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

WILLIAM LEE, *et al.*, **Plaintiffs,** **v.** **VERIZON COMMUNICATIONS INC., *et al.*,** **Defendants.**	**CIVIL ACTION NO. 3:12-cv-04834-D**

VERIZON DEFENDANTS' OPPOSITION TO PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

Matthew D. Orwig
Joanne R. Bush
JONES DAY
2626 North Harwood Street
Dallas, TX 75201

Jeffrey G. Huvelle
Thomas L. Cubbage III
Christian J. Pistilli
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004

Attorneys for the Verizon Defendants

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INTRODUCTION

The extraordinary remedy of interim injunctive relief is not meant to allow a plaintiff to hold a complex transaction hostage by raising meritless objections on the eve of closing.[1]

As announced seven weeks ago, a Verizon pension plan is about to purchase a group annuity contract from Prudential Insurance Company ("Prudential"). This transaction will transfer assets worth more than $8 billion to Prudential, which will then pay annuity benefits to plaintiffs and approximately 41,000 other retirees.

The TRO or preliminary injunction that plaintiffs seek threatens to do more than merely delay the transaction, which is scheduled to close on December 10, 2012. This timing was planned months ago to allow the purchase to be governed by current market conditions and regulatory requirements, as well as to permit annuity certificates to be delivered to the retirees before year's end. Anything more than a brief delay in closing would require re-negotiation of the annuity purchase price, which would almost certainly increase the Plan's costs substantially and could result in the termination of the contract altogether. Even a brief delay will cause additional costs.

The annuity transaction is designed to protect the retirement income of the affected retirees, whose monthly pension benefits will remain unchanged after the closing. Prudential is providing an irrevocable commitment to make all future annuity payments, and this commitment will be supported by the extra protection of assets transferred by the Plan into a fully funded

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[1] This memorandum is submitted on behalf of defendants Verizon Communications Inc. ("Verizon"), Verizon Investment Management Corp. ("VIMCO"), Verizon Corporate Services Group Inc., the Verizon Employee Benefits Committee ("VEBC"), and the Verizon Management Pension Plan ("VMPP"), who are sometimes collectively referred to as the Verizon Defendants.

separate account dedicated exclusively to these Verizon retirees. Allowing the transaction to close on schedule therefore will not threaten plaintiffs' retirement benefits.

Under these circumstances, plaintiffs fall far short of demonstrating that they are entitled to the drastic remedy of interim injunctive relief. Indeed, they have failed to demonstrate that they meet *any* of the required elements.

First, plaintiffs cannot show that they are likely to succeed on the merits. Their principal allegation is that the annuity transaction breaches fiduciary duties under ERISA. Because plaintiffs concede (as they must) that both ERISA and the Plan authorize a transfer of benefits payment obligations to an insurance company, they are left to complain about the manner in which the transfer will occur here. But plaintiffs' claim fails because (i) governing regulations expressly authorize annuity transactions like this one, (ii) ERISA permits employers to amend or terminate pension plans without being subject to fiduciary liability, and (iii) the transaction is consistent with the Plan's terms and the notices provided to retirees. Moreover, both Verizon as Plan sponsor and an independent fiduciary engaged to act solely on behalf of the Plan's participants determined that the Prudential transaction provides ample protections to secure the affected retirees' benefit payments.

Second, plaintiffs will not suffer any harm, let alone *irreparable* harm, if their request for injunctive relief is denied. Plaintiffs rely on conjectural harms and have not taken the position that the annuity purchase would foreclose corrective relief (if warranted) at a later time. Nor do their purported concerns about loss of standing find any support in the law.

Third, Verizon and the Plan will suffer substantial, concrete harm if the Prudential annuity transaction is enjoined. Anything more than a brief delay in closing would cause the agreed-upon price to expire. In a new negotiation, changed pricing factors likely would require

the Plan to pay substantially more for the annuity, assuming a new agreement could be reached at all. By contrast, the harm asserted by plaintiffs is purely speculative, especially in light of the robust guarantees provided for their benefits by the annuity transaction.

Fourth, the public interest would not be served by enjoining the parties from completing the transaction. As recognized by applicable regulations, using insurance annuity contracts to fulfill pension obligations is consistent with ERISA and the public interest.

STATEMENT OF FACTS

On October 17, 2012, Verizon, VIMCO, Prudential, and Fiduciary Counselors Inc., entered into a Definitive Purchase Agreement (the "DPA" or "Agreement") committing the Plan to purchase a single premium group annuity contract (the "Annuity Contract") from Prudential to settle approximately $7.5 billion of pension liabilities of the Plan.[2]

Upon issuance of the Annuity Contract, Prudential will assume the obligation to make future annuity payments to approximately 41,000 Verizon management retirees who began receiving pension payments from the Plan before January 1, 2010. Each retiree's annuity payment will be in an amount equal to that individual's current pension benefit. The Annuity Contract will provide the same rights to future payments, such as survivor benefits, as each retiree currently has.

The following sections set forth the steps taken by Verizon before entering into the transaction, the efforts of the independent fiduciary retained on behalf of plan participants to ensure that the transaction protects plan participants and complies with ERISA, the terms of the DPA, the Plan terms authorizing the transaction, and the advance notice provided to Plan participants affected by the transaction.

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[2] The difference between the more than $8 billion purchase price and the approximately $7.5 billion in pension liabilities being transferred includes a premium paid for the annuity.

A. <u>Verizon Contemplates An Annuity Transaction</u>

Verizon, a global communications company, has approximately 185,000 current employees and provides pension, healthcare or other benefits to thousands of retirees. As a result of its pension benefit obligations, Verizon's wholly-owned subsidiary, VIMCO, has become a money manager of about $24 billion of pension assets.

Maintaining a pension trust to pay pension benefits is a complex and expensive obligation that is not Verizon's core business. Verizon's management began more than a year ago to research and analyze whether to transfer a portion of Verizon's pension benefit obligations to an insurance company, whose core business involves the timely and safe payment of monthly annuities, in order to focus on Verizon's core mission of providing the world's best communications networks.

Although the decision to consider – and ultimately to enter into – an annuity transaction was a business decision made by Verizon's board of directors as a business matter, Verizon carefully considered the impact that any such transaction would have on plan participants as part of its decision-making process. To assist in examining this issue, Verizon retained a leading global investment consulting firm affiliated with AonHewitt. Defs. Appx. 39-40 (Jacobs Decl. ¶ 2).

AonHewitt surveyed the insurance market to determine the availability of suitable annuity providers, such as Prudential, capable of providing reliable income to a large group of retirees. *Id.* at 42 (Jacobs Decl. ¶ 11). It also reviewed with Verizon the structural safeguards that could be used to enhance the security of annuity contracts, such as a fully funded separate account to hold dedicated assets. *Id.* at 43-46 (Jacobs Decl. ¶ 14-27). As it observed, such protections are substantial and can be even more protective than certain aspects of ERISA-governed pension benefits. *Id.* at 41, 44, 46 (Jacobs Decl. ¶ 6-10, 18, 27).

B. <u>The Independent Fiduciary</u>

In August 2012, in anticipation of possible board consideration of an annuity transaction, VIMCO retained Fiduciary Counselors Inc. ("FCI" or the "Independent Fiduciary") to act as an independent fiduciary with respect to the potential transaction.

FCI is a registered investment advisor whose primary focus is providing independent fiduciary services to industry clients. Defs. Appx. 48 (Miller Decl. ¶¶ 3-4). VIMCO appointed FCI to, among other things, "represent the interests of [Plan participants] in connection with the selection of the insurance company (or insurance companies) to provide an annuity" and negotiate "the terms of the annuity contract." Pls. Appx. 38-39. As independent fiduciary, FCI was charged with acting solely in the interest of plan participants. Defs. Appx. 49 (Miller Decl. ¶ 13).

To assist it in its work, FCI retained (i) experienced ERISA counsel, K&L Gates, and (ii) Oliver Wyman, Inc., an insurance industry expert with significant experience consulting on similar successful annuitization transactions for, among others, General Motors. *See id.* (Miller Decl. ¶¶ 15-17). Together with its advisors, "FCI conducted an objective, analytical and thorough due diligence of potential insurers with sufficient capacity, creditworthiness, and administrative claims paying capabilities from which the Plan may purchase buy-out annuities in satisfaction of ERISA's requirements." Defs. Appx. 49-50 (Miller Decl. ¶ 18).

After giving due consideration to other possible insurance companies (or the possibility of purchasing annuity contracts from more than one insurance company), the Independent Fiduciary entered into extensive negotiations with Prudential. *Id.* at 58 (Miller Decl. ¶ 104); *see also id.* at 52-58 (Miller Decl. ¶¶ 44-51, 59-103). Contemporaneously, FCI conducted extensive due diligence into, among other things, the size, quality and diversification of Prudential's assets, its capital and surplus, its creditworthiness and its claims-paying capabilities, and satisfied itself

in all material respects that Prudential was a sound and appropriate annuity provider. *Id.* at 58-62 (Miller Decl. ¶¶ 104-58).

In October 2012, the Independent Fiduciary certified that the selection of Prudential, the terms of the proposed annuity, and all related transactions "satisfy the applicable requirements of ERISA." Pls. Appx. 63. The principal terms of the annuity contract negotiated by FCI – including the creation of a fully funded, bankruptcy-protected separate account to support the payment of benefits to Verizon retirees – are set forth in the parties' contracts, and explained below.

