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

WILLIAM LEE, et al.,

Plaintiffs,

v.

S

Civil Action No.3:12-cv-04834-D

VERIZON COMMUNICATIONS INC.,
et al.,

Defendants.

S

Defendants.

RESPONSE BY DEFENDANT THE PRUDENTIAL INSURANCE COMPANY OF AMERICA TO APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

Gregory F. Jacob (pro hac vice) Gayla C. Crain

gjacob@omm.com gcrain@spencercrain.com

O'MELVENY & MYERS LLP SPENCER CRAIN CUBBAGE 1625 Eye Street, N.W. HEALY & MCNAMARA, PLLC

Washington, DC 20006 1201 Elm Street Suite 4100

Tel.: (202) 383-5300 Tel.: (214) 290-0002 Fax: (202) 383-5414 Fax: (214) 290-0099

Jeffrey Kohn (pro hac vice application forthcoming)

jkohn@omm.com

O'MELVENY & MYERS LLP

Times Square Tower

7 Times Square

New York, NY 10036

Tel.: (212) 326-2000

Fax: (212) 326-2061

Attorneys for Defendant The Prudential Insurance Company of America

TABLE OF CONTENTS

			Page
INTRODUCT	TION		1
LEGAL STA	NDAR	D	3
ARGUMENT			4
I.		NTIFFS WILL NOT SUFFER IRREPARABLE HARM IF THE NSACTION IS COMPLETED	4
	A.	Plaintiffs Will Continue To Receive Payments in the Full Amount of Their Promised Future Benefits, With No Reductions Of Any Kind	6
	B.	Plaintiffs' Claim That The Annuity Transaction Creates A Greater Risk Of Default Is Factually Incorrect And An Insufficient Basis For Injunctive Relief.	7
		Prudential Has Annuitized Retirement Benefits, and Made Payments Without Interruption Pursuant to Such Arrangements, Since 1928.	8
		2. Plaintiffs' Annuitized Benefits Are Secure With Prudential.	9
		3. Prudential's Guaranteed Separate Account Provides Additional Security for Plaintiffs' Retirement Payments	11
	C.	Any Harm Plaintiffs Might Suffer Can Be Adequately Remedied Through Post-Transaction Relief.	12
II.	PLAI	NTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS	14
III.	PRUDENTIAL WOULD BE SIGNIFICANTLY INJURED BY ANY DELAY		
	A.	The Annuity Transaction Cannot Close After December 17, 2012	18
	В.	Prudential Will Be Harmed Irreparably If the Annuity Transaction Does Not Close.	19
IV.		ISSUANCE OF INJUNCTIVE RELIEF OF ANY KIND WOULD ONTRARY TO THE INTERESTS OF PUBLIC POLICY	22
CONCLUSIO	N		24

TABLE OF AUTHORITIES

Page(s)

CASES	
Avmed Inc. v. Browngreer PLC, 300 F. App'x 261 (5th Cir. 2008)	3
Bussian v. RJR Nabisco, Inc., 223 F.3d 286 (5th Cir. 2000)	13
Cigna Corp. v. Amara, 131 S. Ct. 1866 (2011)	14
Digital Generation, Inc. v. Boring, F. Supp. 2d, No. 3:12–CV–00329–L, 2012 WL 1413386 (N.D. Tex. Apr. 24, 2012)	13
Dresser-Rand Co. v. Schutte & Koerting Acquisition Co., No. H–12–184, 2012 WL 460275 (S.D. Tex. Feb. 13, 2012)	18
Flanigan v. GE, 242 F.3d 78 (2d Cir. 2001)	6
Graham v. Med. Mut. of Oh., 130 F.3d 293 (7th Cir. 1997)	12
<i>Harley v. 3M</i> , 284 F.3d 901 (8th Cir. 2002)	7
High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc., 49 F.3d 1551 (Fed. Cir. 1995)	1
Karaha Bodas Co. v. Negara, 335 F.3d 357 (5th Cir. 2003)	4
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)	7
Maher v. Strachan Shipping Co., 68 F.3d 951 (5th Cir. 1995)	13
Mahoney v. Bd. of Trs., 973 F.2d 968 (1st Cir. 1992)	15
Morales v. City of S. Padre Island, No. B-10-76, 2010 WL 2292042 (S.D. Tex. Jun. 4, 2010)	4

TABLE OF AUTHORITIES

(continued)

Page(s)

Nat'l Football League Props. v. Playoff Corp., 808 F. Supp. 1288 (N.D. Tex. 1992)	18
Nichols v. Alcatel USA, Inc., 532 F.3d 364 (5th Cir. 2008)	3, 4, 6
Randolph v. Nationstar Mortg., LLC, No. 11-2165, 2012 WL 2450016 (E.D. La. June 27, 2012)	4, 7
Riley v. Murdock, 890 F.Supp. 444 (E.D.N.C.1 995), aff'd 83 F.3d 415 (4th Cir. 1996)	17
Roho, Inc. v. Marquis, 902 F.2d 356 (5th Cir. 1990)	4
Sanchez v. Fed. Bureau of Prisons, No. 3:05-CV-2376-K, 2005 WL 3555465 (N.D. Tex. Dec. 19, 2005)	4
Texas First Nat'l Bank v. Wu, 347 F. Supp. 2d 389 (S.D. Tex. 2004)	5
Valley v. Rapides Parish Sch. Bd., 118 F.3d 1047 (5th Cir. 1997)	3
Winter v. Natural Res. Def. Counsel, 555 U.S. 7 (2008)	3, 4, 7
Wireless Agents, L.L.C. v. T-Mobile, USA, Inc., No. 3:05–CV–0094–D, 2006 WL 1540587 (N.D. Tex. June 6, 2006) (Fitzwater,	J.)1
STATUTES	
29 U.S.C. § 1132(a)(9)	13
29 U.S.C. § 1341(b)(1)(C)	8
ERISA § 4041(b)(1)(C)	8
ERISA § 502(a)(3)	14
IRC 411(d)(3)	17
Pension Annuitants Protection Act of 1994	13

TABLE OF AUTHORITIES

(continued)

Page(s)

