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

SUPERMEDIA INC., ET AL.,	§	
	§	
Plaintiffs,	§	
	§	**CIVIL ACTION NO.**
v.	§	**3:12-CV-2034-G**
	§	
LINTON BELL, ET AL.,	§	
	§	
Defendants.	§	

PLAINTIFFS' MOTION TO DISMISS THE COUNTERCLAIM BY DEFENDANTS MENTZER, NOE, OHNSTAD, PALMER AND ZENUS AND BRIEF IN SUPPORT

Richard S. Krumholz
Texas Bar No. 00784425
rkrumholz@fulbright.com
Scott P. Drake
Texas Bar No. 24026812
sdrake@fulbright.com
Abby N. Ruth
Texas Bar No. 24056247
aruth@fulbright.com
Rachel L. Williams
Texas Bar No. 24067175
rachelwilliams@fulbright.com

FULBRIGHT & JAWORSKI L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
Telephone: (214) 855-8000
Facsimile: (214) 855-8200

and

Mark S. Miller *(admitted pro hac vice)*
Texas Bar No. 14099600
mmiller@fulbright.com
Justin Coddington
Texas Bar No. 24050434
jcoddington@fulbright.com

FULBRIGHT & JAWORSKI L.L.P.
Fulbright Tower
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

COUNSEL FOR PLAINTIFFS SUPERMEDIA INC., SUPERMEDIA LLC, SUPERMEDIA SERVICES INC., SUPERMEDIA SALES INC., SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, AND IDEARC INCEPTOR LTD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES AND STATUTES

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

SUPERMEDIA INC., ET AL.,	§	
	§	
Plaintiffs,	§	
	§	**CIVIL ACTION NO.**
v.	§	**3:12-CV-2034-G**
	§	
LINTON BELL, ET AL.,	§	
	§	
Defendants.	§	

PLAINTIFFS' MOTION TO DISMISS THE COUNTERCLAIM BY DEFENDANTS MENTZER, NOE, OHNSTAD, PALMER AND ZENUS AND BRIEF IN SUPPORT

Plaintiffs SuperMedia Inc., SuperMedia LLC, SuperMedia Services Inc., SuperMedia Sales Inc., SuperMedia Employee Benefits Committee and Idearc Inceptor LTD (collectively, "SuperMedia" or "Plaintiffs") file their Motion to Dismiss the Counterclaim by Defendants Mentzer, Noe, Ohnstad, Palmer and Zenus (collectively, the "Mentzer Defendants" or "Defendants") and Brief in Support and respectfully show the Court as follows:

I.
SUMMARY OF ARGUMENT

The Mentzer Defendants assert two counterclaims against SuperMedia: (i) breach of fiduciary duty under ERISA Section 404 and (ii) discrimination in interference with protected rights under ERISA Section 510. Defendants' Answer and Counterclaim ("Counterclaim") at ¶¶ 16, 18. Both claims allegedly arise from SuperMedia's filing of the instant suit for declaratory judgment. *Id.* Rule 12(b)(6) requires dismissal, however, where the facts alleged do not give rise to a plausible claim for relief. Fed. R. Civ. P. 12(b)(6); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). Such is the case here because SuperMedia's Complaint does not violate ERISA or Defendants' rights under SuperMedia's health and welfare benefits plans ("Plans").

First, the Mentzer Defendants fail to state a claim for breach of fiduciary duty because SuperMedia is not acting in a fiduciary capacity under ERISA. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). A Section 404 breach can only occur when an employer is engaged in a fiduciary capacity, such as when managing or distributing plan assets. 29 U.S.C.S. § 1002(21)(a). In contrast, SuperMedia's suit arises from its decision to amend the Plans, which is non-fiduciary in nature. *Curtiss-Wright Corp.*, 514 U.S. at 78. Therefore, Defendants cannot support a claim for breach of fiduciary duty.