C. The Definitive Purchase Agreement.

The parties executed the DPA on October 17, 1012. Under the terms of that Agreement and the Annuity Contract, as negotiated by the Independent Fiduciary, the assets transferred by the Plan in connection with the transaction will be placed in a "Guaranteed Separate Account, " *i.e.*, a "dedicated, non-comingled separate account" used to pay the annuities due under the Annuity Contract. Pls. Appx. 80 (DPA § 1.1), 92 (DPA § 2.3).[3] The separate account will (i) hold only assets supporting the payment of Prudential's obligations under the Annuity Contract, and (ii) be invested primarily in investment grade fixed-income securities. Pls. Appx. 141, 145. "[N]one of the assets allocated to the Dedicated Account . . . will be chargeable with liabilities arising out of any other business of Prudential." Pls. Appx. 145. In other words, the assets in the separate account may not be used to satisfy any other obligations of Prudential, even in the event of Prudential's bankruptcy or dissolution. Defs. Appx. 64 (Miller Decl. ¶ 178).

[3] When the assets in the separate account become $50 million or less (out of the $8 billion or so in assets to be transferred to the separate account), Prudential is permitted to convert the separate account into a joint account used for other liabilities. Pls. Appx. 148. It is not anticipated that this will occur until after all or virtually all of the transferred annuity payment obligations have been extinguished.

Under the Agreement, Prudential is required to maintain assets equal to at least 104% of the transferred liabilities in the special account. *Id.* (Miller Decl. ¶ 182). In the unlikely event that these assets are insufficient, the Agreement also requires Prudential to satisfy its annuity payment obligations under the Annuity Contract out of its General Account. Pls. Appx. 144.

The transaction is set to close on Monday, December 10, 2012. Defs. Appx. 23 (DPA § 2.1); *id.* at 33 (Lataille Decl. ¶ 3). In the event it does not close by an "Outside Date" of Monday, December 17, 2012, Prudential has the right to terminate the Agreement. *Id.* at 34 (Lataille Decl. ¶ 6).[4] While Verizon has the right to extend the "Outside Date" into March 2013, doing so would trigger a recalculation of the annuity premium for the Annuity Contract based on updated information regarding "capital market conditions" and other relevant information. *Id.*; Pls. Appx. 125. Prudential has estimated that, should the transaction fail to close by December 17, 2012, the price of the Annuity Contract would likely increase by approximately $100 million. Defs. Appx. at 34 (Lataille Decl. ¶ 6). The Verizon Defendants would also incur substantial additional costs to renegotiate and reschedule this complex transaction if it does not close by December 17, 2012. *Id.*

D. <u>The October 17 Plan Amendments</u>

On October 17, 2012, acting solely in its capacity as plan sponsor and settlor, Verizon's board of directors acted to amend the terms of the Plan to provide for the annuity transaction contemplated by the Agreement. Pls. Appx. 54-59. The amendment, which becomes effective

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[4] Because of the enormous complexity involved in completing required pre-closing activities and the necessity that they be completed during a time-period when the financial markets are closed (*i.e.*, over a weekend), the Agreement contemplates a Monday, December 10 closing, but leaves open the possibility of closing on the following Monday, December 17. Defs. Appx. at 33 (Lataille Decl. ¶ 3). Thus, if any pre-closing difficulties prevent the parties from completing the required activities over the weekend of December 8-9, they would have another opportunity to do so before triggering either party's termination rights under the Agreement. *Id.* at 34-36 (Lataille Decl. ¶¶ 7-11).

December 7, 2012, directs the Plan to "purchase one or more annuity contracts pursuant to the following provisions":

> (i) *The annuity contract shall fully guarantee and pay each pension benefit earned by a "Designated Participant. . . ."*[5]
>
> (ii) The annuity contract shall provide for the *continued payment* of the Designated Participant's pension benefit (whether paid to the Designated Participant or his beneficiary, survivor or alternate payee), *in the same form that was in effect under the Plan immediately before the annuity purchase*, including any beneficiary designation, survivor benefit, and qualified domestic relations order.
>
> . . .
>
> (iv) After the annuity purchase described in this Section 8.3(b), *the Plan shall have no further obligation to make any payment with respect to any pension benefit of a Designated Participant. . . .*

Pls. Appx. 60-62 (emphasis added).

E. Notices To Plan Participants

Shortly after the DPA was executed, in October 2012, Verizon sent plaintiffs and other affected plan participants a notice informing them of the annuity transaction. The notice informed them that Verizon had made a change "regarding the funding and payment of [their] monthly pension benefit":

> This change will not affect the amount of your monthly pension benefit or the amount of any benefits that may be available to your beneficiaries. Beginning with the transfer of about $8 billion in cash and pension assets to [Prudential] in December, 2012, Prudential will assume the responsibility for your pension benefit.
>
> Today, your monthly pension benefit is being paid out of the assets in the Verizon pension trust. In December 2012, responsibility for

[5] "Designated Participant[s]" generally include all Plan participants who retired before January 1, 2010, and are currently receiving an annuity benefit from the Plan, except certain retirees of MCI, Inc. and former union-represented employees. *See* Pls. Appx. 61-62.

> your monthly pension benefit will transfer to Prudential and payments will no longer be made from the Verizon pension trust.

Pls. Appx. 251. The notices sent to affected retirees also enclosed an individualized pension benefit statement informing each retiree of the amount and type of his or her annuity benefits, and asked the retiree to contact the VEBC in the event that any of the information on the statement appeared incorrect. *E.g.*, Pls. Appx. 251-59.

ARGUMENT

I. PRELIMINARY INJUNCTIVE RELIEF IS AN EXTRAORDINARY AND DRASTIC REMEDY.

Preliminary injunctive relief is an "extraordinary remedy" that is "never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). In order to obtain such relief, a plaintiff "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 20; *accord DSC Commc'ns Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 600 (5th Cir. 1996). "[I]f a party fails to meet *any* of the four requirements, the court cannot grant the temporary restraining order or preliminary injunction." *Gonannies, Inc. v. Goaupair.com, Inc.*, 464 F. Supp. 2d 603, 607 (N.D. Tex. 2006) (emphasis in original); *accord Bluefield Water Ass'n, Inc. v. City of Starkville*, 577 F.3d 250, 253 (5th Cir. 2009) ("[A] preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has clearly carried the burden of persuasion on all four requirements." (internal quotation marks omitted)).[6]

[6] The same standard governs both temporary restraining orders and preliminary injunctions. *See Mktg. Investors Corp. v. New Millennium Bank*, No. 3:11-CV-1696-D, 2011 WL 3157214, at *1 (N.D. Tex. July 26, 2011) (Fitzwater, C.J.). The Verizon Defendants refer to both interchangeably herein, or substitute the phrase "interim injunctive relief."

II. PLAINTIFFS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS.

Because plaintiffs fall well short of demonstrating that they have a "substantial likelihood of success on the merits," *DSC Commc'ns Corp.*, 81 F.3d at 600, their request for injunctive relief should be denied. After first addressing their principal (and erroneous) claim in Count II that the annuity transaction violated any applicable standards of fiduciary conduct, we then discuss plaintiffs' Count I disclosure arguments, Count III discrimination argument, and Count IV claim for "equitable relief."

A. Plaintiffs' Breach Of Fiduciary Duty Claim (Count II) Is Meritless.

Plaintiffs advance scattershot arguments in Count II that the Verizon Defendants breached ERISA fiduciary duties. None of their arguments has any merit.

Plaintiffs acknowledge that both ERISA and the Plan permit Verizon to terminate its obligation to pay the pension benefits of putative class members and to transfer those obligations to an insurance company. *E.g.*, Compl. ¶¶ 33 n.5, 52. Having recognized that Verizon has the right to transfer retirees' benefits to an insurance company, plaintiffs are left to complain about the *manner* in which Verizon has undertaken to do so here. Whether the transfer to an insurance company occurs by termination or (as here) by an annuity transaction, the result for retirees is the same. In both cases plaintiffs' benefits and the post-transfer procedural protections available to them are identical. Because the Verizon Defendants undisputedly could transfer the obligation to pay plaintiffs' benefits to Prudential as part of a plan termination, there is no merit to plaintiffs' argument that Verizon breached its fiduciary duty by doing so through an annuity purchase.

1. The Prudential Annuity Transaction Fully Complies With ERISA And All Applicable Regulations.

In enacting ERISA, Congress was careful not to "mandate what kind of benefits employers must provide if they choose to have" a retirement plan. *Lockheed Corp. v. Spink*, 517

U.S. 882, 887 (1996). Congress recognized that providing employers with the freedom to design their own pension plans was "vital" to the willingness of employers to provide such plans, and therefore sought to preserve "flexibility in the design and operation of . . . pension programs." H.R. Rep. No. 93-533 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4647; *see also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 512 (1981) (recognizing that ERISA does not impose "mandatory pension levels" or otherwise dictate the design of benefits).