OTHER AUTHORITIES	
Andrew Harris & Tom Korosec, Verizon Retirees Sue to Block Sale of Pension Plan, Bloomberg (Nov. 29, 2012)	22
Ass'n of BellTel Retirees, Verizon Retirees Sue to Halt Verizon's \$7.5 Billion Sell-Off of 41,000 Pensions; Federal Court Action Seeks to Reverse Spin-Off to Prudential Insurance Annuity Plan, MarketWire (Nov. 29, 2012)	
Associated Press, Verizon Management Retirees Sue to Stop Transfer of Pensions to Prudential Insurance, Wash. Post (Nov. 29, 2012)	22
Department of Labor Advisory Opinion 2006-08A (Oct. 3, 2006)	24
Floyd Norris, <i>Private Pension Plans, Even at Big Companies, May be Underfunded</i> , N.Y Times, Jul. 20, 2012	
H.R. Rep. No. 93-533 (1973), reprinted in 1974 U.S.C.C.A.N. 4639	24
Todd Spangler, Verizon Retirees Sue Telco Over Plan to Spin Off Pensions to Prudential Multichannel News (Nov. 29, 2012)	
RULES	
29 C.F.R. § 2509.95-1	16, 24
29 C.F.R. § 2509.95-1(a)	15
29 C.F.R. § 2509.95-1(b)	15
29 C.F.R. § 2509.95-1(c)	5, 16, 17
29 C.F.R. § 2509.95-1(d)	17
29 C.F.R. § 2510.3-3(d)(2)(ii)	5, 16, 24
29 C.F.R. § 4041.3	8
29 C.F.R. § 4041.26	8
60 Fed. Reg. 12,328	3, 15, 16
60 Fed. Reg. 12,329	13, 16

The Prudential Insurance Company of America ("Prudential"), by and through undersigned counsel, respectfully submits this response and accompanying exhibits to plaintiffs' application for a temporary restraining order and motion for preliminary injunction (respectively, "TRO" and "PI" (ECF Nos. 6, 18)).

INTRODUCTION

On October 17, 2012, Prudential and Verizon Communications, Inc. ("Verizon") announced a transaction, set to close on December 10, 2012, whereby the defined benefit plan sponsored by Verizon will purchase a single premium Group Annuity Contract ("GAC") intended to exactly replicate the pension benefit payment obligations owed to covered Verizon retirees, and Prudential will guarantee all future payments made to the retirees in accordance with the GAC (the "Annuity Transaction"). Plaintiffs, who are but two out of approximately 41,000 covered Verizon retirees, now seek extraordinary injunctive relief preventing that transaction from proceeding—several weeks after the transaction was announced, and on the very eve of its closing. That relief, which would cause significant harm to Prudential, Verizon, and other Verizon retirees by likely preventing the Annuity Transaction from *ever* closing, must be denied.

Prudential and its affiliates are longstanding, market-leading providers of investment management and administrative services for retirement plans, including defined benefit plans and defined contribution plans sponsored by corporate as well as government entities across the country. For decades, Prudential has as a core part of its business entered into transactions with ERISA retirement plan sponsors whereby Prudential has, in exchange for a premium, assumed

¹ ""[D]elay in seeking a remedy is an important factor bearing on the need for a preliminary injunction" because it "militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief." *Wireless Agents, L.L.C. v. T-Mobile, USA, Inc.*, No. 3:05–CV–0094–D, 2006 WL 1540587, at *4 (N.D. Tex. June 6, 2006) (Fitzwater, J.) (quoting *High Tech Med. Instrumentation, Inc. v. New Image Indus., Inc.*, 49 F.3d 1551, 1557 (Fed. Cir. 1995)).

part or all of a plan's pension liability and issued a group annuity contract exactly replicating the plan's pension benefit obligations, with no reduction in benefits. ERISA expressly permits such transactions, and establishes specific conditions designed to protect the interests of plan participants that must be met before retirement benefits can be replaced with insurance guarantees.

All of those conditions are satisfied by the pending transaction between Verizon and Prudential. Verizon is purchasing a group annuity contract that is intended to replicate the payments owed to covered Verizon retirees by the Verizon plan. Prudential is fully and irrevocably guaranteeing the payments in accordance with the group annuity contract. Once the Annuity Transaction closes, covered retirees will continue to receive their monthly payments in the same amount, on the same schedule, and even from the same bank—only the logo printed on the checks will change. And although plaintiffs histrionically (and falsely) charge that the annuitization of Verizon's retirement obligations constitutes "an unprecedented attack against the entire ERISA-governed and PBGC-protected scheme," (Pls.' Supp. Br. at 33 (ECF No. 19)), Prudential has in fact finalized annuitization transactions in 2011 and 2012 alone with at least 29 different plan sponsors.

Plaintiffs do not even come close to meeting their considerable burden to establish an entitlement to extraordinary injunctive relief. Not only will plaintiffs *not be harmed* by the Annuity Transaction, they will actually be *better off* after the transaction than they were before, and *more secure* in their expected retirement payments. By contrast, if the Court issued injunctive relief that delayed the closing of the Annuity Transaction past December 17, 2012, the transaction would likely never happen, costing Prudential untold millions of dollars in irrecoverable losses. At the same time, plaintiffs have no chance of success on the merits. They

do not bring substantive claims against Prudential at all. And their core ERISA claims against the Verizon defendants are all founded on the entirely false premise that the annuitization of retirement benefits is unprecedented and illegal, when in fact ERISA expressly provides for such transactions and they occur routinely. Finally, a TRO or preliminary injunction would plainly be contrary to the public interest. The public interest strongly favors allowing the Annuity Transaction, and others like it, to go forward inasmuch as annuitization arranged pursuant to ERISA's specifications fosters the full funding of retirement benefits. Plaintiffs' request for extraordinary injunctive relief must be denied.

LEGAL STANDARD

Injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Counsel*, 555 U.S. 7, 22 (2008); *see also Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997) (noting injunctive relief is an "extraordinary remedy which requires the movant to unequivocally show the need for its issuance." (citation omitted)). Such relief is strongly disfavored, and for this reason the Fifth Circuit has recognized that an injunction is "the exception rather than the rule." *Avmed Inc. v. Browngreer PLC*, 300 F. App'x 261, 264 (5th Cir. 2008) (quotation omitted); *see also Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008) (denying retirees' request for preliminary injunction to stop changes to ERISA benefit plans).

Whether plaintiffs are now seeking a preliminary injunction or a temporary restraining order, they bear the heavy burden of establishing (1) a substantial threat that they would suffer irreparable harm if they do not get preliminary relief, (2) a substantial likelihood that they will ultimately succeed on the merits, (3) that the threatened harm to plaintiffs outweighs any damage that the restraining order or injunction might cause Verizon or Prudential, and (4) that an

injunction will not undermine the public interest. *Nichols*, 532 F.3d at 372 (providing standard); *see also Morales v. City of S. Padre Island*, No. B-10-76, 2010 WL 2292042, at *2 (S.D. Tex. Jun. 4, 2010) (noting same standard applies to temporary restraining order as to preliminary injunction); *Sanchez v. Fed. Bureau of Prisons*, No. 3:05-CV-2376-K, 2005 WL 3555465, at *1, n.1 (N.D. Tex. Dec. 19, 2005) (similar). The Court may order preliminary relief only after plaintiffs have "clearly carried the burden of persuasion" on all four requirements. *Karaha Bodas Co. v. Negara*, 335 F.3d 357, 373 (5th Cir. 2003) (citations omitted) (reversing district court's grant of preliminary injunction, even though enjoined party was "likely in the wrong"). Plaintiffs' failure to satisfy their burden as to any of the four requirements ends the inquiry without "address[ing] the other elements necessary for granting a preliminary injunction." *Randolph v. Nationstar Mortg., LLC*, No. 11-2165, 2012 WL 2450016, at *4 (E.D. La. June 27, 2012) (citing *Roho, Inc. v. Marquis*, 902 F.2d 356, 361 (5th Cir. 1990)). Here, plaintiffs satisfy none.