The Mentzer Defendants' second count also fails. Although Defendants attempt to construe this claim as simply one of "discrimination"—which itself is unsupported by the fact that SuperMedia filed a declaratory judgment suit—a Section 510 claim specifically requires "interference with protected rights." 29 U.S.C. § 1140. Therefore, this claim should be dismissed because: (i) a suit for declaratory judgment against participants is permissible, not prohibited, and (ii) Defendants do not have "protected rights" under the non-vested health and welfare Plans[1] in the first place. *McGann v. H & H Music Co.*, 946 F.2d 401, 405 (5th Cir. 1991); 29 U.S.C. § 1140.

II.
INTRODUCTION

In order to address growing healthcare costs in a changing marketplace, telephone directory services and media solutions company SuperMedia decided to modify its retiree health and welfare benefits Plans. On June 25, 2012, SuperMedia enacted its amendments to the Plans

[1] The Court may consider the terms of the Plans and related contracts in deciding SuperMedia's Rule 12(b)(6) motion because they are central to Defendants' claims. *See Aspen Specialty Ins. Co. v. Muniz Eng'g, Inc.*, 514 F. Supp. 2d 972, 980 (S.D. Tex. 2007) ("In considering a Rule 12(b)(6) motion to dismiss, a district court may review the pleadings on file [. . .] 'Pleadings on file' includes '[d]ocuments that a defendant attaches to a motion to dismiss . . . if they are referred to in the plaintiff's complaint and are central to [its] claim.'") (quoting *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000)). The Counterclaim refers to the Plans at¶ 5.

("Amendments"). Although the Amendments significantly impact costs for both SuperMedia and retirees, SuperMedia continues to provide access to health care plans for non-Medicare eligible retirees, and it has transferred Medicare eligible retirees to a medical exchange. After executing the Amendments, SuperMedia notified all Plan participants of the changes, and a contentious dispute immediately arose. Hundreds of retirees, including the Mentzer Defendants, objected to SuperMedia's right to amend the Plans, asserted an alleged right to permanent benefits, and made claims. The financial impact of the Amendments on SuperMedia and retirees is significant. Critical financial and healthcare planning for all parties depends on a resolution of the dispute and a declaration of SuperMedia's and participants' rights under the Plans and under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1002 *et seq*., ("ERISA"). Therefore, on June 26, 2012, SuperMedia initiated the instant action, which requests that the Court declare SuperMedia's right to amend.

On October 15, the Mentzer Defendants filed an Answer and Counterclaim to SuperMedia's First Amended Complaint for Declaratory Judgment ("Complaint"). In the Counterclaim, Defendants erroneously assert that SuperMedia's Complaint not only breaches a fiduciary duty but amounts to "discrimination" in interference with their rights. Counterclaim at ¶¶ 16, 18. Because the facts alleged fail to establish a right to relief under either ERISA claim, the Counterclaim should be dismissed in its entirety.

III.
ALLEGED FACTS

A. MENTZER DEFENDANTS ARE PARTICIPANTS IN SUPERMEDIA'S HEALTH AND WELFARE PLANS

Defendants are participants in retiree welfare benefit Plans sponsored by SuperMedia. Counterclaim at ¶ 5. SuperMedia provides retiree health and welfare benefits to participants

through its three Plans,[2] and, in accordance with ERISA, communicates key provisions to participant retirees through the following three ERISA Summary Plan Descriptions (collectively, "SPDs"):

- The Retiree Health & Welfare Summary Plan Descriptions: Pre-65 ("Pre-65 SPD"), a true and correct copy of which is attached hereto as Exhibit E);
- The Retiree Health & Welfare Summary Plan Descriptions: 65+ Medicare ("65 Med SPD"), a true and correct copy of which is attached hereto as Exhibit F; and
- The Retiree Health & Welfare Summary Plan Descriptions: Mid-Atlantic Plan ("Mid-Atlantic SPD"), a true and correct copy of which is attached hereto as Exhibit G.

(collectively, the "2008 SPDs").

