-one (21) additional retirees and Local 2213 of the International Brotherhood of Electrical Workers. (Docket entry 23).

Since then, the Court has since dismissed 6 of the 23 retirees who were named as defendants (See Docket entries 50, 51, 52 and 67). It is an undisputed fact that the retirees had

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[4] There was no forewarning that, if any retiree expressed his or her disagreement with SuperMedia's announced plan to detrimentally change retiree welfare benefits, he or she would be sued in a federal court far from home. It is readily apparent from the timing of SuperMedia's actions taken on June 26, 2012 that SuperMedia and its counsel sent out the Claim Form and chose to lie in wait and immediately prey on the first bunch of unsuspecting retirees who sent back to SuperMedia a completed Claim Form objecting to SuperMedia's announced plan to negatively change retiree welfare benefits. There is absolutely no excuse for such lawyerly misconduct bullying retirees who loyally worked an entire career with SuperMedia's predecessors. When ruling upon Movant's motion to dismiss, the Court should send a very strong message to SuperMedia and each of its involved counsel sanctioning all of them for having terrorized retirees who had no idea that, if they did exactly as requested by SuperMedia and simply expressed their concerns and disagreement with SuperMedia, they could be sued in a federal court, the Dallas federal court.

no expectation of ever being hauled into federal court simply because they had objected to SuperMedia's announced plans to detrimentally change retiree welfare benefits. (See e.g., Docket entry 66-2 at page 2 of 3, "I filled out THEIR form as requested [by SuperMedia] and got swept up in something I have no interest in,"; Docket entry 39 "I do not understand why the plaintiff is filing suit against me for trying to keep [my retirement benefits]."; See also Docket entry 32, "I have no further resources or strength to pursue this matter any longer. Hopefully, the remainder of my retirement may be peaceful.").

## III. Legal Arguments

### A. The First Amended Complaint Against the Movants Should be Dismissed Pursuant to Fed. R. Civ. P. 12)(b)(2), (3) and (6) For Lack of Personal Jurisdiction, Improper Venue and For Failure to State an ERISA-Based Claim.

The First Amended Complaint against the Movants should be dismissed pursuant to Fed. R. Civ. P. 12(b)(2), (3) and (6) because there is no cognizable ERISA-based claim asserted against any of the Movants and the Texas Court lacks personal jurisdiction over each of the individual Movants. "When a nonresident defendant moves to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident." *Wilson v. Belin*, 20 F.3d 644, 648 (5th Cir.1994), *cert. denied*, 513 U.S. 930, 115 S.Ct. 322, 130 L. Ed. 2d 282 (1994); *Gardemal v. Westin Hotel Company*, 186 F.3d 588, 592 (5th Cir.1999). Here, Plaintiffs allege that the Court "has personal jurisdiction over each of the Defendants based on the facts alleged" in the First Amended Complaint. SuperMedia makes no allegation that any one of the Movants has ever had any contacts with the State of Texas.

"[A] federal court may only exercise personal jurisdiction if it is authorized to do so by law and such exercise does not violate the Constitution." *Burstein v. State Bar of California*, 693 F.2d 511, 514 (5th Cir. 1982). If the Court were to exercise personal jurisdiction over the

Movants with respect to the claim made herein by SuperMedia, the Court would be violating the Due Process Clause of the Constitution. To satisfy the Due Process Clause, the nonresident must "have some minimum contact with the forum that results from an affirmative act on his part such that the nonresident defendant could anticipate being haled into the courts of the forum state" and "it must be fair or reasonable to require the nonresident to defend the suit in the forum state." *Isbell v. DM Records, Inc*., Not Reported in F.Supp.2d, 2004 WL 1243153 at *6 (N.D. Tex. June 4, 2004) (Fish, J.), citing *Burger King Corporation v. Rudzewicz*, 471 U.S. 462, 474–77, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). The Due Process Clause thus ensures that persons have a "'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Id*., quoting *Burger King Corporation*, at 472 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218 (1977) (Stevens, J., concurring)). As this Court correctly noted in the more recent decision issued in the case of *Sell v. Gerald Peters Gallery, Inc*., Slip Copy, 2012 WL 2715655 at *3 (N.D. Tex. July 9, 2012) (Fish, J.), "[t]o establish minimum contacts with the forum, a nonresident defendant must do some act by which it "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 471 U.S. at 474–75 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958)). SuperMedia does not allege that any of the Movants have engaged in any affirmative acts that would reasonably cause them to anticipate being haled into Texas courts. Certainly, the act of either faxing or sending via regular mail to SuperMedia a completed Claim Form does not arise to the level of necessary minimum contacts that would justify this Court exercising personal jurisdiction over the Movants. *Moncrief Oil Int'l Inc. v. OAO Gazprom*, 481 F.3d 309, 311 (5th Cir. 2007), *citing Latshaw v. Johnston*, 167 F.3d 208, 211 (5th Cir.1999). Since none of the Movants have done anything to purposely

availed themselves of the privileges and protections of doing any form of business in Texas, for this Court to exercise personal jurisdiction over the Movants would not comport with fair play and substantial justice.

