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

	§
WILLIAM LEE and JOANNE McPARTLIN,	§
Individually, and as Representatives of plan	§
participants and plan beneficiaries of the	§
VERIZON MANAGEMENT PENSION PLAN,	§
	§
Plaintiffs,	§
	§
vs.	§CIVIL ACTION NO. 3:12-CV-04834-D
	§
VERIZON COMMUNICATIONS INC.,	§
VERIZON CORPORATE SERVICES GROUP INC,	§
VERIZON EMPLOYEE BENEFITS COMMITTEE,	§
VERIZON MANAGEMENT INVESTMENT CORP,	. §
VERIZON MANAGEMENT PENSION PLAN, and	§
PRUDENTIAL INSURANCE COMPANY	§
OF AMERICA,	§
	§
Defendants.	§

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs William Lee and Joanne McPartlin, by and through their counsel, submit this memorandum brief in support of their application for temporary restraining order in connection with their Verified Complaint for Declaratory and Injunctive Relief Under ERISA (the "Complaint").

1. PRELIMINARY STATEMENT

By the Complaint, Plaintiffs challenge, on their own behalf and on behalf of approximately
41,000 other retirees under the Verizon Management Pension Plan (the "Plan") of Defendant Verizon

Communications Inc. ("Verizon"), their removal from the Plan pursuant to an agreement between Verizon and other Defendants, including The Prudential Insurance Company of America ("Prudential"). Under the agreement, the Plan would end its responsibility to provide pensions to such retirees and Prudential would issue an annuity substituting for such retirees' pension benefits (hereinafter "Verizon/Prudential annuity transaction"). Defendants intend to consummate the Verizon/Prudential annuity transaction during December 2012. Doing so would allow them to evade the dictates of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001-1461, and the uniform protection accorded by the Pension Benefit Guaranty Corporation ("PBGC") that Congress contemplated and intended to occur with respect to defined benefit pension plans.

By this application, Plaintiffs accordingly seek the issuance of a temporary restraining order as to the Verizon/Prudential annuity transaction pending a hearing to consider a preliminary injunction, and then a preliminary injunction pending trial.

The claims on which the Complaint is based, and which support issuance of a temporary restraining order, are as follows:

Count One Violation of ERISA Section 102(b), Failure to Provide

Required Disclosure in SPDs;

Count Two Violation of ERISA Section 404(a)(1), Breach of ERISA

Fiduciary Duties;

Count Three Violation of ERISA Section 510, Interference with Protected

Rights; and

Count Four Claim for Appropriate Equitable Relief.

Based on the Complaint, as verified through the Appendix filed with it, Plaintiffs' application for a temporary restraining order, and this memorandum brief, this Court should issue a temporary restraining order because Plaintiffs demonstrate (1) a substantial likelihood that they will prevail on the merits, (2) a substantial threat that they will suffer imminent irreparable injury not subject to legal remedy if the injunction is not granted, (3) their substantial injury outweighs any threatened harm to whom Plaintiffs seek to enjoin, and (4) granting the preliminary injunction will not disserve public policy or the public interest.

II. **ARGUMENT**

A. Standard for Temporary Restraining Order.

Plaintiffs request in the Complaint and application that the Court immediately issue a temporary restraining order and, after an evidentiary hearing, a preliminary injunction enjoining Defendants from consummating the proposed Verizon/Prudential annuity transaction pending trial.

To prevail on this request, Plaintiffs must plead and prove that each of the following factors support injunctive relief:

(1) That Plaintiffs will suffer irreparable harm absent an injunction;¹

See DSC Comms. v. DGI Techs, 81 F.3d 597, 600 (5th Cir. 1996) ("in order to obtain a preliminary injunction, DSC was required to demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issue; (3) that the threatened injury to DSC outweighs any damage the injunction might cause to DGI; and (4) that the injunction will not deserve the public interest."); citing Plains Cotton Co-op Ass'n v. Goodpasture Computer Serv., Inc., 807 F.2d 1256, 1259 (5th Cir.), cert. denied, 484 U.S. 821, 108 S.Ct. 80, 98 L.Ed. 2d 42 (1987).