ARGUMENT

I. PLAINTIFFS WILL NOT SUFFER IRREPARABLE HARM IF THE TRANSACTION IS COMPLETED.

"A plaintiff seeking a preliminary injunction must establish . . . that he is *likely* to suffer irreparable harm in the absence of preliminary relief" *Winter*, 555 U.S. at 20 (emphasis added). Plaintiffs, however, will not suffer any harm at all if the transaction is consummated, but rather will continue to receive the exact same monthly payments from the same bank, on the same schedule, and with no reduction in benefits. (*See* Decl. of George P. Waldeck, Jr. ("Waldeck Decl."), ¶ 17, PRU App. 248-59.²)

² Materials included in Prudential's appendix are referenced as "PRU App." Materials included in plaintiffs' appendix are referenced as "Compl. App."

Plaintiffs do not dispute that the Annuity Transaction will not reduce or otherwise alter the monthly payments they receive in any way. Instead, they allege that they will be harmed by the transaction because they will lose certain remedies they might otherwise have been able to invoke—specifically, ERISA claims for fiduciary breach and the backing of the PBGC—if one day their checks failed to arrive. Such a hypothetical future injury, which plaintiffs allege they may one day incur upon the occurrence of a speculative, far-off future event, cannot provide the basis for an assertion of irreparable harm. *Texas First Nat'l Bank v. Wu*, 347 F. Supp. 2d 389, 399 (S.D. Tex. 2004) ("Irreparable harm is neither speculative nor remote, but is actual and imminent," and plaintiffs must demonstrate they are likely to suffer irreparable harm "before a trial on the merits" (emphasis added)). Moreover, plaintiffs' claim is simply inaccurate, as the Annuity Transaction, which will move the plaintiffs from an 81.5% funded plan to a fully funded annuity guaranteed by a financially secure insurance company, will render the plaintiffs less subject to risk with respect to the payments they expect to receive, not more.

Finally, any harm plaintiffs might suffer as a result of the Annuity Transaction can be fully remedied through post-transaction relief. All of the harms plaintiffs allege center on supposed harm to their financial interests, but any losses plaintiffs might one day suffer because of wrongful conduct on the part of the defendants can be compensated, either through an ERISA claim against Verizon or through a contractual claim against Prudential. Moreover, ERISA confers broad equitable powers on courts that could be used as necessary to shape a remedy that would make plaintiffs whole.

In sum, plaintiffs have not and cannot make a showing of irreparable harm attributable to the Annuity Transaction, and their request for extraordinary injunctive relief must be denied.

A. Plaintiffs Will Continue To Receive Payments in the Full Amount of Their Promised Future Benefits, With No Reductions Of Any Kind.

When the Annuity Transaction closes, Verizon will purchase a single premium Group Annuity Contract ("GAC") that is intended to replicate the pension benefit payment obligations owed to covered Verizon retirees, with no reduction in benefit levels. (See Waldeck Decl. ¶ 15, PRU App. 251; see also Compl. App. 149-52 (ECF No. 1-1); id. at 118 (Prudential shall "make or cause to be made all Annuity Payments to each Annuitant and Contingent Annuitant, as required under the Group Annuity Contract, from and after the Insurer Payment Commencement Date.").) Each covered Verizon retiree's annuity payment will be *identical* to the amount of his or her pension benefit. (See Waldeck Decl. ¶ 15, PRU App. 251; see also Compl. App. 149-52; id. at 118 (Prudential shall "make or cause to be made all Annuity Payments to each Annuitant and Contingent Annuitant, as required under the Group Annuity Contract, from and after the Insurer Payment Commencement Date.").) Payments will continue to be made to retirees in the same amounts, on the same schedule, and initially even from the same bank (Wells Fargo Bank). (Waldeck Decl. ¶ 17, PRU App. 252.) The only difference will be that the checks will have a Prudential logo on them instead of a Verizon logo. (Id.) Even the beneficiary designations made by covered Verizon retirees will carry over to Prudential without change. (Id. ¶ 18, PRU App. 252.)

Since plaintiffs cannot claim *any* actual or imminent loss, plaintiffs cannot make out the required showing of irreparable harm. *See Nichols*, 532 F.3d at 378 (finding no substantial threat of irreparable harm where retirees alleged that changes to insurance benefits would harm them in the future, but did not show that any retirees were currently uninsured or unable to pay for coverage, or that they would lose coverage before a final judgment could be reached); *see also Harley v. 3M*, 284 F.3d 901, 907 (8th Cir. 2002) (addressing claims concerning overfunded

pension plan: "The individual pension rights of Plan participants and beneficiaries are fully protected. Indeed, those rights would if anything be adversely affected by subjecting the Plan and its fiduciaries to costly litigation brought by parties who have suffered no injury."); *Flanigan v. GE*, 242 F.3d 78, 88 (2d Cir. 2001) (rejecting retirees' argument that pension plan transfer deprived them of the "right" to remain in their former defined benefit plan, because all that retirees were entitled to were their monetary pension benefits: "because this was a defined benefit plan (a plan in which certain, discrete benefits are guaranteed), plaintiffs ended up receiving everything to which they were entitled.").

B. Plaintiffs' Claim That The Annuity Transaction Creates A Greater Risk Of Default Is Factually Incorrect And An Insufficient Basis For Injunctive Relief.

The alleged risk that Prudential may one day default on its obligation to pay retiree annuities is so remote and speculative that it is not legally cognizable. The Supreme Court has repeatedly required plaintiffs seeking preliminary relief to demonstrate that irreparable harm is likely—not just possible, let alone speculative. *See Winter*, 555 U.S. at 23 (collecting citations). A conjectural threat does not rise to the level of irreparable harm. *See Randolph*, 2012 WL 2450016, at *4; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (explaining that, for constitutional standing, plaintiffs must demonstrate injury that is "concrete and particularized . . . actual or imminent, not conjectural or hypothetical").

Moreover, far from suffering harm from the Annuity Transaction, the transaction will actually provide plaintiffs a *more secure* guarantee of their expected future monthly payments. Plaintiffs are currently participants in the Verizon Plan, which as of the end of last year was only funded at a level sufficient to support 81.5% percent of its pension liabilities. (*See* Compl. App. 52.) When the Annuity Transaction closes, however, the Verizon Plan will transfer to Prudential *more* than the amount of assets necessary to *fully support* the expected payments to be made to

Verizon retirees. (Waldeck Decl. ¶ 20, PRU App. 252-53.) Prudential will hold assets in an amount sufficient to support all of its payment obligations to the Verizon retirees in a dedicated separate account, and will further guarantee the contractually required annuity payments with its general account. (*Id.* ¶¶ 20-21, PRU App. 252-53.) Prudential's significant expertise in managing retirement assets and demonstrable financial stability will provide plaintiffs further safeguards against any possibility of default.