A key feature of ERISA's voluntary retirement system is the employer's ability to leave it. ERISA sets forth several means by which an employer may choose to remove liabilities from a pension plan and specifies protections for participants in each instance. For example, an employer may terminate a pension plan entirely. 29 U.S.C. § 1341 (plan terminations). Or an employer may merge a plan with another plan or spin-off a portion of a plan into a separate plan. 29 U.S.C. § 1058; *see* 26 C.F.R. § 1.414(*l*)-1 (plan mergers and spin-offs). Finally, and most relevant here, Department of Labor regulations specifically authorize the transfer of pension benefit obligations to an insurance company as part of an annuity transaction. *See* 29 C.F.R. § 2510.3-3(d)(2)(ii) ("Annuitization Regulation").

Under the Annuitization Regulation, an individual's benefit ceases to be covered by an ERISA-covered plan if:

> (1) the entire pension benefit is "fully guaranteed by an insurance company, insurance service or insurance organization licensed to do business in a State";
>
> (2) the individual's rights to the benefit "are legally enforceable by the sole choice of the individual against the insurance company, insurance service or insurance organization"; and
>
> (3) a "contract, policy or certificate describing the benefits to which the individual is entitled under the plan has been issued to the individual."

29 C.F.R. § 2510.3-3(d)(2)(ii). The Department of Labor has observed that this regulation "explicitly recognize[s] a transfer of liability from the plan when such an annuity is purchased from an insurance company licensed to do business in a State." 60 Fed. Reg. 12328, 12328 (Mar. 6, 1995). Furthermore, the transfer of liabilities may occur when a plan terminates or when the annuity contract is purchased by an ongoing plan: "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." *Id.* (emphasis added).

Verizon complied with the three-step procedure set out in the Annuitization Regulation, and plaintiffs do not contend otherwise. The October 17 Plan amendment authorizing the transaction requires (i) the Plan to purchase an annuity contract from an insurance company under which the insurance company would "fully guaranty" the payment of the pension benefits of certain designated participants, (ii) the contract to specify that "the benefits are legally enforceable by the sole choice of the individual against the insurance company issuing the contract," and (iii) the insurance company to issue annuity certificates describing participants' rights. Pls. Appx. 61-62. The Annuity Contract to be issued by Prudential under the DPA follows these requirements, i*d.* at 143, 147, 155-56, and the transfer of pension liabilities to Prudential thus fully complies with governing regulations pertaining to the annuitization of benefit obligations.

Verizon's undisputed compliance with the specific requirements governing the annuitization of benefit obligations precludes plaintiffs' claim that the decision to transfer their benefits to an insurance company violates ERISA's fiduciary standards. This conclusion is

consistent with the decisions of courts that have considered the similar question of whether pension benefits can be transferred from one plan to another. ERISA permits a pension plan to transfer or "spin off" some of its benefit obligations to another plan (with a different employer sponsor), and regulations thereunder specify the requirements for doing so. 29 U.S.C. § 1058; *see* 26 C.F.R. § 1.414(*l*)-1; *see also Koch Indus., Inc. v. Sun Co.*, 918 F.2d 1203, 1206-07 (5th Cir. 1990). When those rules are followed, courts have consistently rejected claims that the transfer of benefit obligations violates other ERISA duties. *See Blaw Knox Ret. Income Plan v. White Consol. Indus., Inc.*, 998 F.2d 1185, 1190 (3d Cir. 1993) ("compliance with ERISA's provisions for the funding of merged, transferred or acquired pension plans as set forth in 29 U.S.C. § 1058 precludes a finding that a fiduciary breach had occurred"); *accord Bigger v. Am. Commercial Lines*, 862 F.2d 1341, 1344 (8th Cir. 1988) ("general standard of fiduciary duty [does not] supersede[] and impose[] a higher standard than" ERISA's specific requirements for a plan merger or spin-off). For the same reason, plaintiffs' fiduciary breach claims here are without merit: the Verizon Defendants complied with the regulations governing annuity transactions, and ERISA requires nothing more.

2. Verizon's Decision To Enter Into The Annuity Transaction Was Not Made In A Fiduciary Capacity.

Because Verizon was acting in a business or "settlor" capacity when it decided to enter into the annuity transaction, plaintiffs' challenge to that decision as a breach of ERISA's fiduciary duty provisions fails as a matter of law.

Under ERISA's "two-hats" doctrine, a person or entity may at times wear a fiduciary hat and at other times wear an employer or "settlor" hat with respect to an ERISA-governed plan. *See Pegram v. Herdrich*, 530 U.S. 211, 225 (2000). Thus, the "threshold question" in an action charging breach of fiduciary duty under ERISA is "not whether the actions of some person . . .

adversely affected a plan beneficiary's interest, but whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Id.* at 226.

While plaintiffs recognize that employers "are generally free under ERISA for any reason at any time to adopt, modify or terminate welfare plans," they assert that "ERISA does not permit such actions with respect to pension plans." Pls. Supp. Memo (Dkt. 19), at 13. Their claim is belied by a series of Supreme Court decisions making clear that "*an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties*." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) (emphasis added).

The Supreme Court's decision in *Beck v. PACE International Union*, 551 U.S. 96 (2007), is instructive. *Beck* involved an employer's decision to end its defined benefit pension plans by undertaking a "standard termination," and rejected a proposal instead to transfer the pension assets and liabilities associated with its union employees to a union-sponsored pension plan via merger. *See id.* at 99-100. Participants in the terminated plan argued that the employer's choice between a standard termination and a merger implicated ERISA's fiduciary duties. *See id.* at 101. The Supreme Court unanimously rejected this argument, observing that, unlike a pension plan merger, "terminating a plan through purchase of annuities . . . formally severs the applicability of ERISA to plan assets and employer obligations." *Id.* at 106. *Beck* thus makes clear that the decision whether to maintain pension liabilities in an ERISA-covered pension plan or, instead, to remove pension liabilities from ERISA coverage is a fundamental design decision that belongs to the employer as settlor, *not* as a fiduciary under ERISA. *See id*. at 101 ("an

employer's decision *whether* to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations" (emphasis in original)).

The holding in *Beck* is dispositive here. As in *Beck*, plaintiffs seek to challenge as a breach of fiduciary duty Verizon's decision to "sever[] the applicability of ERISA to plan assets and employer obligations." *Id.* Because *Beck* makes clear that Verizon's decision to pursue the annuity transfer is a settlor decision and not a fiduciary decision, plaintiffs' breach of fiduciary duty claim fails as a matter of law.

3. The Annuity Transaction Is Authorized By Plan Terms.

Plaintiffs also assert that the "proposed transaction violates the controlling terms of documents establishing and governing the [Plan]." Compl. ¶ 5. This assertion is incorrect.

As plaintiffs acknowledge, the Plan was amended on October 17, 2012, expressly to provide for the annuity transaction. The October 17 Plan amendment states that the Plan "*shall purchase* one or more annuity contracts" for designated participants (on terms negotiated by VIMCO or an independent fiduciary selected by VIMCO). Pls. Appx. 61 (emphasis added). Thus, the Plan terms not only authorize the proposed transaction, they unambiguously *require* the Plan to enter into an annuity transaction.

Plaintiffs further allege that, before October 17, 2012, no Plan terms expressly authorized the Prudential transaction. *E.g.*, Compl. ¶ 31. But nothing here turns on the pre-October 17 terms of the Plan. Verizon undisputedly had the right to amend the Plan at any time, and the Plan was duly amended on October 17 to authorize and require the annuity transaction. Thus, the Plan terms that will be in effect when the transaction is set to close expressly authorize the annuity transaction.

To the extent plaintiffs mean to suggest that pre-existing Plan terms *preclude* Verizon from adopting the Plan amendments, they are again mistaken:

First, plaintiffs point to Section 11.2, which states that no plan "amendment shall [] reduce . . . any benefit[] that is accrued." Compl. ¶ 78; Appx. 29. This provision represents the Plan's codification of ERISA's anti-cutback rule, which states that the "accrued benefit of a participant under a plan may not be decreased by an amendment of the plan." 29 U.S.C. § 1054(g). Because plaintiffs will receive exactly the same monthly payments after the annuity transaction as before, the October 17 Plan amendment clearly does not reduce any accrued benefits. *See* Defs. Appx. 26 (Reed Decl. ¶ 9).

ERISA provides no support for plaintiffs' assertion that their "accrued benefit" includes a right to receive "*benefits paid directly from the Plan*." Compl. ¶ 79. That is because the statute protects the form and amount of benefits paid to participants; it does not guarantee that benefits will be paid by any specific entity or source. As plaintiffs concede, *see* Compl. ¶¶ 33, 52, 68, Verizon has the right under both ERISA and the Plan (i) to terminate the plan, resulting in the transfer of benefit obligations to an insurance company, (ii) to "transfer[] to another plan" the "assets or liabilities" of the Plan, or (iii) to merge the Plan into another plan. Pls. Appx. 29-30; s*ee* 29 U.S.C. § 1058 (providing that a pension plan may "merge or consolidate with, or transfer its assets or liabilities to" another plan); 29 U.S.C. § 1341 (authorizing the termination of a pension plan and the transfer of plan liabilities to an insurer). All of these plainly permissible choices contradict plaintiffs' "accrued benefit from the Plan" theory. If plaintiffs were correct, *all* pension plan mergers, spinoffs and terminations would necessarily violate ERISA's anti-cutback rule, which is not a sensible reading of ERISA and is belied by the extensive line of cases finding that such transactions satisfy ERISA's requirements.