Apparently, in order to circumvent the most glaring problematic fact that there is an absence of any evidence that any Movant has minimum contacts with Texas, SuperMedia seeks to apply the nationwide service provision of ERISA Section 502(e)(2). (Docket entry 23, ¶ 37, citing 29 U.S.C. § 1132(e)(2)). However, that statutory provision does not apply to SuperMedia's declaratory judgment action herein because it is not a claim that is cognizable under ERISA Section 502. SuperMedia's claim asking the Court for a declaration that its employee benefit plan amendments do not violate ERISA is not a claim under which any Movant can be made a defendant party and to which ERISA Section 502(e)(2)'s nationwide service of process applies.

A divided Fifth Circuit panel of judges has ruled that when a federal court is attempting to exercise personal jurisdiction over a defendant in a suit based upon a federal statute providing for nationwide service of process, the relevant inquiry is whether the defendant has had minimum contacts with the United States. *Busch v. Buchman, Buchman & O'Brien*, 11 F.3d. 1255, 1258 (5th Cir. 1974) (case concerning 15 U.S.C. § 78aa). However, that panel's decision was severely criticized by another Fifth Circuit panel that decided the ERISA-based case of *Bellaire General Hospital v. Blue Cross Blue Shield of Michigan*, 95 F.3d. 822, 825-26 (5th Cir. 1996), which panel, nevertheless, dutifully applied the *Busch* ruling, as the rules require, until reversed by an *en-banc* Fifth Circuit decision. The very faulty logic of the divided *Busch* ruling should not be applied in an employee benefits dispute so as to allow an unsuspecting retiree who is receiving SuperMedia sponsored retiree benefits while residing in Barrow, Alaska to be

randomly chosen to become a defendant party and legally required to respond to a declaratory judgment civil action instigated by SuperMedia in the Dallas federal court. Such a scenario simply conflicts with the Due Process Clause of the Constitution and fundamental notions of fair play and justice.

Anyhow, none of the Movants can be made to be a party defendant herein because no cognizable ERISA claim is being asserted against any of them. SuperMedia is not making a claim for payment of employee benefits. SuperMedia is not asserting against any of the Movants either a claim of subrogation or claim for return of an overpayment of employee benefits given to any of the Movants. SuperMedia is simply seeking a declaration of its rights to reduce Movants' retiree welfare benefits. But, ERISA only allows either "a participant or beneficiary " to bring a civil action "to clarify his rights to future benefits under the terms of the plan." ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Obviously, this section expressly acknowledges the right of participants/beneficiaries to seek a declaratory judgment; just as obviously, plan sponsors and plan fiduciaries are omitted as parties that can bring such an action regarding benefits. *HSC Hospitality, Inc. v. Sun Life Assur. Co. of Canada*, Not Reported in F.Supp.2d, 2001 WL 327831 (N.D. Tex. April 2, 2001) (Kaplan, MJ). Since the statutory provision does not authorize either a plan sponsor or plan fiduciary to bring a civil action for a declaratory judgment, ERISA Section 502(a)(1)(B) cannot be the basis for SuperMedia's making the Movants to be defendant parties and applying ERISA's national service of process provision.

Moreover, SuperMedia is not claiming any of the Movants violated a provision of the retiree benefit plans or ERISA. Of course, Movants have done nothing wrong and they cannot be accused of any wrongdoing whatsoever. Indeed, SuperMedia makes no claim that any one of the Movants has done something wrongful. Since SuperMedia does not seek to enjoin an act or

practice that violates either any part of ERISA or any part of an employee benefit plan, ERISA Section 502(a)(3)(A), 29 U.S.C. § 1132(a)(3)(A), does not apply. Likewise, ERISA Section 502(a)(3)(B), 29 U.S.C. §1132(a)(3)(B), also does not apply, as SuperMedia neither seeks to redress a violation of ERISA or a plan, nor to enforce ERISA or a plan provision. SuperMedia is neither seeking "appropriate equitable relief" nor asking the Court for help in enforcing its employee benefit plans, and there is no basis under ERISA Section 502(a)(3) to make any of the Movants to be a defendant party.