No language suggests these benefits have vested or will vest in the future. To the contrary, the Plans and SPDs explicitly preclude vested welfare benefits. For example, section 7.4 of the Management Plan states:

> **7.4 No Vested Rights**
>
> To the maximum extent permitted by law, no person shall acquire any right, title, or interest in or to any portion of a Trust, an Insurance Contract, an HMO Contract, or Medicare Plan Contract otherwise than by the actual payment or distribution of such portion under the provisions of the Plan or a Component Benefit, or acquire any right, title, or interest in or to any benefit referred to or provided for in the Plan or any Component Benefit otherwise than by actual payment of such benefit.

Am. Comp. Exhibit A, at § 7.4.[3] Section 6.1 of the Management Plan provides:

> **6.1 Amendment or Termination**
>
> The Plan was established with the bona fide intention and expectation that it will be continued indefinitely. However, **SuperMedia reserves the right to amend or terminate the Plan** or any Component Benefit at any time and from time to

[2] The Plans include: (i) the SuperMedia Management and Non-Union Hourly Plan for Group Insurance ("Management Plan"), Am. Comp. Exhibit A; (ii) the SuperMedia Plan for Group Insurance for Mid-Atlantic Associates ("Mid-Atlantic Plan"), Am. Comp. Exhibit B; and (iii) the SuperMedia Plan for Group Insurance for New York and New England Associates ("New York Plan"), Am. Comp. Exhibit C.

[3] *See also* Am. Comp. Exhibit B, at § 7.4 (stating identical language to Exhibit A, at § 7.4); Am. Comp. Exhibit C, at § 7.4 (stating identical language to Am. Comp. Exhibit A, at § 7.4).

> time and to any extent and in any manner that it deems advisable, by written resolution of the Board of Directors of SuperMedia (for purposes of this section 6.1, the "Board"). [. . .]
>
> The Board has delegated the authority to amend or terminate the Plan to the Committee, which shall exercise such authority by written instrument. Any Plan amendment, except as otherwise specifically provided therein, shall apply from and after its effective date to all classes of covered individuals, including current employees, former employees (including retired individuals), their beneficiaries, spouses, and other dependents.

Am. Comp. Exhibit A, at § 6.1 (emphasis added).[4]

The Pre-65 SPD states:

> **The Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate these Plans in whole or in part at any time**, except to the extent limited by an applicable collective bargaining agreement as to retirees covered by the collective bargaining agreement. If a plan is terminated, you will not have any further rights other than payment of expenses you had incurred before the Plan was terminated.

Am. Comp. Exhibit E at 2 (emphasis added).[5] Like the other 2008 SPDs, the Pre-65 SPD reiterates these rights numerous times throughout the SPD:

> [T]he Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate the benefits […]
>
> [Circumstances] When Coverages End . . . termination […]
>
> [T]he Company reserves the right to – at any time and for any reason – change or discontinue the Plan, or increase or decrease contributions under the Plan at its sole discretion […]
>
> Idearc Media reserves the right to amend, modify, or terminate these plans.

Id. at pp. 4, 23, 35, and non-paginated section.

---

[4] *See also* Am. Comp. Exhibit B, at § 6.1 ("[T]he Committee expressly reserves the right to amend the Plan"); *see also* Am. Comp. Exhibit C, at § 6.1 ("[T]he Committee expressly reserves the right to amend the Plan).

[5] *See also* Am. Comp. Exhibit F, at p. 4 ("the Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate the benefits") and p. 23 (identifying termination of the plan as an event that causes coverages to end); Am. Comp. Exhibit G, at p. 4 ("the Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate the benefits") and 23 (identifying termination of the plan as an event that causes coverages to end).