Second, plaintiffs point to Section 8.5 of the Plan, which requires that Plan assets be used for the "exclusive benefit" of participants, to "provide benefits under the terms of the Plan" and pay "reasonable expenses." Pls. Appx. 25. This Plan provision, again, simply incorporates an ERISA provision – in this case, the exclusive benefit rule of Section 404(a). *See* 29 U.S.C. § 1104(a)(1)(A)(i). The annuity purchase here does not violate this rule because Plan assets will be used in the transaction solely to pay annuity benefits to designated participants and to defray reasonable expenses. Moreover, for the reasons explained above, interpreting ERISA's exclusive benefit rule (and thus Plan Section 8.5) to prohibit using plan assets to purchase annuity contracts to transfer benefit obligations cannot be reconciled with ERISA provisions expressly authorizing analogous asset transfers in the context of plan mergers, spin-offs and terminations.[7]

Third, plaintiffs' references to Sections 11.3, 12.3 and 12.7 of the Plan, *e.g.*, Compl. ¶ 37, are also unavailing. Section 11.3 of the Plan authorizes the Plan to transfer benefit liabilities to another ERISA-governed plan (in accordance with applicable regulations); it says nothing about annuity transactions. Similarly, Sections 12.3 and 12.7 set forth certain requirements in the event of a plan termination; they cannot plausibly be construed to prohibit annuity transactions. *See* Defs. Appx. 25 (Reed Decl. ¶ 7).

Finally, plaintiffs assert that the language added to the Plan by the October 17 Plan amendment – in light of Sections 8.5, 11.3, 12.3 and 12.7 – creates an "ambiguity" in the Plan. Compl. ¶ 37. This assertion, however, is belied by the clear and specific terms of the amendment requiring that the Plan "*shall purchase* one or more annuity contracts." Pls. Appx. 61. Moreover, the terms of the Plan expressly grant the VEBC and its chairperson the "discretionary

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[7] For the same reason, plaintiffs' reliance on the "exclusive benefit" language in the Master Trust, *see* Pls. Supp. Memo at, 15-16, does not help them.

power" to "interpret the Plan and to decide all matters arising thereunder." Defs. Appx. 24 (Reed Decl. ¶ 3). In response to the supposed ambiguity asserted by plaintiffs, the VEBC chairperson has interpreted the specific provisions of the October 17, 2012 Plan amendment to *require* consummation of the annuity transaction, notwithstanding any other Plan provisions. *Id.* at 25 (Reed Decl. ¶ 8). Under well-established law, such a reasonable interpretation of purportedly ambiguous Plan terms by the fiduciary vested with interpretative discretion is entitled to deference from the Court. *E.g.*, *Conkright v. Frommert*, 130 S. Ct. 1640, 1644 (2010) (deferring to plan interpretation proffered for the first time in litigation); *Worthy v. New Orleans S.S. Ass'n.*, 342 F.3d 422, 427-28 (5th Cir. 2003) (deferring to ERISA trustee's interpretation of trust language in a suit alleging that trust administrators violated their fiduciary duties).

4. Nothing In ERISA Or The Plan Requires Plaintiffs' Consent For Plan Amendments.

Plaintiffs repeatedly complain that the transfer of the obligation to pay their benefits to Prudential is being done without their consent. *E.g.*, Compl. ¶ 21. Nothing in ERISA or the Plan requires participant consent, however, and neither of plaintiffs' arguments to the contrary has merit.

First, plaintiffs argue that the "lack of consent means that the Verizon/Prudential annuity transaction cannot proceed as a matter of fiduciary duty." Pls. Supp. Memo at 19. Their sole support for this argument is *Howe v. Varity Corp.*, 36 F.3d 746, 749, 756 (8th Cir. 1994), *aff'd on other grounds*, 516 U.S. 489 (1996). *Howe* held that it was a breach of fiduciary duty under ERISA to transfer the welfare benefit obligations for retired employees to a new employer without their knowledge or consent. This Eighth Circuit decision, however, was effectively overruled by the subsequent succession of Supreme Court cases holding that employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare

plans." *E.g.*, *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *see* Part II.A.2, *supra*. As the Sixth Circuit has noted, "[t]o the extent that the Eighth Circuit's holding [in *Howe*] is grounded in the retirees' lack of consent," the holding is "an anomaly within the case law governing the scope of employer action subject to ERISA's fiduciary standards." *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 668 n.8 (6th Cir. 1998).

Second, Plaintiffs assert that Section 1.2 of the Plan, in conjunction with Article 15.1 of a predecessor plan ("NYNEX Plan"), requires participant consent from the subset of participants who retired from NYNEX before 2002. *See* Pls. Supp. Memo, at 17.

Section 15.1 of the NYNEX Plan states that a "change or termination shall not adversely affect the rights of any Employee, without his or her consent, to any benefit or pension to which he may have previously become entitled hereunder." Pls. Appx. 286. That section, however, is simply a re-statement of ERISA's anti-cutback rule. *See supra*, p. 16.

Plaintiffs' effort to give a broader reading to Section 15.1 is contradicted by a number of other provisions of the NYNEX Plan. Article 15 contemplates that the NYNEX Plan may be "changed" or "terminated," and Section 16.4 expressly states that the Plan may "purchase . . . annuities from an insurance company" in order to satisfy its obligations, without requiring consent. Defs. Appx. 12-13, 20. Thus, the transfer of benefit obligations to an insurance company for a subset of former NYNEX employees is not a change for which consent is required under Section 15.1(c) of the NYNEX Plan, and any possible ambiguity on this score has been reasonably resolved by the Plan's fiduciary to permit the annuity transaction. *Id.* at 26 (Reed Decl. ¶ 11).

In sum, because neither ERISA nor the terms of the Plan require Verizon to obtain participants' consent to the October 17 Plan amendment, plaintiffs' "involuntary transfer" allegations fail as a matter of law.

5. Any Assertion That The Selection Of Prudential Did Not Comply With ERISA's Fiduciary Standards Is Wholly Without Merit.

Plaintiffs suggest in passing that the decision to select Prudential – on the terms and conditions negotiated and approved by the Independent Fiduciary – constitutes a separate violation of ERISA's fiduciary duty provisions. *See* Compl. ¶ 85. However, the selection of Prudential fully complied with ERISA's fiduciary duty requirements, and plaintiffs therefore have no substantial likelihood of success on the merits of this claim.

Under ERISA, a fiduciary is obligated to act "solely in the interest of the participants," with the "care, skill, prudence, and diligence" of a "prudent man" acting in like circumstances. 29 U.S.C. § 1104(a)(1)(B). As the Fifth Circuit has observed, "the test of prudence is one of conduct, not results." *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243, 253 (5th Cir. 2008); *see generally Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 299 (5th Cir. 2000). Thus, courts will generally not second guess the decisions of a disinterested fiduciary made in good faith after following a thorough deliberative process. *See*, *e.g.*, *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009) ("In evaluating whether a fiduciary has acted prudently, we therefore focus on the process by which it makes its decisions rather than the results of those decisions.").

In August 2012, VIMCO retained Fiduciary Counselors to act as an independent fiduciary in connection with the annuity transaction. As independent fiduciary, FCI engaged in an extensive, deliberative process to select Prudential as the annuity provider and to negotiate annuity terms that were favorable to affected Plan participants. In accordance with guidance

issued by the Department of Labor, *see* Interpretive Bulletin 95-1 (codified as 29 C.F.R. § 2509.95-1), FCI considered:

- The quality and diversification of Prudential's investment portfolio;
- Prudential's size relative to the proposed contract;
- The level of the Prudential's capital and surplus;
- Prudential's lines of business and other indications of its exposure to liability;
- The annuity contract's structure and guarantees supporting the annuities, including the separate account; and
- The extent of the protections available through state guaranty associations.

Defs. Appx. at 50, 58-62 (Miller Decl. ¶¶ 22, 104-58). Based on this thorough and independent process, FCI determined that "the selection of [Prudential] to issue the [Annuity Contract] as contemplated by the DPA satisfied ERISA, including its fiduciary standards." *Id.* at 68 (Miller Decl. ¶ 220). Accordingly, there is no substantial likelihood that plaintiffs will prevail on their claim to the contrary.[8]

B. <u>Plaintiffs' Disclosure Claim (Count I) Fails As A Matter Of Law.</u>

Count I alleges that the VEBC breached its fiduciary duties by impermissibly failing to disclose in a "summary plan description " ("SPD") that participants "could be involuntarily removed from enrollment in the Plan and transferred to either Prudential or any other insurance company." Compl. ¶ 62. According to plaintiffs, this failure runs afoul of Section 102(b) of

[8] Plaintiffs assert that the Prudential annuity contract will constitute a plan investment that would run afoul of ERISA's requirement that a fiduciary "diversify the investments of the plan." 29 U.S.C. § 1104(a)(1)(C). *See* Pls' Supp. Memo. (Dkt. 19) at 22-23. When a plan purchases a contract that transfers liabilities from the plan to an insurance company, however, the purchase is a plan distribution, *not* a plan investment. *See, e.g.*, 60 Fed. Reg. 12328, 12329 & n.5 (Mar. 6, 1995) (comparing fiduciary duties when purchasing an annuity contract as a distribution with fiduciary duties when purchasing an annuity contract as a plan investment). Accordingly, plaintiffs' diversification claim is without merit.