- (2) That there is a substantial likelihood that Plaintiffs will prevail on the merits of their claims;²
- (3) That the injury faced by the Plaintiffs outweighs the injury that would be sustained by Defendants as a result of the injunctive relief requested;³ and
- (4) That the granting of the injunctive relief sought would not adversely affect public policy or the public interest.⁴

Each of these factors support the issuance of the requested temporary restraining order.

B. Plaintiffs Will Suffer Irreparable Harm Absent a Temporary Restraining Order

If the requested temporary restraining order is not issued, Plaintiffs and the putative class members will suffer irreparable harm. Consummation of the Verizon/Prudential annuity transaction will result in the immediate loss of all ERISA protections to Plaintiffs and putative class members with respect to their pension benefits under the Plan. In addition, all of the retirees will lose the uniform federal protection for payment of benefits under the Plan provided by the PBGC. The injury that the

² See Id.; see also Doran v. Salem Inn, Inc., 422 U.S. 922, 931, 95 S.Ct. 2561, 2568 (1976).

³ See DSC Comms., 81 F.3d at 600; see also Yakus v. U.S., 321 U.S. 414, 440, 64 S.Ct. 660, 375 (1944).

⁴ See DSC Comms., 81 F.3d at 600.

retirees stand to suffer is imminent and irreparable,⁵ and there is no legal remedy adequate to redress the injury.⁶

The injury to Plaintiffs in this case is imminent because Defendants are planning on irrevocably removing their pensions out of the Plan, an ERISA-governed and PBGC-protected defined pension benefit plan, into an annuity under which they would not be afforded comparable rights or protections against nonpayment of benefits.

In fact, for countless retirees, depending upon the federal judicial circuit in which they live, as soon as their pension participation in the Plan ends, they will no longer have standing to sue under ERISA, so as to challenge the very action that ended their participation.⁷

⁵ See Chacon v. Granata, 515 F.2d 922, 925 (5th Cir. 1975) ("A injunction is appropriate only if the anticipated injury is imminent and irreparable.").

⁶ See Northern Cal. Power Agency v. Grace Geothermal Corp., 469 U.S. 1306, 105 S.Ct. 459 (1984).

E.g. Wolf v. Coca-Cola, 200 F.3d 1337, 1342 (11th Cir. 2000) ("Thus, if the terms of the Plan exclude from coverage a certain group of workers, e.g., nonmanagement, then those classified workers are not participants and they have no standing to sue under ERISA"); Mitchell v. Mobil Oil Corp., 896 F.2d 463, 474 (10th Cir. 1990) (rejecting ERISA standing test that "but for actions" of defendant, plaintiff would have been a participant or beneficiary of an ERISA covered plan); Raymond v. Mobil Oil Corp., 983 F.2d 1528, 1535 (10th Cir. 1993) (same); Stanton v. Gulf Oil Corp., 792 F.2d 432, 433 (4th Cir. 1986) (same).

Injury is irreparable and without legal remedy when plaintiffs cannot be compensated for such damages and if such damages cannot be calculated accurately. The harm to Plaintiffs and the putative class of retires is irreparable because there is no claim for money damages under ERISA for the loss of the panoply of ERISA protections, including Department of Labor oversight, and PBGC uniform protection and ready access to the federal courts, which Plaintiffs and such other retirees would suffer if Defendants are allowed to consummate the Verizon/Prudential annuity transaction. While the economic impact of the loss of federal protections provided by ERISA and the PBGC is very real, it is also impossible to monetarily quantify with any level of accuracy. On both of these grounds, Plaintiffs will suffer irreparable harm without an available legal remedy if the injunction requested is not granted.