Earlier plan documents adopted by SuperMedia's predecessor also expressly reserves the broad right to unilaterally amend or terminate plan benefits at any time. For example, the 2004 Verizon SPD states, "the Verizon Employee Benefits Committee (VEBC) also reserves the **right to amend, modify, suspend or terminate** the plans at any time, at its discretion, with or without advance notice to participants, subject to any duty to bargain collectively." 2004 Verizon Medical Expense Plan for New York and New England Post-1986 Associate Retirees SPD, at p. 5 (emphasis added), Am. Comp. Exhibit L.[6][7] Further, the CBAs for former unionized employees lack any agreement that retiree health and welfare benefits vest. *See, e.g.*, Am. Comp. Exhibit K.

B. SUPERMEDIA AMENDED ITS PLANS

On June 25, 2012, the SuperMedia Employee Benefits Committee ("SuperMedia EBC") enacted the Amendments. Counterclaim at ¶ 6. These Amendments reduce SuperMedia's contributions to premium costs and increase certain co-pays and deductibles. Counterclaim at ¶ 6. On June 26, 2012, SuperMedia sent retirees notice of the Amendments, along with a Claim Form, with which retirees could register objections to the Amendments and/or make a claim for benefits. Counterclaim at ¶ 7. The Mentzer Defendants each submitted Claim Forms. *See* Am. Comp. Exhibits AE, AF, AG, AI, and AK. SuperMedia reviewed these Claim Forms and, subsequently, notified each of the Mentzer Defendants of the denial of his or her claim.

---

[6] *See also* the 2004 Verizon Managed Care Network and Medical Expense Plan for Mid-Atlantic Post-1989 Associate Retirees SPD, at p. 5, Am. Comp. Exhibit M; the 2006 Verizon Long Term Care Coverage for Management Retirees SPD, at p. 35, Am. Comp. Exhibit N; the 2001 Verizon New York and New England Survivor Benefits Program for Retirees, at p. 4, Am. Comp. Exhibit O.

[7] Certain participants who retired from GTE prior to 1999 or who were within five years of retirement eligibility at GTE by 1999 are subject to certain provisions in the GTE "Change in Control" ("GTE Retirees"). *See* the GTE Retiree Medical Choices SPD, Am. Comp. Exhibit U at p. 3. This document provides that a successor "may not discontinue the Plan", but "may in the ordinary course of business […] (ii) change, increase or decrease co-payments, deductibles and other requirements for coverage and benefits; and/or (iii) make other changes in administration or changes in the Plan's design and its coverage and benefits." *Id.*[7] (emphasis added). Thus, GTE Retirees also do not have a guaranteed right to benefits, such as premium costs or deductibles, which were modified by the Amendments.

C. PROCEDURAL BACKGROUND

After receiving claims to recover benefits and disputes regarding SuperMedia's right to enact the Amendments, SuperMedia filed this action for declaratory judgment, seeking the Court to declare its rights under the Plan Documents and CBAs. On October 15, 2012, the Mentzer Defendants filed their Counterclaim against SuperMedia, asserting unsupportable claims for breach of fiduciary duty under ERISA Section 404 and interference with a protected right under Section 510. *See* Counterclaim at ¶¶ 16, 18.

IV.
ARGUMENTS AND AUTHORITIES

A. APPLICABLE LEGAL STANDARD: RULE 12(B)(6)

Dismissal under Rule 12(b)(6) is appropriate when a plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A claim for relief is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). In reviewing the sufficiency of a complaint under Rule 12(b)(6), the Fifth Circuit construes the complaint in the light most favorable to the plaintiff, "accepting as true all well-pleaded factual allegations and drawing all reasonable inferences in plaintiff's favor." *Id.*; *Herrmann Holdings Ltd. v. Lucent Techs., Inc.*, 302 F.3d 552, 557-58 (5th Cir. 2002). "A plaintiff must, however, assert more than general legal conclusions to avoid dismissal." *Aspen Specialty Ins. Co. v. Muniz Eng'g, Inc.*, 514 F. Supp. 2d 972, 980 (S.D. Tex. 2007) (citing *Jefferson v. Lead Industries Assoc., Inc.*, 106 F.3d 1245, 1250 (5th Cir. 1997)). "[T]he complaint must contain either direct allegations on every material point necessary to sustain a recovery. . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). "[W]here a

complaint shows on its face that it is barred by an affirmative defense, a court may dismiss the action for failing to state a claim." *Aspen Specialty Ins. Co.*, 514 F. Supp. 2d at 980.