ERISA, 29 U.S.C. § 1022(b), and applicable regulations requiring SPDs to describe the "circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery" of benefits, 29 C.F.R. § 2520.102-3(*l*). *See* Compl. ¶ 58. This claim fails as a matter of law.[9]

1. <u>Plaintiffs' Disclosure Claims Are Baseless.</u>

First, plaintiffs are wrong that the transfer of their benefit obligations to Prudential constitutes a circumstance that results in the denial or loss of benefits. Under the terms of the October 17 Plan amendment, Prudential is required to pay plaintiffs benefits in precisely the same amount and in the same form that they would otherwise receive from the Plan. Pls. Appx. 61-62. Thus, no denial or loss of benefits results from the Plan amendment or the Prudential annuity transaction.

Second, as the Fifth Circuit has explained, "Section 102[](b) relates to an individual employee's eligibility under *then existing, current terms of the Plan* and *not* to the possibility that those terms might later be changed, as ERISA undeniably permits." *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993) (emphasis added); *see* 29 C.F.R. § 2520.102-3 ("The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed."). Plan administrators do not have a "duty of clairvoyance," and ERISA does not require them to anticipate and disclose in an SPD every plan amendment that the plan's sponsor might conceivably make to the plan in the future. *See Fischer v. Philadelphia Elec. Co.*, 994 F.2d 130,

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[9] Plaintiffs also assert that Verizon is attempting to "avoid[]" satisfying the "notice requirements" that apply to a plan termination. Compl. ¶ 75 (citing 29 C.F.R. §§ 4041.23, 4041.27). These regulations do not apply because the Prudential transaction does not constitute a plan termination. Moreover, Verizon provided retirees with notices substantially similar to those that would be required in the event of a plan termination. *See, e.g.*, Pls. Appx. 251-59.

135 (3d Cir. 1993). Thus, while SPDs generally must disclose existing plan provisions under which benefits may be offset – for example, provisions stating that pension benefits will be offset by Social Security payments – they need not disclose possible future plan terms unless and until they are adopted. *See, e.g.*, *Martinez v. Schlumberger, Ltd.*, 338 F.3d 407, 428 (5th Cir. 2003) (holding that there is no affirmative duty under ERISA to disclose contemplated plan amendments to participants).

Here, on the same day that the Plan amendment relating to the Prudential annuity transaction was adopted, plaintiffs and putative class members were sent a notice explaining the amendment and its impact on them. *See, e.g.*, Pls. Appx. 251-59. This satisfied any disclosure obligation under ERISA. *See* 29 C.F.R. § 2520.104b-3 (plan amendments must be disclosed no later than 210 days after the close of the plan year in which the modification or change was adopted).

Third, even if participants needed to be informed prior to October 17 that a plan amendment affecting their benefits could be adopted, the SPD did so. The SPD made clear that Verizon reserved the "unlimited right to amend, modify, suspend, terminate or partially terminate the plan at any time, at their discretion, with or without any advance notice to participants," Pls. Appx. 17, thus fully disclosing the "circumstance" that resulted in the purported loss or denial of benefits at issue here.

Fourth, plaintiffs are wrong that the SPD failed to inform participants that they "could be removed from a Verizon sponsored pension plan and transferred to an insurance company." Pls. Supp. Memo. (Dkt. 19) at 9. To the contrary, the SPD clearly stated that participants might "receive benefits . . . *in the form of an annuity contract issued by an insurance company*." Pls. Appx. 18 (emphasis added). While this provision relates specifically to payment of benefits in

the event of a plan termination, it undisputedly put participants on notice that the obligation to pay their benefits might be transferred to an insurance company. And, from the standpoint of participants, there is no material difference between a standard termination and the Prudential transfer: in either case, the obligation to pay their benefits transfers from an ERISA-covered pension plan to an insurance company. The SPD thus provided adequate notice to participants that the obligation to pay their benefits might be transferred outside ERISA's regulatory regime.[10]

2. Plaintiffs Cannot Satisfy The "Actual Harm" Requirement For SPD Disclosure Claims.

Plaintiffs' disclosure claim fails for a second, independent reason. The Supreme Court has held that a plan participant may "obtain relief" for an SPD disclosure violation only upon an individualized showing of "actual harm" and "causation." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1881 (2011).[11] And the participant's remedy is limited to the "harm stemming from [the plaintiff's] reliance on the SPD." *See id.* at 1885 (Scalia, J., concurring in the judgment). Here, there is no record evidence that plaintiffs will suffer any harm *caused by* the alleged deficiencies in the pension plan SPDs if the annuity transaction occurs.

The only potentially cognizable harm that plaintiffs claim to have suffered is the "lost . . . opportunity to . . . take . . . legal steps" to prevent the transaction from occurring. Compl. ¶ 69;

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[10] Plaintiffs' reliance on *Mers v. Marriott Int'l Grp. Accidental Death & Dismemberment Plan*, 144 F.3d 1014 (7th Cir. 1998), is misplaced. At best for plaintiffs, the relevant SPD here is silent regarding annuity transfers (outside the termination context). As *Mers* makes clear, "[a]n SPD's silence on an issue does not estop a plan from relying on the more detailed policy terms when no direct conflict exist." *Id.* at 1023.

[11] Plaintiffs have also failed to establish that they relied to their detriment on the allegedly defective SPD, as they must do where, as here, the remedy they seek is estoppel. *See* Compl. ¶ 70; *Amara*, 131 S. Ct. at 1881 ("[W]hen a court exercises its authority under §502(a)(3) to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made.").

see Pls. Appx. 247 (McPartlin Aff., ¶ 5); *id.* 242 (Lee Aff., ¶ 5); *see also id.* 262 (Jones Aff., ¶ 7). Even if this were a cognizable legal injury, plaintiffs' allegation is belied by the very existence of this proceeding, which constitutes precisely such a legal challenge. Accordingly, plaintiffs cannot establish the required element of "actual harm" and so fail to state a claim for relief under *Amara*.[12]

C. <u>Plaintiffs' "Discrimination" Claims (Count III) Are Meritless.</u>

Plaintiffs allege that Verizon's decision to enter into the annuity transaction violates Section 510 of ERISA, which makes it "unlawful for any person to . . . expel . . . or discriminate against a participant . . . for the purposes of interfering with the attainment of any rights to which such participant may become entitled under the plan." 29 U.S.C. § 1140. The gravamen of plaintiffs' argument appears to be that the members of the putative class were discriminated against because the obligation to pay *other* Plan participants' benefits was *not* transferred to Prudential. (*See* Compl. ¶¶ 80, 83.) This argument fails to state a claim.

First, several circuits have held that the decision to adopt a plan "amendment is not actionable under section 510." *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1504 (3d Cir. 1994); *accord Mattei v. Mattei*, 126 F.3d 794, 800 (6th Cir. 1997) ("[Section] 510 offers no protection against an employer's actions affecting the status or scope of an ERISA plan itself."); *Deeming v. Am. Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990) (similar). As the Fifth Circuit has explained, permitting an ERISA discrimination claim based upon the adoption of a plan amendment "would clearly conflict with Congress's intent that employers remain free to create, modify and terminate the terms and conditions of

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[12] Plaintiffs' other allegations of actual harm make no sense. For instance, plaintiffs assert that the "lost opportunity to be informed" itself constitutes a cognizable legal harm. But this would eviscerate the Supreme Court's holding in *Amara*, since such a lost opportunity will always be present where a disclosure violation has been found.

employee benefits plans without governmental interference." *McGann v. H & H Music Co.*, 946 F.2d 401, 407 (5th Cir. 1991).[13]

Here, the basis for plaintiffs' discrimination claim is the inclusion of certain participants – but not others – as part of the annuity transaction. Decisions regarding which participants to include in the transaction, however, were made by Verizon in its capacity as settlor of the Plan, as reflected in the October 17 Plan amendment. Because the decision to amendment a plan cannot give rise to a claim under Section 510 of ERISA, plaintiffs' discrimination allegations fail as a matter of law.

Second, in order to state a *prima facie* case under Section 510, plaintiffs at a minimum would need to demonstrate that Verizon's decision to enter into the annuity transaction was made with the "specific intent" to interfere with plaintiffs' benefits. *E.g.*, *Unida v. Levi Strauss & Co.*, 986 F.2d 970, 980 (5th Cir. 1993). There is no reasonable probability that plaintiffs will be able to make this showing. Under the Annuity Contract, Prudential will irrevocably guarantee to pay the same benefits that the Plan would otherwise pay plaintiffs. Rather than being interfered with, their retirement benefits will be fully funded and guaranteed after the annuity transaction.

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[13] While the Fifth Circuit has rejected the proposition that the reach of Section 510 is limited to decisions that affect the "employment relationship," it has never held that Section 510 may be used to challenge a plan amendment, and any such holding would conflict with its decision in *McGann*. *See Heimann v. Nat'l Elevator Indus. Pension Fund*, 187 F.3d 493, 507 (5th Cir. 1999), *overruled on other grounds*, *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003). Moreover, *Heimann* relies heavily on the Sixth Circuit's *Mattei* decision, which makes clear that Section 510 "offers no protection against an employer's actions affecting the status or scope of an ERISA plan itself." 126 F.3d at 800; *see id.* at 801 ("From a review of the[] cases involving employers' alterations of ERISA plans, we think that, rather than viewing attacks on the 'employment relationship' as a sine qua non of § 510 coverage, it is more appropriate to view 'employment relationship' as an illustrative but non-exclusive description of a set of rights that are protected by § 510, *as compared to . . . 'merely the pension plan,' which is not*." (emphasis added)).