C. There is a Substantial Likelihood that Plaintiffs Will Prevail in a Trial on the Merits.

A temporary restraining order or preliminary injunction is only appropriate if there is a substantial likelihood that Plaintiffs will prevail on the merits of one or more of their claims.⁹

Likelihood need not equate to absolute certainty for a preliminary injunction to issue. See *Cho v. Itco, Inc.*, 782 F.Supp. 1183, 1185 (E.D. Tex.1991); *Sebastian v. Tex. Dep't of Corrections*, 541 F.Supp. 970, 975 (S.D. Tex.1982). "It is enough that the movant[s] ... raise[] questions going to the merits so serious, substantial, and doubtful as to make them fair ground for litigation, and thus more deliberate investigation." See *Cho*, 782 F.Supp. at 1185 (citing *Sebastian*, 541 F.Supp. at 975). A showing of a substantial likelihood of success on the merits does not require that the movant prove his case. *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 n.11 (5th Cir. 1991). Even some likelihood of

See Ross-Simons of Warwick, Inc., v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996).

⁹ See Id., see also Doran v. Salem, Inc., 422 U.S. 922, 95 S.Ct. 2561, 2568 (1976).

success can be enough where the factors, relating to harm, and other factors, exist and are compelling. See *Productos Carnic, S.A. v. Cent. Am. Beef and Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980) ("Where the other factors are strong, a showing of some likelihood of success on the merits will justify temporary injunctive relief."). Here, Plaintiffs easily demonstrate they have a substantial likelihood of prevailing on the claims asserted in the Complaint.

In their first claim, Plaintiffs are requesting from the Court a declaration that none of the summary plan descriptions issued them with respect to the Plan complied with ERISA Section 102(b) and Department of Labor Regulation 29 CFR 2520. 102-3(e), requiring disclosure to Plaintiffs and putative class members that their pensions could be involuntarily removed from the ERISA-governed and PBGC-backed Verizon Management Pension Plan.

The Court need only look to the text of the most recent SPD contained in the Appendix in support of the Complaint to determine it is an undisputed fact there is no disclosure about the possibility of retirees' pensions being removed from the Plan and shifted into an insurance annuity contract. (App. 15-22). Plaintiffs are accordingly entitled to appropriate equitable relief under ERISA Section 502(a)(3) in the form of an order estopping Defendants from exercising heretofore undisclosed rights against the retirees without their consent. Given the undisputed fact of lack of adequate disclosure, Plaintiffs have not only established a substantial likelihood of success on the merits of their claim for such relief, but a probability.

In their second claim, Plaintiffs are requesting from the Court a declaration that the Verizon/Prudential annuity transaction violates the Plan and the fiduciary duty of Defendants other than Prudential under the Plan and ERISA. The Court again has before it undisputed evidence in the

Appendix in support of the Complaint that the Plan does not permit the transaction and that it is not in the best interest of the affected retirees, such that Defendants other than Prudential have violated ERISA Section 401(a)(1), imposing a fiduciary duty upon them to act "with respect to a Plan soly in the interest of the participant." (App. 23-36, 37-47, 54-59, 65-210, 241-281). Plaintiffs are accordingly entitled to equitable relief under ERISA Section 502(a)(2) and Plaintiffs have established a substantial likelihood of success on the merits of their claim of violation of fiduciary duty.

Finally, in their third claim, Plaintiffs claim that the Verizon/Prudential annuity transaction discriminates against 41,000 retirees and interferes with their rights under the Plan and under ERISA in violation of ERISA Section 510, 29 U.S.C. § 1140. The Court need only look to the terms of the Verizon/Prudential annuity transaction reflected in the Appendix in support of the Complaint (App. 60-62, 65-210), to appreciate that 41,000 management retirees are being excluded from the Plan while over 6,000 other similarly situated management retirees and almost 50,000 other Plan participants are left in the Plan. Based on that undisputed fact, Plaintiffs are entitled to appropriate equitable relief under ERISA Section 502(a)(3) enjoining the Verizon/Prudential annuity transaction and again, Plaintiffs have established a substantial likelihood if not probability of success on the merits of one of their claims.

