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

SUPERMEDIA, INC., ET AL.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION NO.
	)	
VS.	)	3:12-CV-2034-G
	)	
ROBERT B. MENTZER, ET AL.,	)	

DEFENDANTS MENTZER'S, NOE'S, OHNSTAD'S, PALMER'S AND ZENUS'S MOTION FOR SUMMARY JUDGMENT DISMISSAL

Defendants, Robert B. Mentzer, Sandra R. Noe, Carl B. Ohnstad, Claire Palmer and Bernard A. Zenus, (hereinafter "Movants") [1], pursuant to Fed.R.Civ.P. 56, by and through their counsel, file their Motion for Summary Judgment dismissal of the pending First Amended Complaint (Docket entry 23). The First Amended Complaint purports to assert a single claim for a declaratory judgment under the Employee Retirement Income Security Act ("ERISA"), but it fails as a matter of law. There is no cognizable claim under ERISA. An employer lacks standing to sue for a declaratory judgment under ERISA in a federal court. Since this Court has ruled that SuperMedia Employee Benefits Committee was acting in a non-fiduciary employer capacity when it commenced this lawsuit, no named plaintiff has standing to sue under ERISA. Furthermore, when this case was commenced, it was not ripe for adjudication.

Accordingly, the Court has no subject matter jurisdiction, and this case should come to an end. Movants request such other relief as the Court deems appropriate, along with an award of costs and attorney's fees. Movants incorporate their memorandum brief filed herewith.

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[1] The Court previously dismissed 17 of the 23 retirees who were named as individual defendants to the First Amended Complaint. (See Docket entries 50, 51, 52, 67, 69 and 98).

DATED this 2nd day of October, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2013, 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 Robert B. Mentzer, Sandra R. Noe, Carl B. Ohnstad, Claire Palmer and Bernard A. Zenus.

s/ Curtis L. Kennedy
Curtis L. Kennedy

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ROBERT B. MENTZER, ET AL.,	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS MENTZER'S NOE'S OHNSTAD'S PALMER'S AND ZENUS'S MOTION FOR SUMMARY JUDGMENT DISMISSAL

I. Introduction

Defendants Robert B. Mentzer, Sandra R. Noe, Carl B. Ohnstad, Claire Palmer and Bernard A. Zenus (hereinafter "Movants") submit this memorandum brief in support of their motion for summary judgment filed pursuant to Fed. R. Civ. P. 56. The single claim asserted against them in the First Amended Complaint should be summarily dismissed.

The SuperMedia Plaintiffs needlessly commenced this civil action within hours after SuperMedia received completed administrative claim forms solicited from the Movants. Quite simply, SuperMedia ambushed the unsuspecting retirees. There is no justiciable case, and this civil action is the very example of totally unnecessary and harassing litigation. This Court ought to sanction the SuperMedia Plaintiffs by requiring them to pay the individual named defendants' reasonable attorney's fees and costs.

II. Undisputed Material Facts

The following material facts asserted in the First Amended Complaint, docket entry 23, are undisputed, as revealed by the Answer, docket entry 73, filed by Movants.

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).

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 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).[1] 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, including Movants, and Local 2213 of the International Brotherhood of Electrical Workers. (Docket entry 23).

Since then, the Court has since dismissed 17 of the 23 retirees who were named as defendants (See Docket entries 50, 51, 52, 67, 69 and 98). It is an undisputed fact that the retirees had no expectation of ever being haled 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.").

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[1] 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 for a summary judgment dismissal, 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, objections and disagreement with SuperMedia, they could be sued in a federal court, the Dallas federal court.

III. Rule 56 Motion for Summary Judgment Standard.

Summary judgment is proper when the pleadings and evidence before the court show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); see also *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986). The disposition of an ERISA case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Martin v. SBC Disability Income Plan*, Not Reported in F.Supp.2d, 2006 WL 3040926 at *5, fn2 (N.D. Tex. October 26, 2006) (quoting *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir.1986)). The movant makes the necessary showing for summary judgment by informing the Court of the basis of his motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *Celotex*, 477 U.S. at 323, 106 S.Ct. at 2553. The nonmovants cannot survive a motion for summary judgment by merely resting on the allegations in their pleadings. *Isquith for and on behalf of Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 199 (5th Cir.), *cert. denied*, 488 U.S. 926, 109 S.Ct. 310 (1988); see also *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553.