Third, a Section 510 claim must be denied so long as "a defendant has advanced a legitimate, nondiscriminatory reason for its action." *E.g.*, *Isbell v. Allstate Ins. Co.*, 418 F.3d 788, 796 (7th Cir. 2005). This is because "discrimination laws [are not] vehicles for judicial second guessing of business decisions." *Deines v. Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 281 (5th Cir.1999) (alterations in original) (internal quotation marks omitted).

Here, the population of Plan participants subject to the annuity transaction consists of most participants who have been in pay status since at least January 1, 2010. Verizon determined that the Plan had sufficient liquid assets to support a pension transfer for a population of that size, considering the liquidity needs of the insurer and Plan liabilities that would remain after an annuity transaction. Defs. Appx. 29 (Nebens Decl. ¶ 4). Thus, the size of the transaction satisfied a business objective of Verizon.

In addition, limiting the transaction to participants who are already receiving fixed, monthly annuity payments (*i.e.*, participants in "pay status"), simplifies the transaction and is therefore less costly, principally because of uncertainties relating to the time, form, and amount of payment for participants not yet in pay status. *Id*. at 29-30 (Nebens Decl. ¶¶ 5-6). Moreover, limiting the transaction to participants who have already been in pay status for a time reduces the prospect for any future disagreements regarding the calculation of their benefits. *Id.* Thus, consistent with its overall sizing objectives, Verizon determined to transfer the benefit obligations only for retirees who had been receiving benefits since at least January 1, 2010. *Id.* at 30-31 (Nebens Decl. ¶ 8).

Because Verizon's decision to transfer a portfolio of liabilities relating only to individuals in pay status for more than two years "has a readily apparent business justification" and is made "along independently established lines," the decision "demonstrates no invidious intent."

Aronson v. Servus Rubber, Div. of Chromalloy, 730 F.2d 12, 16 (1st Cir. 1984). Accordingly, plaintiffs' discrimination claim has no chance of succeeding on the merits.

D. Plaintiffs' Free-Standing "Equitable Relief" Claim (Count IV) Does Not State A Distinct Claim Upon Which Relief Can Be Granted.

Count IV purports to state a claim for appropriate equitable relief pursuant to Sections 502(a)(2) and (a)(3) of ERISA. But "Section 502(a)(3) 'does not . . . authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions' of ERISA.'" *Peacock v. Thomas*, 516 U.S. 349, 353 (1996) (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253 (1993) (alterations and emphasis in original)).[14] To the extent that Count IV rests upon the purported violations of ERISA or the Plan set forth in other counts, Count IV fails for the same reasons that those counts are defective. To the extent Count IV purports to go further than the other counts, it fails to state a claim upon which relief can be granted.

III. PLAINTIFFS HAVE FAILED TO ESTABLISH IRREPARABLE HARM.

Interim injunctive relief should be denied for the independent reason that plaintiffs have not demonstrated that irreparable harm would likely result from the annuity purchase next week. Indeed, plaintiffs have not shown that they will be cognizably harmed *at all* by the closing. And if the change in status from pension plan participant to insurance annuitant resulted in a cognizable injury, such harm could be adequately remedied by a judgment on the merits.

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[14] Similarly, Section 502(a)(2), 29 U.S.C. § 1132(a)(2), authorizes suit only "for appropriate relief under [29 U.S.C. § 1109]." That section, in turn, provides that a plan fiduciary "who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109. Thus, equitable relief is available under Section 502(a)(2) only to the extent that someone acting in a fiduciary capacity violates the fiduciary standards imposed by ERISA.

A. <u>Plaintiffs Have Failed To Show The Unavailability Of Adequate Remedies On The Merits.</u>

An injunction is not needed here to preserve the "ability to render a meaningful decision on the merits," *Canal Auth. of State of Fla. v. Callaway*, 489 F.3d 567, 576 (5th Cir. 1974), because the Court's authority to provide meaningful relief to plaintiffs would not be thwarted by the annuity purchase. "[T]he possibility that adequate *compensatory or other corrective relief* will be available at a later date, in the ordinary course of litigation, weigh[s] heavily against a claim of irreparable injury." *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472-73 (5th Cir. 1985) (emphasis added).

When the transaction closes, plaintiffs will become annuitants with Prudential. Prudential will begin paying them monthly annuity benefits *identical in amount* to the payments that they currently receive from the Plan. Payments will be delivered by the same means; any deductions will be handled in the same manner. From a practical perspective, the annuity payments will be virtually indistinguishable from payments by the Plan.[15]

Plaintiffs do not argue otherwise. They contend instead that the mere change in status from participant to annuitant, and the resulting removal of ERISA regulation and the PBGC safety net, constitutes "irreparable harm." Yet status alone is not cognizable harm. The protections afforded by ERISA and the PBGC matter because they ensure the reliable provision of retirement income. No evidence justifies worry that the payment of annuity benefits from the fully-funded separate account at Prudential will be in jeopardy while the Court adjudicates the merits. Plaintiffs have alleged only speculative and unrealistic threats to the security of their retirement income. That is not enough to justify extraordinary interim relief. But also, if the loss

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[15] Nor are payments by insurance companies to annuitants anything unusual or unreliable. Prudential, for example, already regularly makes annuity payments to millions of workers and retirees. Pls. Appx. 224.

of ERISA security were to harm plaintiffs during the pendency of this lawsuit, such harm would be economic and could be remedied by monetary relief.

An analogy may be drawn to the situation in *Schmidt v. Enertec Corp.*, 598 F. Supp. 1528 (S.D.N.Y. 1984). The *Schmidt* plaintiffs opposed an allegedly illegal tender offer for their debentures. Bondholders were offered preferred stock of doubtful value that would not pay dividends in the near term. The plaintiffs sought to preliminarily enjoin the tender offer by arguing that its consummation would leave them with less favorable rights than they possessed as bondholders. In denying the motion, the court recognized that the rights at issue were ultimately "financial rights" that could be compensated with monetary relief. *See id*. at 1544. Similarly, plaintiffs here contend that they are threatened with the loss of pension benefit protections afforded by ERISA and the PBGC, but such protections are ultimately financial in nature. If plaintiffs' retirement benefits were to be actually diminished by the absence of such protections, such injury would be compensable.

Plaintiffs have also failed to demonstrate that "corrective relief" would not be available at the time of judgment on the merits. *Enter. Int'l*, 762 F.2d at 472-73. The Supreme Court has recognized that ERISA Section 502(a)(3) authorizes a variety of remedies as "appropriate equitable relief" for violations of ERISA and to enforce the terms of a Plan. *See Amara*, 131 S. Ct. 1866. While not conjecturing about the equitable relief, if any, that might ultimately be proper on the merits here, it is evident that plaintiffs have failed to demonstrate the absence of possible corrective relief. And plaintiffs' own counsel are currently advocating, in another case before this Court, a remedy requiring workers and retirees of a business spun off from Verizon to be reinstated to the ERISA plan(s) sponsored by Verizon in which they previously participated. *See* No. 3:09-cv-2262-G, *Murphy v. Verizon Comm'cns,* (N.D. Tex.) (Fish, J.), Dkt. 86, at 4 (Oct.

14, 2011) ("Plaintiffs ask the Court to enter an order requiring Defendants to restore Plaintiffs and Class members to their former status as participants in Verizon's employee benefit plans . . . ."). While defendants do not concede that such equitable relief would be appropriate on the merits in either the *Murphy* case or this one, counsel's statement in *Murphy* demonstrates that the case for interim injunctive relief has not been made.

B. Plaintiffs' Concerns About Loss Of Standing Are Unfounded.

In seeking interim relief, plaintiffs also contend that the annuity purchase threatens retirees' standing to obtain federal court relief. That is incorrect. Closing the transaction will neither deprive plaintiffs of standing here nor foreclose other affected retirees' access to federal court to protect their benefits. Fear of losing "standing to sue under ERISA, " Pls. Memo. (Dkt. 7) at 5 – apparently referring to statutory authority to prosecute ERISA claims, rather than to constitutional standing – is misplaced for several reasons and does not establish irreparable harm.

First, there is no basis for concern that closing the annuity transaction will extinguish plaintiffs' constitutional standing in this case. They undoubtedly had standing when they filed the complaint. *See Baisden v. I'm Ready Prods., Inc.*, 693 F.3d 491, 510 n.19 (5th Cir. 2012). Closing the transaction will not moot the Article III controversy because debate over the transaction's legality will continue into the merits phase.