1. Prudential Has Annuitized Retirement Benefits, and Made Payments Without Interruption Pursuant to Such Arrangements, Since 1928.

The annuitization of retirement benefits is a core, routine business for Prudential.

Prudential has paid retiree benefits under group annuity contracts and other arrangements since 1928 without interruption. (Waldeck Decl. ¶ 9, PRU App. 250.) Indeed, Prudential continues to this day to make annuity payments on one of its earliest such contracts, executed in 1928. (*Id.*) In the past 30 years, Prudential has annuitized single groups of participants in close to 168 pension plans that remained active after the transaction, including plans sponsored by Mount Sinai Medical Center, Kellogg, and A&P. (*Id.* ¶ 10, PRU App. 251.) The size of the transactions has ranged from less than \$10,000 to over \$1 billion. (*Id.*) The recent GM transaction, which was reviewed by the Pension Benefit Guaranty Corporation without challenge, annuitized approximately \$25 billion of GM's pension liabilities and transferred the pension liabilities associated with 110,000 GM retirees to Prudential. (*Id.* ¶ 12, PRU App. 251.) Indeed, in 2011 and 2012, Prudential has successfully finalized numerous annuity transactions covering the risks of pension obligations for retirees from at least 29 plan sponsors. (*Id.* ¶ 11, PRU App. 251.)

 $^{^3~}See~ERISA~\S~4041(b)(1)(C),~29~U.S.C.~\S~1341(b)(1)(C);~29~C.F.R.~\S\S~4041.3,~4041.26.$

2. Plaintiffs' Annuitized Benefits Are Secure With Prudential.

Plaintiffs assert that the Annuity Transaction places their future monthly payments at greater risk. Not so. The GAC Prudential will issue when the Annuity Transaction closes provides plaintiffs *greater* protections and *more security* than they have today. The Verizon Plan will transfer to Prudential *more* than the amount of assets necessary to *fully support* the expected payments to be made to the covered Verizon retirees. (*See* Waldeck Decl. ¶ 32, PRU App. 256.) By contrast, Verizon Plan's funding level available to support its pension obligations, as of the end of last year, was 81.5% percent. (*See* Compl. App. 52.)

Furthermore, Prudential will *irrevocably guarantee* the amounts to be paid to plaintiffs through an annuity. (*See* Waldeck Decl. ¶ 16, PRU App. 252; *see also* Compl. App. 143 ("Upon receipt of the Contribution Amount due on the Effective Date, Prudential agrees to pay the Annuity Payments due under this Contract and further agrees that such obligation shall be irrevocable and, thereafter, Prudential may not rescind, or seek to rescind, this Contract or declare this Contract to be, or seek to have this Contract declared to be, null and void from its inception.").) Thus, in the unlikely event the separate account assets proved insufficient at any time to make the required payments, Prudential would be obligated to make such payments using assets from its own general account. (*See* Waldeck Decl. ¶ 23, PRU App. 253.) Plaintiffs will thus enjoy the financial security of a fully funded retirement annuity backed by the full faith and credit of Prudential, a AA-rated insurance company that has consistently received among the highest ratings from independent credit ratings agencies. ⁵ Prudential and its corporate affiliates

⁴ The Annuity Transaction also will not have an adverse impact on the remaining participants in the Verizon Plan, as Verizon expects to contribute an additional \$2.5 billion to the Plan so that the Plan's funding percentage does not decrease as a result of the annuity transaction. (*See* Verizon Communications Inc. Form 8-K (Oct. 17, 2012), (Ex. 12 to Jacob Decl.), PRU App. 145-46 ("Verizon Oct. 17, 2012 8-K").)

⁵ (*See, e.g.*, Company Tree Rating, The Prudential Insurance Company of America, Prudential Insurance Co of America/The, Credit Profile, Bloomberg (December 3, 2012, 12:10 pm, EST) (attached at Exhibit 1 of the

are a top 10 asset manager, managing assets for 23 of the largest 25 companies in the U.S. and 22 of the 25 largest government pension plans, with over \$1 trillion under management and more than \$8 billion in statutory capital and surplus. (*See* Waldeck Decl. ¶ 8, PRU App. 250.)

Confirming that plaintiffs' benefits are well protected by Prudential, the Annuity Transaction was reviewed and approved by an independent fiduciary representing the interests of covered Verizon retirees, which certified that the transaction satisfies ERISA's exacting requirements. (*See* DPA, § 5.1(b), Compl. App. 108 ("The Independent Fiduciary has provided and will continue to provide [] services . . . prudently and for the exclusive benefit and in the sole interest of the Plan and its participants and beneficiaries."); DPA § 5.4(b), Compl. App. 109 ("The Independent Fiduciary has selected [Prudential] to issue the Group Annuity Contract . . . and such selection and the transactions contemplated . . . satisfy the requirements of ERISA.").)

Plaintiffs argue that they would be better off if they were instead protected by the federal insurance program administered by the Pension Benefit Guaranty Corporation ("PBGC").

PBGC's significant unfunded liabilities cast serious doubt on that proposition, however.

According to a November 7, 2012 study by the Government Accountability Office ("GAO"),⁶

Declaration of Gregory F. Jacob in Support of the Prudential Insurance Company of America's Response to Application for Temporary Restraining Order and Motion for Preliminary Injunction ("Jacob Decl."), PRU App. 4 (showing Moody's long term rating of "A2," Standard & Poor's rating financial strength "AA-": Fitch rating

financial strength as "A+," A.M. Best rating financial strength "A+"); see also Fitch Ratings, Definitions of Ratings and Other Forms of Opinion 28 (Nov. 2012) (Ex. 2 to Jacob Decl.), PRU App. 32 (explaining rating "indicate[s] strong capacity to meet policyholder and contract obligations"); Moody's, Rating Symbols & Definitions 27 (June 2009) (Ex. 3 to Jacob Decl.), PRU App. 91 (explaining rating means "offer[s] good financial security"); Standard & Poor's Rating Services, Crediting Ratings Definitions & FAQs, (Ex. 4 to Jacob Decl.), PRU App. 118 (explaining rating means "[v]ery strong capacity to meet financial commitments"); A.M. Best, Ratings & Criteria Center (Ex. 5 to Jacob Decl.), PRU App. 120-21 (explaining rating is "excellent")); Standard & Poor's, Prudential Financial Inc. 2 (Nov. 24, 2012) (Ex. 7 to Jacob Decl.), PRU App. 127 ("Despite the turbulence in the financial markets stemming from the financial crisis of 2008 and 2009 and the ensuing feeble economic recovery, PRU's operations have improved aided by acquisitions. Between 2007 and 2011, total revenues advanced 45%, while net income attributable to shareholders rose fractionally reflecting higher expenses, particularly policyholder benefits.").) ⁶ The GAO is the audit, evaluation, and investigative arm of Congress, established to help improve the performance and accountability of the federal government to the American public. As described in the report, "GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions." (GAO Report at 95, PRU App. 241.)