"In considering a Rule 12(b)(6) motion to dismiss, a district court may review the pleadings on file and matters of public record. 'Pleadings on file' includes '[d]ocuments that a defendant attaches to a motion to dismiss . . . if they are referred to in the plaintiff's complaint and are central to [its] claim.'" *Aspen Specialty Ins. Co.*, 514 F. Supp. 2d at 980 (quoting *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000)). Therefore, a Court may dismiss a cause of action where the facts alleged and the unambiguous terms of the contract on which the claim depends fail to support the cause of action. *Id*.

B. SECTION 404 BREACH OF FIDUCIARY DUTY CLAIM SHOULD BE DISMISSED

The Mentzer Defendants allege that SuperMedia breached its duty as a fiduciary of the Plans by filing a suit for declaratory judgment. Counterclaim at ¶ 16; 29 U.S.C. § 1104(a)(1) ("Section 404") ("a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."). This claim fails because SuperMedia was not acting in a fiduciary capacity, and, therefore, there can be no breach. 29 U.S.C.S. § 1109(a) ("No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary."). ERISA defines a fiduciary as follows:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan

29 U.S.C.S. § 1002(21)(a).

An employer does not act as a fiduciary with respect to participants at all times. Rather, certain actions are considered outside of any "fiduciary capacity." *Pegram v. Herdrich*, 530 U.S. 211, 225-26 (2000) (ERISA defines a party as a fiduciary "only 'to the extent' that he acts in such a capacity in relation to a plan") (quoting 29 U.S.C. § 1002(21)(A)); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan"); *Bodine v. Emplrs. Cas. Co*., 352 F.3d 245, 251-252 (5th Cir. 2003) ("a decision to terminate an employee, who is also a Plan beneficiary, is inherently not fiduciary in nature"). Because SuperMedia's suit is an action taken to validate its right to amend or terminate the Plans, it cannot reasonably be said to be fiduciary in nature, but instead arises from the decision to amend. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. at 78 ("Accordingly, that Curtiss-Wright amended its plan to deprive respondents of health benefits is not a cognizable complaint under ERISA; the only cognizable claim is that the company did not do so in a permissible manner"). SuperMedia's modification of its retiree health and welfare Plans and subsequent suit for declaratory judgment are permissible under ERISA and the law of the Fifth Circuit. *See, e.g., Halliburton Co. Benefits Comm. v. Graves*, 463 F.3d 360 (5th Cir. 2006) (adjudicating a declaratory judgment action by a company against retirees, where the company invoked ERISA Section 502(a)(1)(B)); *KLLM, Inc. v. Ontario Community Hosp*., 947 F. Supp. 262, 269 (S.D. Miss. 1996) ("[T]he court agrees with the Plan that its action may be maintained under the Declaratory Judgment Act as a federal question is presented. . . . [I]f the declaratory judgment defendant could have brought a coercive action to enforce his rights, then [the federal court has] jurisdiction.") (quoting *Janakes v. United States Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985)); *see also Halliburton Co. Benefits*

Comm. v. Mem'l Hermann Hosp. Sys., 2006 U.S. Dist. LEXIS 3184, *7, 2006 WL 148901 (S.D. Tex. Jan. 19, 2006).

SuperMedia's suit for declaratory judgment is an action that stems from its modification of the Plans and is permitted under ERISA and the Fifth Circuit. Because these kinds of actions are not fiduciary in nature, the Mentzer Defendants cannot plausibly allege that these actions breached any fiduciary duty, and this claim should be dismissed. *Curtiss-Wright Corp*, 514 U.S. at 78; Fed. R. Civ. P. 12(b)(6).