D. The Harm to Plaintiffs Outweighs Any Harm to Defendants.

Plaintiffs request a temporary restraining order in the form of a prohibitory injunction that freezes the status quo and is intended to "preserve the relative positions of the parties until a trial on the merits can be held." See *Wenner v. Tex. Lottery Comm'n*, 123 F.3d 321, 326 (5th Cir.1997) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)).

Generally, the status quo is defined as the "'last peaceable uncontested status' existing between the

parties before the dispute developed." See *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n. 5 (10th Cir.2006) (quoting 11A Wright, Miller & Kane, Federal Practice and Procedure § 2948 (2d ed.1995)). The only harm, if any, that will result to Defendants from the issuance of a temporary restraining order is a requirement to maintain administration of the Plan as before Defendants entered into the agreement for the Verizon/Prudential annuity transaction. Certainly, a harm involving loss of federal protections provided by ERISA and the uniform guarantee provided by the PBGC outweighs mere delay to Defendants in consummating a transaction violating ERISA.

E. <u>The Requested Temporary Restraining Order Will Promote</u> Clear Public Policy and the Public Interests.

In enacting ERISA and creating the PBGC, Congress was very much concerned about protecting retirees enrolled in defined pension benefit plans. The federal law reflects a carefully calibrated balance between the rights of employers and the rights of retirees with a goal of giving security to hard carned pension benefits. The Verizon/Prudential transaction is an unprecedented attack against the entire ERISA-governed and PBGC-protected scheme set in place by Congress and puts retirees back where they would have been before ERISA was enacted in 1974. Indeed, the Verizon/Prudential annuity transaction violates Congressional intent when enacting ERISA and creating the PBGC. "Congressional purpose is the 'ultimate touchstone' of the Court's inquiry." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). There can be no doubt that Congress sought to bring retirees' pensions under federal regulatory control, and that, if the Verizon/Prudential annuity transaction is permitted to go forward, the retirees' pensions will be removed from federal regulatory control and place the retirees in

a morass of uneven and unpredictable state regulatory control, the very situation that ERISA was intended to preempt. In fact, ERISA Section 544, the preemption provision of ERISA, was specifically intended remove the traditional role of states in controlling retirement issues. The Verizon/Prudential annuity transaction, therefore, takes all affected retirees back in time before 1974. The injunctive relief requested in regard to the Verizon/Prudential annuity transaction, scheduled to close nearly forty years later, during December 2012, should therefore be stopped consistent with the public policy and public interest served by ERISA.

F. Compliance with Rule 65.

Rule 65(b), Fed.R.Civ.P. provides that courts may grant a temporary restraining order "without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting the claim that notice should not be required." As stated in more detail in their application for temporary restraining order, Plaintiffs undersigned counsel provided notice of their intention to file the Complaint to counsel for Verizon on Monday, November 26, 2012, and filed the Complaint on November 27, 2012 (with Defendants acknowledging the filing and the ability to review the Complaint). Plaintiff's undersigned counsel have further provided notice of the application and this memorandum brief to Defendants by serving it upon such counsel concurrently with their filing.

G. No Bond Should be Required

Since Plaintiffs seek to prevent a harm to a putative class of approximately 41,000 retirees, no security should be required for the issuance of a temporary restraining order. The Fifth Circuit has made clear that it is well within the discretion of the district court to decide that, under the circumstances, no security is required. See *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir.1996) ("In holding that the amount of security required pursuant to Rule 65(c) 'is a matter for the discretion of the trial court,' we have ruled that the court 'may elect to require no security at all.'" (quoting *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir.1978))).

WHEREFORE, Plaintiffs William Lee and Joanne McPartlin, individually and on behalf of a putative class of approximately 41,000 similarly situated retirees, seek a temporary restraining order and, after concluding an evidentiary hearing set at the Court's earliest convenience, grant Plaintiffs a preliminary restraining order until this case is tried.

DATED this 28th day of November, 2012.

Respectfully submitted,

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