"PBGC's 2011 net accumulated deficit of \$26 billion, coupled with future risks posed by plan sponsors and their plans, threatens PBGC's solvency." (GAO Report 13-58, Pension Benefit Guaranty Corporation: Redesigned Premium Structure Could Better Align Rates with Risk from Plan Sponsors, Highlights (Nov. 7, 2012) (Ex. 13 to Jacob Decl.), PRU App. 148 ("GAO Report").) Indeed, PBGC itself announced that its deficit for fiscal year 2012 was \$34 billion. (See Press release, PBGC Reports Continued Quality Service, but Record \$34 Billion Deficit for FY 2012 (Ex. 15 to Jacob Decl.), PRU App. 245-47).) PBGC's insurance program is not funded from general tax revenue and, "if at some point in the future the agency were to exhaust all of its assets and become insolvent, its commitments would not be backed by the full faith and credit of the federal government." (Id.) In that eventuality, "PBGC could be forced to dramatically cut benefit payments to participants, seek federal assistance, or raise premiums significantly to meet its benefit commitments." (Id. at 9, PRU App. 161.) Accordingly, PBGC's "guarantee" of their benefits is hardly the panacea plaintiffs represent, and its unstable financial condition renders it a less secure guarantor of the Verizon retirees' pension payments than Prudential under the conditions of the Annuity Transaction.

3. Prudential's Guaranteed Separate Account Provides Additional Security for Plaintiffs' Retirement Payments.

As yet another measure of security, Prudential will hold sufficient transferred assets to support its obligations under the GAC in a guaranteed separate account. Such a separate account provides several layers of protection against risk and default. In the unlikely event of an insurance company insolvency, separate account assets are insulated from the claims of other policyholders, to the full extent of reserves held, and such assets cannot be used to pay the insolvent insurance company's general creditors. (*See* Waldeck Decl. ¶ 21, PRU App. 253.)

Thus, in the event of a Prudential insolvency, the assets in the Verizon guaranteed separate account would be held exclusively to pay plaintiffs' guaranteed annuity.⁷

Because the Annuity Transaction would accord plaintiffs several layers of protection against risk that are comparable—and indeed superior—to the protections they currently enjoy, plaintiffs cannot establish that they would be irreparably harmed by the transaction, and their request for injunctive relief must be denied. *See, e.g., Graham v. Med. Mut. of Oh.*, 130 F.3d 293, 296-97 (7th Cir. 1997) (finding that plaintiff, a cancer patient in remission, could not establish irreparable harm because she could not prove that the alternative chemotherapy treatment she sought was more effective than the treatment covered by the terms of her insurance plan).

C. Any Harm Plaintiffs Might Suffer Can Be Adequately Remedied Through Post-Transaction Relief.

Virtually all of the harms plaintiffs allege center on supposed harm to their financial interests. Any losses plaintiffs might one day suffer because of alleged wrongful conduct by Verizon or Prudential can be fully compensated through monetary relief, either by bringing an ERISA fiduciary breach claim against Verizon or by asserting a contractual breach claim against Prudential. "Loss of income, compensable after trial on the merits, or financial distress, does not constitute irreparable injury." *Digital Generation, Inc. v. Boring*, --- F. Supp. 2d ----, No. 3:12–CV–00329–L, 2012 WL 1413386, at *16 (N.D. Tex. Apr. 24, 2012).

The only purportedly non-economic harm plaintiffs assert is their claim that, if the transaction were completed, they will lose standing to bring any ERISA claims against Verizon.

⁷ As noted above, in the extremely unlikely event that the separate account assets proved insufficient to support the ongoing payment of the plaintiffs' annuities, Prudential would be required under the terms of the GAC to make the payments from its general assets. (*See* Waldeck Decl., ¶ 23PRU App. ____.) And, in the even more unlikely event of a Prudential insolvency—notwithstanding the company's exceptional financial standing noted above—separate account holders would receive the benefit of such relief as may be available under applicable state guaranty laws. (*See*, *e.g.*, Pls.' Compl. ¶¶ 42, et seq. (ECF. No. 1).)

That is not the case. As part of the Pension Annuitants Protection Act of 1994, Congress amended ERISA to add § 502(a)(9), codified at 29 U.S.C. § 1132(a)(9), which expressly provides standing for "pension annuitants to bring actions for fiduciary breaches" or for violations of plan terms during the time they were participants. 60 Fed. Reg. 12,328, 12,329 at n.4. Section 502(a)(9) was specifically enacted to provide standing to annuitants *after* their annuity payments commenced to assert claims under ERISA. *Id.* at 12,328-29. And § 502(a)(9) plainly makes clear that a monetary remedy will suffice: "a court may order appropriate relief to assure the annuitant's receipt of the amounts provided or to be provided by the annuity, plus reasonable prejudgment interest." ERISA § 502(a)(9); 29 U.S.C. § 1132(a)(9).

Thus, if preliminary injunctive relief were not to issue and the case were to progress, plaintiffs would be able to maintain their claims that Verizon committed breaches of fiduciary duty in concluding the Annuity Transaction. For example, in *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286 (5th Cir. 2000), former employees brought suit alleging that their company breached its fiduciary duties in terminating its plan and selecting as its annuity provider Executive Life, an insurer that collapsed after investing the majority of its portfolio in junk bonds. In fact, it was the well-publicized failure of Executive Life and other insurance carriers whose investment portfolios, unlike Prudential's, consisted largely of junk bonds that inspired amending ERISA to permit suits by annuitants. *See* 60 Fed. Reg. 12,328, 12,328-29; *see also Maher v. Strachan Shipping Co.*, 68 F.3d 951 (5th Cir. 1995) (rejecting employer's argument that former participants who were receiving annuities lacked standing to bring breach of fiduciary duty claims, when annuitants' payments were reduced after Executive Life collapsed). Plaintiffs make no allegation that Verizon would be unable to pay any judgment that might be awarded

when this matter concludes, and indeed emphasize throughout the complaint Verizon's financial strength.

Similarly, under the terms of the GAC, plaintiffs will have the ability to bring legal action directly against Prudential for breach of any of the contract's terms. Indeed, the GAC contract specifically provides that "any Annuitant . . . shall have the contractual right to enforce any provision of this Contract against Prudential, its successors and assigns, by the sole choice of such Annuitant[.]" (GAC, Compl. App. 189.) And both the GAC and the relevant regulations require Prudential to issue certificates to each annuitant specifically describing the benefits they are entitled to. *See* 29 C.F.R. § 2510.3-3(d)(2)(ii); (Waldeck Decl. ¶ 28, PRU App. 254.) It is therefore highly unlikely that plaintiffs would be unable to recover monetary damages should they prevail in this or future actions concerning the annuity transaction or Group Annuity Contract.