In short, since SuperMedia does not state any cognizable ERISA-based claim against any of the Movants and there is no basis for *any* viable claim to be asserted under any subpart of ERISA Section 502(a) against any of the Movants, SuperMedia may not avail itself of the nationwide service provision of ERISA Section 502(e)(2), 29 U.S.C. § 1132(e)(2). *NGS American., Inc. v. Jefferson*, 218 F.3d 519, 524 (6th Cir. 2000)*; Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1524 (11th Cir. 1987) (ruling that a fiduciary that had filed a declaratory judgment action to determine its liability under ERISA could not invoke the national service provisions of ERISA Section 502(e)(2)).

For all the foregoing reasons, the Court should grant Movants' motion to dismiss filed pursuant to Fed.R.Civ.P. 12(b)(2), (3) and (6).

B. <u>The Claim Asserted Against Movants Should be Dismissed For a Lack of Ripeness</u>.

The First Amended Complaint does not present a dispute as to the Movants that is ripe for judicial determination. SuperMedia alleges that the claim asserted against Movants is ripe for determination because "[e]xtrinsic or substantial factual development will prove unnecessary or inappropriate because the pertinent facts of this matter – the terms of the Plan Documents and

the Amendments – should be undisputed, resulting in a proceeding comprised chiefly of legal issues." (Docket entry 23, ¶ 78). A court "should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 833 F.2d 583, 586-87 (5th Cir. 1987) (citing *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985)).

SuperMedia intentionally solicited each of the Movants to complete a Claim Form and send it back to SuperMedia. Movants and about 900 other retirees did exactly that. Numerous retirees, including some of the Movants sent SuperMedia a written claim form that states:

> I was surreptitiously and involuntarily transferred from Verizon's sponsored retiree benefit plans. I have never consented to being enrolled in Idearc/SuperMedia's sponsored retiree benefit plans. I expressly object to each and every negative detrimental change that has been proposed and announced by SuperMedia. SuperMedia has no right to amend, modify, revoke or terminate any of my retiree benefits. <u>I submit this as a written claim for continued retiree benefits</u>, and for all of the reasons stated and established in the legal arguments and supporting documentation submitted by attorneys for the Plaintiffs/Class Representatives in the pending *Murphy* lawsuit, I expressly demand that, immediately, I be transferred out of SuperMedia's retiree benefit plans and reinstated into Verizon's retiree benefit plans and restored all lost benefits.

(emphasis added). (See generally, Docket entry 23-46, Exs. Y-AM, a sample collection of retirees' written claim forms). The Movants' protests and submissions of claim forms do not rise to the level of being acts of clear repudiation of the terms of any of the employee benefit plans. In all fairness, before filing this lawsuit, SuperMedia should have first responded to the retirees' written claims and administratively processed the claims. On June 26, 2012, not one Movant could have pursued a declaratory judgment claim under ERISA without having first exhausted internal plan procedures. What's good for the goose is good for the gander. In *Belmonte v. Examination Management Services, Inc.*, Not Reported in F.Supp.2d, 2010 WL 1741330 at *3 (N.D. Tex. April 29, 2010) (Lindsay, J.), this district court ruled that "[e]xhaustion of administrative remedies is a prerequisite to an ERISA action in federal court"

(citing *Swanson v Hearst Corp. Long Term Disability Plan*, 586 F.3d 1016, 1018 (5th Cir. 2009) (citing *Bourgeois v. Pension Plan for the Employees of Santa Fe Int'l Corps*., 215 F.3d 475, 479 (5th Cir. 2000)).

In bad faith, prior to filing this lawsuit and harassing unsuspecting retirees from the far corners of this nation, there was no effort by SuperMedia to comply with the plans' internal claims process and give either the Movants or any other retiree a full and fair review of their written claims. Therefore, this Court should rule that this case is not ripe for judicial review.

## IV. Conclusion

For all of the above reasons, the Movants/Defendants Bell, Foy, Harvey, Ketzer, Kraft, Lane, Leynes, Russo, Shapses and Sullivan respectfully request that the Court dismiss the First Amended Complaint against them and grant them such other appropriate equitable relief, along with an award of costs and attorney's fees.

DATED this 12th day of October, 2012.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 12TH day of October, 2012, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system causing a copy to be emailed to all counsel of record.

Also, copy of the same was delivered via Internet email to Defendants Bell, Foy, Harvey, Ketzer, Kraft, Lane, Leynes, Mentzer, Noe, Ohnstad, Palmer, Russo, Shapses, Sullivan and Zenus.

*s/ Curtis L. Kennedy*
Curtis L. Kennedy