Second, with respect to "standing to sue under ERISA," a plaintiff's authority to prosecute a Section 502(a) action as a "participant" goes to the merits, not subject matter jurisdiction. *See Vaughn v. Bay Envtl. Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009) (amended panel decision); *Lanfear v. Home Depot, Inc.*, 536 F.3d 1217, 1221-22 (11th Cir. 2008); *Harzewski v. Guidant Corp.*, 489 F.3d 799, 803-04 (7th Cir. 2007). For Section 502(a) purposes, "participant" encompasses someone who may become eligible to receive plan benefits, including anyone with a colorable claim to entitlement to them. *Abraham v. Exxon Corp.*, 85

F.3d 1126, 1129 (5th Cir. 1996) (discussing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989)); *see also LaRue v. DeWolff, Boberg & Assocs*., 552 U.S. 248, 256 n.6 (2008). Thus, for example, the Fifth Circuit has held that the distribution of lump sum benefits to employees from an employee stock ownership plan did not eliminate their statutory "standing" to prosecute a Section 502(a)(2) action. *Sommers Drug Stores Co. Emp. Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 350 (5th Cir. 1989). Here, the gravamen of the complaint is that the plaintiffs should remain entitled or be restored to entitlement to Plan benefits because the annuity transaction and their resulting separation from the Plan are allegedly unlawful. That suffices to allow them to sue under Section 502(a).

Third, despite separating from the Plan when they become insurance annuitants with Prudential, all affected retirees will continue to have access to federal court to pursue claims for benefits based on the theory, advanced by plaintiffs here, that the transaction violates ERISA. Section 502(a)(9), enacted through the Pension Annuitants Protection Act of 1994, Pub. L. 103-401, 108 Stat. 4172 (1994), provides that, if the purchase of an insurance annuity in connection with the termination of an individual's status as a plan participant violates ERISA Sections 401-414 or the terms of the plan, then "any individual who was a participant at the time of the alleged violation" may bring a civil action to obtain appropriate relief to assure receipt of the benefits due under the annuity. 29 U.S.C. § 1132(a)(9).[16]

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[16] In full, Section 502(a)(9) provides:

> (a) A civil action may be brought – . . . (9) in the event that the purchase of an insurance contract or insurance annuity in connection with the termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the

The decisions cited by plaintiffs, *e.g.*, Pls. Supp. Memo. (Dkt. 19) at 6 n.9, do not demonstrate that they and other affected retirees would lack standing in federal court after the annuity purchase closes. For example, *Wolf v. Coca-Cola Co.*, 200 F.3d 1337 (11th Cir. 2000), held that summary judgment was properly granted *on the merits* because the plaintiff was not eligible for benefits under the terms of the plan at issue. *Id.* at 1342.[17] The remaining, older decisions are of doubtful vitality, especially insofar as they predate the enactment of Section 502(a)(9). In any event, as plaintiffs recognize, their concern with standing would apply at most to residents of a few circuits outside of the Fifth Circuit – and ERISA's venue provision does not require lawsuits to be filed in the state in which the plaintiff resides. *See* 29 U.S.C. § 1132(e)(2).

IV. THE BALANCE OF HARMS WEIGHS AGAINST GRANTING PLAINTIFFS' REQUEST FOR AN INJUNCTION.

If this Court were to grant plaintiffs' request for interim injunctive relief, it would cause demonstrable harm to Verizon and the Plan far outweighing any speculative and contingent harm to plaintiffs.

A. Verizon And The Plan Would Suffer Substantial, Concrete Harm If An Injunction Were Granted.

This complex, multi-billion dollar transaction has been scheduled since mid-October to close on December 10, 2012. Even a delay of a few days would require the recalculation of asset values, require adjustments to the annuity purchase price, and hinder the logistical arrangements made to transition 41,000 monthly benefits from one obligor to another (including the timely

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> amounts provided or to be provided by such insurance contract or annuity, plus reasonable interest on such amounts."

29 U.S.C. § 1132(a)(9).

[17] The purportedly quoted language in the parenthetical to plaintiffs' citation to the *Wolf* decision does not appear in that judicial opinion. *Compare* Pls. Supp. Memo. (Dkt. 19) at 6 n.9 (citing *Wolf* with purported quotation) *with Wolf*, 200 F.3d at 1337-44 (lacking the quoted language).

delivery of annuity certificates to affected retirees). This is not a closing for which all steps can be prepared in advance and then placed on hold while awaiting a green light. And failure to close the annuity purchase before December 18 would result in the expiration of the agreed-upon price and threaten to scuttle the entire transaction. Even if the purchase went forward next year, such a delay would certainly increase the purchase price substantially – likely by hundreds of millions of dollars. While the closing's alleged harm to plaintiffs is conjectural and unrealistic, the harms that a delay would cause to the defendants are concrete and substantial.

1. <u>The Definitive Purchase Agreement And The Closing Date.</u>

The DPA governing the purchase of the group annuity contract establishes December 10, 2012, as the Closing Date. Defs. Appx. 23 (DPA, § 2.1(b)). The price to be paid by the Plan to transfer the benefit obligations, including the premium paid to Prudential to undertake them, is premised upon that Closing Date. Although the Agreement provides for price adjustments, if circumstances were to require a slight delay, the annuity price and adjustments are valid only through December 17. *Id*. at 33-34 (Lataille Decl. ¶¶ 5-6).[18]

More concern arises because valuing the assets being conveyed to Prudential at closing requires operations that would be disrupted by even a short delay. The parties have been preparing for weeks to convey primarily non-cash assets (such as bonds) to purchase the annuity. *Id*. 33, 35 (Lataille Decl. ¶¶ 4, 7). Many of those assets change in value whenever markets are open. *Id*. at 35 (Lataille Decl. ¶¶ 8-9). The value of the non-cash assets at the time of closing will be determined by third-party vendors, who will rely on data from yet other sources. *Id*. The parties have planned to perform this daunting exercise over the weekend of December 8-9. If the

[18] If the transaction does not close before December 18, 2012, the DPA essentially provides only parameters, effective through March 31, 2013, for a new negotiation of the annuity purchase price. If the annuity transaction did not close before April 1, 2013, there would no longer be any deal at any price. Defs. Appx. 34, 37 (Lataille Decl. ¶¶ 6, 15).

closing were delayed, then the vendors would either have to perform the same operations over a single weekday night – an option fraught with risks of serious errors and outright failure – or postpone them until the weekend of December 15-16.[19] *See id.* If problems arose that weekend in preparing to close on December 17, the window of opportunity to consummate the agreed-upon deal would close.

In addition, anything more than a brief delay in closing would jeopardize the plans for delivering annuity certificates to 41,000 retirees, as required by Plan Section 8.3(b)(iii), Pls. Appx. 62, before year's end. Defs. Appx. 38 (Lataille Decl. ¶ 18). Those certificates will confirm each annuitant's entitlement to benefits from Prudential and provide details required by ERISA regulations, 29 C.F.R. § 2510.3-3(d)(2)(ii), but such documents cannot be dispatched until the annuity has actually been purchased.

2. Additional Harm to Defendants Resulting From Delay Beyond December 17, 2012.

Plaintiffs do not advocate a delay of one week or less. They seek to enjoin the annuity transaction until a final judgment on the merits, which would certainly prevent closing in 2012. As already noted, the DPA does not establish a price for the annuity purchase if it occurs after December 17, 2012. Defs. Appx. 34 (Lataille Decl. ¶ 6). The price would have to be re-negotiated, and many of the economic and regulatory factors that would drive those negotiations are currently uncertain. *Id.* 33-34 (Lataille Decl. ¶¶ 5-6). At least some of them, however, can almost certainly be expected to lead to a substantially higher purchase price in 2013 – assuming that the parties would even reach a new agreement. Prudential has estimated that the premium it

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[19] Beyond that, holiday weekends and other logistical issues make it impractical to close during the last two weekends of December 2012. In any event, the DPA's purchase price and delay adjustments are valid only through December 17. Defs. Appx. 33-34 (Lataille Decl. ¶ 5).

would seek to charge the Plan for the annuity would likely increase by approximately $100 million in 2013, *see id.*, as we understand its counsel will inform the Court.

B. **Plaintiffs Would Not Suffer Any Concrete Harm If Injunctive Relief Were Denied.**

Because plaintiffs will suffer no financial harm when the annuity transaction closes, they contend that the absence of ERISA regulation and, in particular, the PBGC's replacement as guarantor of their benefits constitute harm. That assertion is untenable. Simply put, replacing (a) a pension benefit paid from the Plan trust, backed by its sponsor, and guaranteed by the PBGC, with (b) an equal retirement benefit paid from a fully-funded separate account within Prudential, backed by Prudential's general assets, and guaranteed by state insurance guaranty associations does not constitute actual harm. Affected retirees will continue to enjoy robust protections as Prudential annuitants throughout their retirements; *a fortiori*, their benefits will be adequately protected during the limited duration of this lawsuit.

1. The Prudential Annuity Contains Significant Structural Safeguards.

ERISA does not require pension plans to be fully funded at all times, and in recent years the Verizon Plan has not been fully funded on most actuarial bases. Defs. Appx. 41 (Jacobs ¶ 10).[20] In contrast, the purchase of the Annuity Contract will transfer to Prudential assets in an amount that exceeds the value of the annuity commitments to all 41,000 retirees; these assets will be placed in a separate account; and the contract will impose on Prudential the obligation to use its general assets to support those commitments. So with regard to the primary source of benefit payments to the affected retirees, those retirees who transfer to Prudential will stand on *at least*

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[20] The Plan has at all times remained above the 80% funding level required under ERISA to avoid restrictions imposed on underfunded plans. Defs. Appx. 41 (Jacobs Decl. ¶ 10).

equal footing from a funding perspective as Plan participants at the time of closing, and that will likely remain the case for the life of this lawsuit.