IV. Argument.

A. The First Amended Complaint Asserts No Cognizable Claim Under ERISA.

The First Amended Complaint against the Movants should be summarily dismissed pursuant to Fed. R. Civ. P. 56 because there is no cognizable ERISA-based claim asserted against any of the Movants. The SuperMedia Plaintiffs cannot point to any specific provision of ERISA authorizing their suit. They are not making a claim for payment of employee benefits.

They are are 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. The SuperMedia Plaintiffs are simply seeking a declaration of their rights to reduce and eliminate Movants' retiree welfare benefits. The SuperMedia Plaintiffs' action must be authorized by a specific sub-provision of ERISA Section 502(a), and it isn't.

This case is totally unnecessary to further the purpose of Subchapter 1 of ERISA. This case is an unnecessary suit for a declaratory judgment, and Congress did not intend to enable either a plan sponsor or plan fiduciary, acting in any capacity, to bring a direct suit for a declaratory judgment under ERISA. 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.

Moreover, the SuperMedia Plaintiffs are 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 either any one of the Movants has done something wrongful or that any one of the Movants needs to be enjoined from conducting an act which violates either the terms of an

employee benefit plan or ERISA. 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. The First Amended Complaint gives no indication that there has been any disobedience to or violation of the terms of either a plan or ERISA. 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. The SuperMedia Plaintiffs' declaratory action is not directly authorized by ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3). (Memorandum Opinion and Order, Docket entry 98, p. 15). [2]

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 this federal court forum. *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)).

B. The SuperMedia Plaintiffs Lack Standing to Sue Under ERISA.

Except two limited circumstances, an employer has no standing to sue under ERISA. ERISA Section 502(a)(8) allows an employer to bring suit to enjoin an act or practice that

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[2] The Court has already intimated that this case "'is not one to 'enforce' the provisions of ERISA or a plan.'" (Memorandum Opinion and Order, Docket entry 98, p. 13).

violates ERISA Section 101(f) or under any subsection thereof. ERISA Section 101(f) concerns a defined benefit plan funding notice, something not even remotely related to this case. ERISA Section 502(a)(10) allows an employer to bring suit concerning the funding of a multiemployer pension plan, another issue completely unrelated to this case. Thus, the employer and plan sponsor of the welfare plans, to-wit: SuperMedia Inc.; SuperMedia LLC; SuperMedia Services Inc.; SuperMedia Sales Inc.; and Idearc Interceptor LTD, all lack standing to sue to continue forward with this case.

In addition, this Court has concluded that SuperMedia Employee Benefits Committee ("SuperMedia EBC") was not and is not acting in a fiduciary capacity when filing and prosecuting this action but, rather, acting in a non-fiduciary employer capacity. (Docket entry 98, pp. 26-27, the Court concluding that "the EBC was not performing a fiduciary function when it brought this declaratory judgment action."). Thus, the SuperMedia EBC, too, lacks standing to sue and continue forward with this case.[3] SuperMedia EBC has standing under § 502(a) only if it is a fiduciary under ERISA and is asserting a claim in its fiduciary capacity. *Sonoco Prods. Co. v. Physicians Health Plan, Inc*., 338 F.3d 366, 372 (4th Cir. 2003). Since none of the SuperMedia Plaintiffs have standing to sue under ERISA, this court lacks subject matter jurisdiction. *Harris v. TMG Life Ins. Co.*, 915 F.Supp. 869, 870 (S.D. Tex.1996) (citing *Coleman v. Champion Int'l Corp/Champion Forest Prods*., 992 F.2d 530, 534 (5th Cir.1993) ("Where Congress has defined the parties who may bring a civil action founded on ERISA, we are loathe to ignore the legislature's specificity.")).

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3 While the Movants disagree with the Court's conclusion that SuperMedia Employee Benefits Committee is somehow empowered to act in a non-fiduciary capacity, that decision, nevertheless, remains the law of this case.

C. The Claim Asserted Against Movants Should be Dismissed For a Lack of Ripeness.

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, 105 S.Ct. 3325, 3333 (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. I submit this as a written claim for continued retiree benefits, 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 the SuperMedia Plaintiffs 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.

V. Conclusion

For all of the above reasons, the Movants/Defendants Robert B. Mentzer, Sandra R. Noe, Carl B. Ohnstad, Claire Palmer and Bernard A. Zenus respectfully request that the Court grant a summary judgment dismissal of 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 2nd day of October, 2013. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October, 2013, 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 Mentzer, Noe, Ohnstad, Palmer, and Zenus.

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