C. SECTION 510 INTERFERENCE WITH PROTECTED RIGHT CLAIM SHOULD BE DISMISSED

Second, Defendants assert that SuperMedia's filing of a suit to declare the parties' rights constitutes a prohibited act in violation of Section 510. 29 U.S.C.S. § 1140; Counterclaim at ¶ 13. Despite their false and conclusory allegations of "discrimination" and "retaliation," however, the Mentzer Defendants fail to state a violation because: (i) a declaratory judgment suit engenders a declaration of, not an interference with, parties' rights, and (ii) the Mentzer Defendants have no enforceable right to continued health and welfare benefits in the first place.

Section 510 provides:

> **Interference with protected rights**
>
> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, section 3001 [29 U.S.C.S. § 1201], or the Welfare and Pension Plans Disclosure Act, for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C.S. § 1140. Therefore, to state a valid Section 510 claim, a current or former employee must allege facts to establish the following elements: "(1) prohibited (adverse) employer action

(2) taken for the purpose of interfering with the attainment of (3) any right to which the employee is entitled." *Bodine v. Emplrs. Cas. Co.*, 352 F.3d 245, 250 (5th Cir. 2003).

i. **DECLARATORY JUDGMENT ACTION IS NOT A PROHIBITED EMPLOYER ACTION**

First, a declaratory judgment suit is not the sort of "discrimination" or "retaliation" that Section 510 prohibits. Section 510 prohibits only interferences with rights. SuperMedia's Amended Complaint seeks a declaration of the validity of Amendments to the Plans, and, generally, of SuperMedia's right to modify, amend, or terminate the Plans at its discretion. Am. Comp. at ¶ 71. A declaration, especially of a party's *lack* of rights to continued benefits, cannot logically amount to an interference with that party's rights. Thus, that the Fifth Circuit regularly adjudicates declaratory judgment suits by plans and plan administrators. *See, e.g., Halliburton Co. Benefits Comm. v. Graves*, 463 F.3d 360 (5th Cir. 2006); *KLLM, Inc. v. Ontario Community Hosp.*, 947 F. Supp. 262, 269 (S.D. Miss. 1996); *Janakes v. United States Postal Serv.*, 768 F.2d 1091, 1093 (9th Cir. 1985)); *Halliburton Co. Benefits Comm. v. Mem'l Hermann Hosp. Sys.*, 2006 U.S. Dist. LEXIS 3184, *7, 2006 WL 148901 (S.D. Tex. Jan. 19, 2006).

ii. **DEFENDANTS HAVE FAILED TO ALLEGE A PROTECTED RIGHT**

Second, even if SuperMedia's declaratory judgment suit were the sort of adverse interference that Section 510 prohibits (and it is not), the Mentzer Defendants have failed to allege a "protected right" under ERISA or the Plans that would be subject to any alleged interference in the first place. 29 U.S.C.S. § 1140. A "protected right," for purposes of Section 510, does not include "conceivable" or prospective rights, but only those which the employer actually has an "existing, enforceable obligation" to provide. *McGann v. H & H Music Co.*, 946 F.2d 401, 405 (5th Cir. 1991) ("The right referred to in the second clause of section 510 is not simply any right to which an employee may conceivably become entitled, but rather any right to

which an employee may become entitled pursuant to an existing, enforceable obligation assumed by the employer."). That is, a Section 510 claim only survives if the alleged right is one to which the retiree is actually "entitled." *Id*.

a. Alleged Rights under Health and Welfare Plans are Not the Sort of Protected Rights Contemplated by Section 510