Finally, there is no merit to plaintiffs' suggestion that the Court would not have adequate remedial powers to protect their interests if it denies their present bid for relief and permits the Annuity Transaction to go forward. While plaintiffs have asserted three distinct substantive ERISA claims, each of them invokes the Court's power to award "appropriate equitable relief" under Section 502(a)(3) of ERISA. Although the exact nature of this relief could vary depending on which claim or claims were ultimately sustained by the Court, the Court would, as the Supreme Court has recently stated, retain broad equitable powers to remedy any harm in appropriate circumstances. *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011).

II. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

ERISA and its associated regulations and interpretive guidance explicitly contemplate the annuitization of retirement benefits, both for plans that fully terminate and for active and ongoing plans that use annuitization to transfer a portion of their pension liabilities. *See* 60 Fed.

Reg. 12,328; 29 C.F.R. § 2509.95-1(c) ("The selection of an annuity provider for purposes of a pension benefit distribution, *whether upon separation or retirement of a participant* or upon the termination of a plan, is a fiduciary decision governed by the provisions of part 4 of title I of ERISA.") (emphasis added); 29 C.F.R. § 2510.3-3(d)(2)(ii). ERISA does not require that annuities be reserved as a retirement benefit option exclusively for plan terminations. To the contrary, it recognizes that "[a]nnuities are issued by insurers in a variety of forms designed to suit different purposes", including "for the purpose of pension plan benefit distributions where the plan intends to transfer liability for benefits to the annuity provider," as long as certain protections are provided. 60 Fed. Reg. 12,328; 29 C.F.R. § 2509.95-1(a).

Under ERISA, the transfer of pension benefit obligations to an insurance company is expressly permitted as long as the participant's benefit rights "[a]re fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State, and are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization" 29 C.F.R. § 2510.3-3(d)(2)(ii); see 29 C.F.R. § 2509.95-1(b); *Mahoney v. Bd. of Trs.*, 973 F.2d 968, 974 (1st Cir. 1992) (noting DOL regulations allow employee pension plan to buy out its continuing obligations to beneficiary by making lump sum payment or purchasing annuity). The regulations also require the insurer to issue to the individual "a contract, policy or certificate describing the benefits to which the individual is entitled under the plan." 29 C.F.R. § 2510.3-3(d)(2)(ii). Prudential easily satisfies these criteria, and plaintiffs make no claim otherwise.

Prudential guarantees it is licensed to do business in a state (*see* Compl. ¶ 19), and the GAC provides the annuitant the right to enforce the terms of the contract against Prudential (GAC, Compl. App. 189-90) and the annuitant will be provided a contract, policy or certificate

describing the benefit to which he or she is entitled under the plan. (Waldeck Decl. ¶ 28, PRU App. 254.)

The regularity of retirement plan annuitization transactions is further emphasized by a long-standing Department of Labor interpretive bulletin expressly recognizing that "Pension plans purchase benefit distribution annuity contracts in a variety of circumstances. Such annuities may be purchased for participants and beneficiaries in connection with the termination of a plan, or in the case of an ongoing plan, annuities might be purchased for participants who are retiring or separating from service with accrued vested benefits." 60 Fed. Reg. 12,328, Announcement of Department of Labor Interpretive Bulletin 95-1, 29 C.F.R. § 2509.95-1 ("IB 95-1") (emphasis added); see infra. The bulletin itemizes the considerations a plan fiduciary should take into account "when choosing an annuity provider for purposes of a benefit distribution, whether for purposes of separation or retirement of a participant or upon termination of a plan." 60 Fed. Reg. 12,329; 29 C.F.R. § 2509.95-1(c). The considerations set forth by the Department fall into three general categories: (1) the insurance company's financial strength (e.g., its claims-paying ability; credit-worthiness; investment portfolio; size relative to the proposed annuity contract; financial strength in terms of capital and surplus; lines of business and other indications of exposure to liability), (2) protections provided to the annuitant (e.g., the structure of the annuity contract and guarantees supporting the annuities, such as the use of a separate account, and the availability of state guaranty protections), and (3) avoidance of conflicts of interest. See 29 C.F.R. §§ 2509.95-1(c), (d).

As described above, plaintiffs cannot and do not seriously challenge the Plan's selection of Prudential. *See supra* Section I.C. Plaintiffs present some misleading statistics in their papers in an attempt to cast doubt on Prudential's financial stability, but nowhere do they even hint that

a more financially secure insurance company partner was available to Verizon to complete the Annuity Transaction. Indeed, plaintiffs' claims do not focus on Verizon's selection of Prudential at all, but rather constitute a broadside attack on the entire practice of annuitization—an entirely misguided attack that fails for all of the reasons stated above.

With respect to the merits of the Annuity Transaction in particular, it is significant that an independent fiduciary was retained to evaluate the transaction in the sole interest of the Plan, its participants, and its beneficiaries. The independent fiduciary concluded that the Annuity Transaction and the selection of Prudential as the issuer of the GAC "satisfy the requirements of ERISA." (Compl. App. 151); *see also Riley v. Murdock*, 890 F.Supp. 444, 458 (E.D.N.C.1 995), *aff'd* 83 F.3d 415 (4th Cir. 1996) (table) (finding fiduciaries engaged in prudent selection of insurance company as annuity provider by evaluating insurance company's financial status, claims paying ability and industry ratings); (DPA, § 5.1(b), Compl. App. 108; DPA § 5.4(b), Compl. App. 109.)

Finally, plaintiffs' claim that the Annuity Transaction would result in a partial termination of the Plan goes nowhere. The only significance of a partial termination is that the pension benefits of affected participants become vested or "nonforfeitable" under IRC § 411(d)(3), 26 U.S.C. § 411 (d)(3). Since plaintiffs' benefits are already vested—indeed, they are already in pay status—plaintiffs' contention is simply beside the point.

III. PRUDENTIAL WOULD BE SIGNIFICANTLY INJURED BY ANY DELAY.

Although plaintiffs will suffer no harm when the Annuity Transaction closes, enjoining the Annuity Transaction would significantly harm Prudential. "Where the defendant's likely harm if an injunction is granted is equal to or greater than any injury threatened by defendant's conduct, injunctive relief is generally denied." *Nat'l Football League Props. v. Playoff Corp.*, 808 F. Supp. 1288, 1295 (N.D. Tex. 1992); *see also Dresser-Rand Co. v. Schutte & Koerting*

Acquisition Co., No. H–12–184, 2012 WL 460275, at *11 (S.D. Tex. Feb. 13, 2012) ("Dresser–Rand has not met its burden to demonstrate that the balance of harms weighs in its favor sufficient to justify extending the injunction beyond that to which the parties have already agreed" because "the harm to defendants is greater than the harm to Dresser–Rand.").