Furthermore, Prudential will segregate assets to support the annuity commitment in a separate account, which may be used only to pay benefits or related expenses for plaintiffs and their fellow Verizon retirees. Such assets cannot be diverted to satisfy other Prudential obligations. At the same time, those assets do not *limit* Prudential's obligations. Although the separate account will be dedicated exclusively to the affected retirees, Prudential will be obligated to pay their annuity benefits even if the value of that separate account were to become deficient. *See* Defs. Appx. 63-64 (Miller Decl. ¶¶ 164-82); *cf. id.* at 43 (Jacobs Decl. ¶ 14).

The Court should also consider the fact, which Plaintiffs ignore, that Prudential's assets, including the assets in the separate account, must be conservatively invested under applicable insurance regulations and the terms of the DPA. *See id.* at 64 (Miller Decl. ¶ 175); *id.* at 44 (Jacobs Decl. ¶ 18). Indeed, in many respects, Prudential has less discretion than pension plan fiduciaries to undertake investment risk. *Id.*.[21]

2. <u>State Insurance Guaranty Associations Provide Meaningful, Additional Protections.</u>

Plaintiffs assert that the safety net for annuity payments under state insurance guaranty regimes are inferior to PBGC's backstop for pension plan payments. These assertions are overstated. As a threshold matter, insurance guaranty associations would become relevant to plaintiffs only in the extremely unlikely event that (i) the separate account was no longer sufficient to fund their entire annuity payments, *and* (ii) Prudential could not make up any

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[21] *See* JOHN H. LANGBEIN, ET AL., PENSION AND EMPLOYEE BENEFIT LAW 603 (4th ed. 2006) (recognizing that, under principles of prudent investing required by ERISA, "[n]o investment is per se too risky for fiduciary investing if the risk is properly compensated and is undertaken as part of an appropriately diversified portfolio.").

shortfalls with its remaining assets, *and* (iii) state-supervised rehabilitation of Prudential or a transfer of its assets and liabilities to other insurance companies, in a manner similar to a receivership, were insufficient to provide the necessary assets. Absent such remote circumstances, the identity of the safety net for retirement income will be irrelevant.

In acting in its settlor capacity when choosing to amend the Plan to purchase an annuity contract for the affected retirees, Verizon sought to understand how that change could affect the reliability of their future retirement income. As a result, Verizon understands that the annuity benefits have substantial protections. *See* Defs. Appx. 45, 46 (Jacobs Decl. ¶¶ 2-3, 27). An insurance guaranty association is the form of protection that is most remote and least likely to come into play for annuity benefits that have multiple structural safeguards.

In criticizing the protections of insurance guaranty associations, plaintiffs seem to presume that annuitants would receive *none* of their benefits from Prudential. For example, they allege that limited state association coverage might provide "as little as two years pension benefit replacement in case of default by Prudential on its annuity obligation." Compl. ¶ 48. That assertion presumes a *complete* default by Prudential: an extremely remote and unprecedented scenario. The more plausible – yet still very unlikely – scenario would involve payments by insurance guaranty associations to supplement relatively minor shortfalls in annuity payments. Defs. Appx. 44-45 (Jacobs Decl. ¶¶ 20-21). In the latter situation, the aggregate limits on guaranty association coverage would be much less significant.

At the same time, plaintiffs overstate the benefits of PBGC protection when asserting that its absence would constitute harm. The PBGC is not fully funded; indeed, it is currently reporting its greatest deficit ever. *Id.* at 46 (Jacobs Decl. ¶ 26). The PBGC depends upon pension plan premiums rather than federal appropriations, and it is not backed by the full faith

and credit of the United States. *Id.* Given the conservative regulatory requirements for Prudential's capital requirements and investments, *id.* at 41, 44 (Jacobs Decl. ¶¶ 6-8, 18), it seems unlikely that an economic scenario dire enough to bring state insurance guaranty associations into play to fulfill Prudential's annuity commitments would not also gravely affect many pension plan portfolios and the ability of the PBGC to backstop their retirement obligations.

In any event, the PBGC, like insurance guaranty associations, is merely a final safety net. Neither is likely to become actually relevant to plaintiffs, whether they are Plan participants or Prudential annuitants. Given the meaningful protections afforded by insurance guaranty associations when needed, their substitution for PBGC protection for retirement income does not constitute irreparable harm, even over the long term.

Finally, when considering plaintiffs' request for *interim* injunctive relief, the relevant inquiry is whether the substitution of state annuity protection for PBGC pension protection would constitute irreparable harm *during the pendency of the lawsuit*. Plaintiffs cannot plausibly demonstrate substantial risk of such harm. Edward Stone, on whose declaration they rely to denigrate state annuity protection (Pls. Appx. at 265-272), was quoted in an article published on November 30, 2012, as stating: "I'm not worried about Prudential in the next few years . . . [but] 10 or 20 years down the road: who knows?" Defs. App. 73. At the very least, the structural safeguards for Prudential annuity benefits will ensure the delivery of benefits through the conclusion of this action. Thus, even if speculative concerns about the loss of ERISA rights were credited, they deserve little weight in the balancing analysis.[22]

[22] Plaintiffs' contention that the absence of the PBGC safety net would constitute harm is undermined by relief they seek. Plaintiffs ask the Court to order that retirees be allowed to elect the immediate distribution, as a lump sum, of the present value of future pension benefits. *See*

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An interim injunction could cause substantial, concrete monetary harm to Verizon and Plan, ranging up to hundreds of millions of dollars (depending on the duration of the injunction and on variable market factors). By contrast, if the Court allows the annuity purchase to close on schedule, it is clear that plaintiffs and the putative class members will continue to receive their monthly payments from a fully-funded separate account for at least the duration of this lawsuit. Any purported harm to plaintiffs, especially during the pendency of the merits phase of this case, is wholly speculative. Accordingly, this factor too weighs heavily against granting an injunction.

V. THE PUBLIC'S INTEREST WOULD BE HARMED BY ENTRY OF INTERIM INJUNCTIVE RELIEF.

"Enforcing a contract promotes rather than disserves the public interest." *King Aerospace Commercial Corp., Inc. v. Al-Anwa Aviation, Inc.*, No. 3:08-CV-0999-L, 2008 WL 4585250, at *8 (N.D. Tex. 2008). By interfering with the implementation of the contract between the Verizon parties, the Plan, and Prudential, the interim relief plaintiffs seek would disserve the public interest.

To suggest otherwise, plaintiffs speculate that unless this transaction is enjoined, other plan sponsors might undertake similar annuity transactions, reducing the number of large pension plans and weakening the PBGC. Compl. ¶ 53. But that policy argument is one for the Congress or the Executive Branch to consider, not for the courts.

Compl. at 39 (Prayer ¶ 6); Pls. Supp. Memo. (Dkt. 19) at 32. That is an impermissible attempt to use litigation to impose a change in benefit design, because the Plan does not allow participants in pay status to belatedly elect a lump sum distribution. Ironically, the request also contradicts plaintiffs' theory of harm, because assets distributed in this fashion to retirees would thus be removed from PBGC protection. See *Beck*, 551 U.S. at 106.

VI. PLAINTIFFS MUST POST APPROPRIATE SECURITY.

Federal Rule of Civil Procedure 65(c) requires a movant to "giv[e] security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." As set forth above, Verizon and the Plan may suffer multi-million dollar damages if an injunction is entered. If the Court were to determine that an interim injunction would be appropriate here, Verizon respectfully requests that plaintiffs be required to provide appropriate security, in a manner determined by the Court in its discretion.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs' request for entry of a temporary restraining order and/or a preliminary injunction.

Respectfully submitted,

/s/ Thomas L. Cubbage III
Jeffrey G. Huvelle (*pro hac vice* application forthcoming)
Thomas L. Cubbage III (Texas State Bar No. 00783912)
Christian J. Pistilli (admitted *pro hac vice*)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, DC 20004
Tel.: (202) 662-6000
Fax: (202) 662-6291
jhuvelle@cov.com
tcubbage@cov.com
cpistilli@cov.com

Matthew D. Orwig (Texas State Bar No. 15325300)
Joanne R. Bush (Texas State Bar No. No. 24064983)
JONES DAY
2626 North Harwood Street
Dallas, TX 75201
Tel.: (214) 220-3939
Fax: (214) 969-5100
morwig@jonesday.com
jrbush@jonesday.com

Attorneys for the Verizon Defendants

Dated: December 5, 2012

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2012, I caused a true and correct copy of the foregoing to be served on all counsel who have appeared in this action to date via the Court's electronic filing system as set forth in Miscellaneous Order 61. Those counsel are:

Curtis L. Kennedy
8405 E. Princeton Avenue
Denver, CO 80237-1741
CurtisLKennedy@aol.com

Robert E. Goodman, Jr.
Kilgore & Kilgore Lawyers
3109 Carlisle St.
Dallas, TX 75204
reg@kilgorelaw.com

Gayla C. Crain
Spencer Crain Cubbage Healy & McNamara, pllc
1201 Elm Street, Suite 4100
Dallas, TX 75270
GCrain@spencercrain.com

Gregory F. Jacob
O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, DC 20006

/s/ Thomas L. Cubbage III
Thomas L. Cubbage III