Because health and welfare benefits are not vested, retirees do not have an enforceable right to them. *McGann v. H & H Music Co.*, 946 F.2d 401, 405 (5th Cir. 1991). Congress purposefully excepted welfare benefits from the vesting requirements that apply to pension benefits, and, therefore, a retiree has no right to permanent medical benefits. *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 373 (5th Cir. 2008) ("It is true that ERISA itself does not regulate the substantive content of welfare benefit plans."); *Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997) ("unless an employer contractually cedes its freedom, it is generally free under ERISA, for any reason at any time, to adopt, modify, or terminate its welfare plan"); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("Nor does ERISA establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans."). In this distinction between pensions, on the one hand, and health and welfare benefit plans, on the other, Congress intentionally recognized an employer's inherent need for flexibility in administering health and welfare plans, which, unlike pension plans, are subject to the ever-fluctuating costs of medical care. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993) ("Congress has conspicuously chosen to exempt welfare benefit plans from the full breadth of ERISA's extensive requirements . . . The disparate treatment accorded welfare plans is not accidental. . ."); *see Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("With regard to an employer's right to change medical plans, Congress evidenced its recognition of the need for flexibility in rejecting the automatic vesting of

welfare plans. Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables.”).

Therefore, alleged rights under health and welfare benefits plans do not support a claim for violation of Section 510 because these are not permanent, enforceable rights, but rather may be terminated at any time. *See McGann*, 946 F.2d at 405 (holding that an employer’s modification of a medical benefits plan was not a violation of Section 510 because the employees did not have a right to continued or permanent welfare benefits); *see also Clark v. Resistoflex Co., Div. of Unidynamics Corp.*, 854 F.2d 762, 770 (5th Cir. 1988); *Bodine*, 352 F.3d at 251 (“This requirement for ‘entitlement’ to a § 510 action is only satisfied if the employer has promised the employee a benefit that is eventually denied.”).

b. SuperMedia Has Not Contractually Provided for Enforceable or Guaranteed Rights under its Health and Welfare Benefits Plans

Consistent with ERISA, SuperMedia’s Plans maintain its right to discontinue health and welfare. Indeed, the Plans and SPDs explicitly preclude vested welfare benefits and reserve to SuperMedia the unilateral right to amend or terminate, consistent with Congress’ treatment of health and welfare benefits. *See, e.g.*, Management Plan, Am. Comp. Exhibit A, at § 7.4[8] (“No Vested Rights); *id.* at § 6.1 (“SuperMedia reserves the right to amend or terminate the Plan or any Component Benefit at any time and from time to time and to any extent and in any manner that it deems advisable”)[9]; Pre-65 SPD, Am. Comp. Exhibit E, at p. 2 (“The Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate these Plans in whole

[8] *See also* Am. Comp. Exhibit B, at § 7.4 (stating identical language to Exhibit A, at § 7.4); Am. Comp. Exhibit C, at § 7.4 (stating identical language to Am. Comp. Exhibit A, at § 7.4).

[9] *See also* Am. Comp. Exhibit B, at § 6.1 (“[T]he Committee expressly reserves the right to amend the Plan”); *see also* Am. Comp. Exhibit C, at § 6.1 (“[T]he Committee expressly reserves the right to amend the Plan).

or in part at any time.").[10] Similarly, Verizon plan documents, which preceded SuperMedia's Plans, also expressly reserved the broad right to unilaterally amend or terminate plan benefits at any time. *See, e.g.*, 2004 Verizon Medical Expense Plan for New York and New England Post-1986 Associate Retirees SPD, Am. Comp. Exhibit L, at p. 5 ("the Verizon Employee Benefits Committee (VEBC) also reserves the right to amend, modify, suspend or terminate the plans at any time, at its discretion, with or without advance notice to participants, subject to any duty to bargain collectively.").[11] Further, the CBAs for former unionized employees lack any agreement that retiree health and welfare benefits vest. *See, e.g.*, Am. Comp. Exhibit K. As a result, none of the terms of the Plans provided by SuperMedia have vested.

Because health and welfare benefits do not automatically vest under ERISA, and since the Plans which form the basis of the Mentzer Defendants' claim do not provide for vested benefits, the Mentzer Defendants have no enforceable, protected rights under ERISA or the Plans. Instead, the Plans can be terminated at any time. Furthermore, a declaratory judgment suit is not the kind of prohibited, interfering action contemplated by Section 510. Therefore, the Mentzer Defendants cannot state a plausible claim for relief, and this claim should be dismissed in its entirety. Fed. R. Civ. P. 12(b)(6).