A. The Annuity Transaction Cannot Close After December 17, 2012.

Any delay of the closing of the Annuity Transaction would almost certainly cost Prudential the full value of the multi-billion-dollar deal, along with the company's considerable investments of time and resources over the past one-and-a-half years. If the Annuity Transaction does not close by December 17, 2012, it *cannot close in 2012*. (Waldeck Decl. ¶ 27, PRU App. 254.) Under the group annuity contract contemplated by the DPA, Prudential will assume the obligations to ensure that all of roughly 41,000 Verizon retirees continue to receive uninterrupted payments equal to their pension benefits. (Id. ¶ 28, PRU App. 254.) Any delay after December 17, however, would make it virtually impossible for Prudential to implement all of the mechanics necessary to ensure covered Verizon retirees timely receive their guaranteed monthly payments at the beginning of 2013. (Id.) For example, Prudential is required by law to send each covered Verizon retiree an annuity certificate identifying the future payments. (Id.) Prudential will also need to carefully coordinate the transition with the bank that currently issues all of the payments to retirees. (Id. ¶ 17, PRU App. 252.) If the transaction closing date were to be pushed past December 17, 2012, there simply would not be enough time left in calendar year 2012 to put the required mechanics in place, thus pushing the entire transaction into the first quarter 2013. (Id. ¶ 27, PRU App. 254.)

Moreover, by the express terms of the agreement, if the closing date for the Annuity Transaction slips past December 17, 2012, the agreement would cease to be a binding obligation. (*See id.* ¶ 29, PRU App. 254-55; *see also* Unreducted DPA, § 11.1(b), (Tab A to Waldeck Decl.),

PRU App. 331 ("This Agreement may be terminated at any time prior to the Closing . . . by [Verizon] if the Closing has not occurred by or on December 17, 2012"); *id.*, § 11.1(d) ("This Agreement may be terminated at any time prior to the Closing . . . by [Prudential] if the Closing has not occurred by or on [December 17, 2012]").). The parties would be left with nothing more than an agreement to engage in further good-faith negotiation regarding a new or revised transaction.

It is exceedingly unlikely that the parties would enter into a new agreement. (Waldeck Decl. ¶ 32, PRU App. 256.) Prudential's pricing for the Annuity Transaction is highly sensitive to market conditions that change over time. (*Id.* ¶ 30, PRU App. 255.) Prudential will be required to increase the premium if the deal is not consummated before January 1, 2013 because dynamic pricing components outside the parties' control—in particular, the statutory valuation interest rate—are certain to change as of that date. (*Id.* ¶ 31, PRU App. 255-56.) In its current form, the DPA already requires the Verizon Plan to transfer to Prudential *more* than the amount of assets necessary to *fully support* the expected payments to be made to Verizon retirees. (*Id.* ¶ 20, PRU App. 252-53.) If the transaction were consummated after the new pricing conditions take effect on January 1, 2013, Prudential expects to require that Verizon contribute an approximately \$100 million beyond the amount currently required under the DPA. (*Id.* ¶ 32, PRU App. 256.) In light of this dramatic price increase, there is very little chance that the parties would realistically enter into a new agreement. (*Id.*)

B. Prudential Will Be Harmed Irreparably If the Annuity Transaction Does Not Close.

Should the Annuity Transaction collapse as a result of the requested judicial order, Prudential would be injured in two ways. *First*, Prudential would miss out on the significant business opportunity presented by the Annuity Transaction. (Waldeck Decl. ¶ 38, PRU App.

257.) Because the Annuity Transaction taps into Prudential's core competencies, which it has spent generations building, the Annuity Transaction presents tremendous economic value for the company. (*Id.* ¶ 42, PRU App. 258.) Independent analysts have noted the substantial contribution the Annuity Transaction is likely to make to Prudential's financial performance, reporting that it "could be highly profitable for Pru[dential], matching or exceeding the company's 13 % ROE goal." (RBC Capital Markets, Prudential Financial Inc.: Leading Pension Closeout Consultants Weigh In (Oct. 22, 2012) (Tab B to Waldeck Decl.), PRU App. 256 ("RBC October 22 Report"); *see also* Sterne Agee, Prudential Financial Inc.: PRU Announces Another Pension Transfer Deal 1 (Oct. 18, 2012) (Ex.6 to Jacob Decl.), PRU App. 122 ("we expect the transaction to contribute between \$50-60m in after-tax earnings, or \$0.11-\$0.13 per share to 2013E EPS (we assume 462m avg diluted shares).") ("Stern Agee Report").)

Prudential devoted incalculable resources to secure this business opportunity. Prudential has worked on securing the Annuity Transaction since June of 2011. (Waldeck Decl. ¶ 35, PRU App. 257.) During that 16-month period, hundreds of Prudential employees have been tasked with researching, negotiating, and executing the Annuity Transaction. (*Id.* ¶ 36, PRU App. 257.) And given the size and complexity of the deal, Prudential spent millions of dollars to retain several outside firms to assist in developing and executing various aspects of the Annuity Transaction. (*Id.* ¶ 37, PRU App. 257.)

Prudential has experienced opportunity costs as well. Since entering into the agreement, Prudential has foregone several important business opportunities. (*Id.* ¶ 38, PRU App. 257; *see also* Sterne Agee Report, PRU App. 122 (noting after announcement of Annuity Transaction a "key question is whether PRU has now 'used up' all/most of its capital capacity such that buybacks will be curtailed.").) In the nearly two months since the Annuity Transaction was

executed, for instance, Prudential has been contractually barred from issuing certain specified dividends and from making other significant acquisitions. (*See* Waldeck Decl. ¶ 38, PRU App. 257; Unredacted DPA, § 7.10, PRU App. 323-24; *see also* Compl. App. 117.) The purpose of these contractual bars has been to ensure that Prudential has sufficient reserve capital on hand to support the Annuity Transaction at the time it is consummated. (Waldeck Decl. ¶ 38, PRU App. 257.) In these final weeks before closing, Prudential's opportunity costs have only escalated. (*Id.* ¶ 34, PRU App. 256-57.) There are currently dozens of senior professionals at Prudential dedicated almost exclusively to the final preparations for the consummation of the Annuity Transaction. (Waldeck Decl. ¶ 39, PRU App. 257-58.) Prudential cannot redeploy the personnel or capital reserves to any other business objectives until the Annuity Transaction is finally consummated. (*Id.*)

Second, blocking the deal would deprive Prudential of its coveted position as the unquestioned market leader in this field. The Annuity Transaction cemented Prudential's market-leading reputation for such risk-transfer transactions. (See, e.g., Waldeck Decl. ¶¶ 40-42, PRU App. 258; RBC October 22 Report, PRU App. 345 ("Prudential has such a head start over rivals that we wouldn't be surprised if in coming quarters Pru were to announce that it had agreed to take over several other corporate pensions, outdistancing equally big rivals attempting to establish themselves in the pension-closeout area, such as MetLife and AIG."); Standard & Poor's, Prudential Financial Inc. 2 (Nov. 24, 2012) (Ex. 7 to Jacob Decl.), PRU App. 127 ("We believe PRU is well positioned to capture a larger share of the growing retirement and savings market in the U.S. given its strong financial position, well recognized brand name, and superior distribution capabilities.").) Outsiders even noted Prudential's aggressive commitment to achieving this status, highlighting that "CEO John Strangfeld and Vice Chairman Mark Grier

[were brought] into talks to help get deals closed." (RBC October 22 Report, PRU App. 346.)
Undermining the Annuity Transaction with an injunction would strip Prudential of this
competitive advantage and expose the company to significant reputational risk. Indeed, the mere
filling of plaintiffs' complaint has already resulted in negative publicity concerning the Annuity
Transaction. (See, e.g., Ass'n of BellTel Retirees, Verizon Retirees Sue to Halt Verizon's \$7.5
Billion Sell-Off of 41,000 Pensions; Federal Court Action Seeks to Reverse Spin-Off to
Prudential Insurance Annuity Plan, MarketWire (Nov. 29, 2012) (Ex. 8 to Jacob Decl.), PRU
App. 136-37; Andrew Harris & Tom Korosec, Verizon Retirees Sue to Block Sale of Pension
Plan, Bloomberg (Nov. 29, 2012) (Ex. 9 to Jacob Decl.), PRU App. 138-39; Associated Press,
Verizon Management Retirees Sue to Stop Transfer of Pensions to Prudential Insurance, Wash.
Post, (Nov. 29, 2012) (Ex. 10 to Jacob Decl.), PRU App. 140-41; Todd Spangler, Verizon
Retirees Sue Telco Over Plan to Spin Off Pensions to Prudential, Multichannel News (Nov. 29, 2012) (Ex. 11 to Jacob Decl.), PRU App. 142-44.)

These harms to Prudential will not be compensated if the requested injunction issues.

Any purported harm for plaintiffs pales in comparison to the harm that Prudential would suffer if the Court were to delay the closing date. As detailed above, plaintiffs will receive the *full value* of their future pension benefits, which will be distributed from a separate account after the Annuity Transaction closes and backed by Prudential's insurance guarantees. Based on the imbalance of harms alone, plaintiffs' request should be denied.

IV. THE ISSUANCE OF INJUNCTIVE RELIEF OF ANY KIND WOULD BE CONTRARY TO THE INTERESTS OF PUBLIC POLICY

Granting injunctive relief would disserve current and future retirees, as well as the general public interest. Defined benefit plans in the United States are, on the whole, substantially underfunded. (Floyd Norris, *Private Pension Plans, Even at Big Companies, May*

be Underfunded, N.Y. Times, Jul. 20, 2012, at B3 ("The companies in the Standard & Poor's 500 collectively reported that at the end of their most recent fiscal years, their pension plans had obligations of \$1.68 trillion and assets of just \$1.32 trillion. The difference of \$355 billion was the largest ever, S.& P. said in a report.") (Ex. 14 to Jacob Decl.), PRU App. 242.) And while the PBGC is designed as a theoretical backstop, the agency's \$34 billion in unfunded liabilities precludes it from serving as a reliable safety net. (See Press release, PBGC Reports Continued Quality Service, but Record \$34 Billion Deficit for FY 2012 (Ex. 15 to Jacob Decl.), PRU App. 245-47.) One significant advantage of annuitization transactions is that they require, at a minimum, full funding of the pension liabilities that are annuitized. (See, e.g., Handout used by P. Waldeck (Tab C to Waldeck Decl.) PRU App. 355-56.) The covered Verizon retirees, for example, will move from a plan that was only 81.5% funded into annuities that are fully funded. Participants who remain in the Plan will not be adversely affected in the least; Verizon is planning "to make additional contributions to the Plan prior to the date of the closing of the transaction . . . of approximately \$2.5 billion" to ensure the Verizon Plan's funding percentage does not decrease after the Annuity Transaction. (Verizon Oct. 17, 2012 8-K, PRU App. 146.) The ready availability of annuitization transactions thus supports fuller funding of America's retirement system, a goal that is decidedly in the public interest. Moreover, annuitizing retiree pension payments reduces PBGC's potential liability for insuring these individuals, which shores up PBGC's system in light of its severe deficit situation.

In addition, annuitization encourages plan sponsors to maintain defined benefit plans by providing a solution for investment and pension funding concerns with respect to retirees. Many plan sponsors utilize a liability-driven investment strategy to match the risks of their plan's investment portfolio assets with the risks associated with its benefit liabilities. This strategy can

present areas of significant risk due to volatility in investment return and unpredictability in benefit obligations, such as mortality and longevity risk. One way to manage those risks is to transfer pension liabilities for retirees by annuitizing them.

Prudential, as discussed above, has provided such annuity solutions since 1928, allowing plan sponsors to focus their resources on administering and managing their defined benefit plans for active employees or deferred vested retirees, thereby encouraging them to maintain those plans. Not only are these kinds of transactions necessary for the future of defined benefit plans, but this type of plan-management flexibility is expressly contemplated by ERISA. *See* H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647 (noting Congress's intent to preserve "flexibility in the design and operation of . . . pension programs."); *see also* § 29 C.F.R. 2510.3-3(d)(2)(ii); 29 C.F.R. § 2509.95-1. Enjoining this transaction would strip Verizon, and by implication other plan sponsors, of the flexibility Congress intended to accord sponsors of defined benefit plans, which would in turn discourage employers from offering defined benefit plans altogether.

CONCLUSION

For the reasons state above, plaintiff have failed to meet their burden to obtain the extraordinary remedy that it seeks. Prudential respectfully requests this Court deny plaintiffs' application for a temporary restraining order and motion for preliminary injunction (ECF Nos. 6, 18)).

Respectfully submitted,

/s/ Gayla C. Crain

Gayla C. Crain SPENCER CRAIN CUBBAGE HEALY & MCNAMARA, PLLC 1201 Elm St., Suite 4100 Dallas, TX 75270

Tel.: (214) 290-0002 Fax: (214) 290-0099

Fax: (214) 290-0099

Gregory F. Jacob (pro hac vice) gjacob@omm.co District of Columbia Bar #474639 O'MELVENY & MYERS LLP 1625 Eye Street, N.W. Washington, DC 20006

Tel.: (202) 383-5300 Fax: (202) 383-5414

Jeffrey Kohn (*pro hac vice* application forthcoming) New York Bar #1980838 jkohn@omm.com O'MELVENY & MYERS LLP Times Square Tower 7 Times Square New York, NY 10036

Tel.: (212) 326-2000 Fax: (212) 326-2061

Attorneys for Defendant The Prudential Insurance Company of America

Dated: December 5, 2012

CERTIFICATE OF SERVICE

I certify that on December 5, 2012, 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 attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Gayla C. Crain Gayla C. Crain