---

[10] *See also* Am. Comp. Exhibit F, at p. 4 ("the Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate the benefits") and p. 23 (identifying termination of the plan as an event that causes coverages to end); *see also* Am. Comp. Exhibit G, at p. 4 ("the Company and the Plan Administrator reserve the right to amend, modify, revoke, or terminate the benefits") and p. 23 (identifying termination of the plan as an event that causes coverages to end).

[11] *See also* 2004 Verizon Managed Care Network and Medical Expense Plan for Mid-Atlantic Post-1989 Associate Retirees SPD, at p. 5, Am. Comp. Exhibit M; 2006 Verizon Long Term Care Coverage for Management Retirees SPD, at p. 35, Am. Comp. Exhibit N; 2001 Verizon New York and New England Survivor Benefits Program for Retirees, at p. 4, Am. Comp. Exhibit O.

V.
CONCLUSION

SuperMedia filed the instant action to obtain necessary declarations of the parties' rights under the Plans and, quite simply, has not violated ERISA by doing so. Nonetheless, the Mentzer Defendants have lodged two implausible claims, seeking to hold SuperMedia liable for filing the Complaint. Defendants attempt to spin SuperMedia's suit first as a breach of fiduciary duty and, second, as a prohibited interference with enforceable rights. Both of these claims must be dismissed.

First, the breach of fiduciary duty claim should be dismissed because an employer's amendment of health and welfare plans and subsequent suit to declare the validity of those amendments are outside the scope of an employer's fiduciary capacity under ERISA. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Thus, there can be no breach. 29 U.S.C.S. § 1109(a).

Second, the claim of interference with a protected right should also be dismissed. A suit for declaratory judgment, by its very nature, *declares*, rather than *interferes with*, parties' rights. Furthermore, Defendants have no protected, permanent rights under SuperMedia's health and welfare benefits Plans in the first place. *See, e.g., McGann v. H & H Music Co.*, 946 F.2d 401, 405 (5th Cir. 1991). Both ERISA and the unambiguous terms of the governing Plan documents make clear that participants do not have a right to continued or permanent benefits. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993). Instead, SuperMedia has the right to modify, amend, or terminate the Plans at its discretion. *Id.* Therefore, the Mentzer Defendants have no guaranteed rights with which SuperMedia could have prohibitively interfered. 29 U.S.C. § 1140. Because the facts alleged, the terms of the Plans, and the law of the Fifth Circuit

preclude relief under either cause of action, the Mentzer Defendants have failed to state a claim under Rule 12(b)(6).

DATED: November 16, 2012

Respectfully submitted,

s/ Richard S. Krumholz

Richard S. Krumholz
Texas Bar No. 00784425
rkrumholz@fulbright.com
Scott P. Drake
Texas Bar No. 24026812
sdrake@fulbright.com
Abby N. Ruth
Texas Bar No. 24056247
aruth@fulbright.com
Rachel L. Williams
Texas Bar No. 24067175
rachelwilliams@fulbright.com

FULBRIGHT & JAWORSKI L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
Telephone: (214) 855-8000
Facsimile: (214) 855-8200

and

Mark S. Miller *(admitted pro hac vice)*
Texas Bar No. 14099600
mmiller@fulbright.com
Justin Coddington
Texas Bar No. 24050434
jcoddington@fulbright.com

FULBRIGHT & JAWORSKI L.L.P.
Fulbright Tower
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
Telephone: (713) 651-5151
Facsimile: (713) 651-5246

COUNSEL FOR PLAINTIFFS SUPERMEDIA INC., SUPERMEDIA LLC, SUPERMEDIA SERVICES INC., SUPERMEDIA SALES INC., SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, AND IDEARC INCEPTOR LTD

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2012, I electronically filed the foregoing document with the clerk of 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 attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

s/ *Richard S. Krumholz*