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

WILLIAM LEE, JOANNE McPARTLIN, and EDWARD PUNDT, 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 INVESTMENT MANAGEMENT CORP., and VERIZON MANAGEMENT PENSION PLAN,	§	
Defendants.	§	

PLAINTIFFS' RESPONSE OPPOSING (Docket 79)
MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Plaintiffs William Lee, Joanne McPartlin, and Edward Pundt, by and through their counsel, file this response in opposition to Docket No. 79, the Verizon Defendants' motion to dismiss the Second Amended Complaint**.**

DATED this 29TH day of August, 2013.

Respectfully submitted,

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PRELIMINARY STATEMENT

After the Court issued Docket entry 77, the Memorandum Opinion and Order addressing the Verizon Defendants' motion to dismiss the Amended Complaint, Plaintiffs filed their Second Amended Complaint (Dkt. 78). Plaintiffs point out, as a courtesy and for the convenience of the Court and counsel for the Verizon Defendants that the following paragraphs in the Second Amended Complaint address the pleading issues with respect to the Amended Complaint that were noted in the Court's Memorandum Opinion and Order entered on June 24, 2013: 45, 46, 50- 52, 59- 60, 68-69, 73, 76- 77, 79, 91, 108-115, 117, 120-124, 132-133, 137 and Prayer, paragraphs B.8 and B.9. Notwithstanding the additions and corrections, the Verizon Defendants, again, move for dismissal of all four Counts in the Second Amended Complaint. The motion should be denied.

STANDARD OF REVIEW

The Verizon Defendants move to dismiss the Second Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In deciding the Rule 12(b)(6) motion, the Court must construe the Amended Complaint petition in the light most favorable to plaintiffs, accept as true all well-pleaded factual allegations, and draw all reasonable inferences in their favor. See, e.g., *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004). The Court may also consider those documents referenced in the Amended Complaint that are central to the Plaintiffs' claims. See, e.g., *Hoffman v. L & M Arts*, 774 F.Supp.2d 826, 829 n.2 (N.D. Tex. 2011) (Fitzwater, C.J.) (citing *Kane Enters. v. MacGregor (USA) Inc*., 322 F.3d 371, 374 (5th Cir. 2003)).

"To survive a Rule 12(b)(6) motion, the plaintiff[s] must plead 'enough facts to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litigation*, 495 F.3d

191, 205 (5th Cir. 2007) (quoting *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974 (2007)), *cert. denied*, 552 U.S. 1182, 128 S.Ct. 1230 (2008). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Katrina Canal*, 495 F.3d at 205 (quoting *Twombly*, 127 S.Ct. at 1965). "The court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Id*. (internal quotation marks omitted) (quoting *Martin K. Eby Construction Company v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)). The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid claim when it is viewed in the light most favorable to the plaintiff. *Great Plains Trust Co. v. Morgan Stanley Dean Witter*, 313 F.3d 305, 312 (5th Cir. 2002).

The United States Supreme Court has prescribed a "two-pronged approach" to determine whether a complaint fails to state a claim under Rule 12(b)(6). See *Ashcroft v. Iqbal*, 556 U.S. 652, 678, 129 S.Ct. 1937, 1949-50 (2009). The trial court must "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id*. at 1950. The trial court should then assume the veracity of any well-pleaded allegations and "determine whether they plausibly give rise to an entitlement of relief." *Id*. The plausibility principle does not convert Fed.R.Civ.Proc. Rule 8(a)(2) notice pleading into a "probability requirement," but "a sheer possibility that a defendant has acted unlawfully" will not defeat a motion to dismiss. *Id*. at 1949. A plaintiff need only "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The trial court, drawing on its judicial experience and common sense, must undertake the "context-specific task" of determining whether the plaintiff's allegations "nudge" its claims against the defendant "across the line from conceivable to plausible." See *id*. at 1950, 1952.

The trial court does not evaluate the plaintiff's likelihood of success; instead, it only determines whether the plaintiff has pleaded a legally cognizable claim. *United States ex rel. Riley v. St. Luke's Episcopal Hosp*., 355 F.3d 370, 376 (5th Cir. 2004).

ARGUMENT

I. <u>The Transferee Class Has Stated an ERISA Section 102(b) Claim</u>.

Count One of the Second Amended Complaint alleges that the Verizon Employee Benefits Committee breached a duty to make disclosure pursuant to ERISA Section 102(b), requiring SPDs to describe the "circumstances which may result in disqualification, ineligibility, or denial, or loss of benefits." 29 U.S.C. § 1022(b). No SPD ever informed any retiree that, prior to termination of the Plan, he or she might lose eligibility for benefits *provided by the Plan* as a result of an annuity transaction and, thereby lose all associated federal rights under ERISA, including the uniform PBGC protection. (Dkt. 78, SAC ¶ 79). However, the pertinent Department of Labor ("DOL") regulation promulgated under ERISA Section 102(b) requires that any SPD contain a statement

> clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction or recovery. . . of any benefits that a participant or beneficiary might otherwise reasonably expect <u>the plan to provide</u> on the basis of the description of benefits. . . (emphasis added).

29 C.F.R. Section 2520.102-3(*l*). An SPD, and especially the portion describing the circumstances under which a person's participation rights may be threatened, is necessarily essential, in informing employees and retirees of their rights, reasonable expectations and obligations under a pension plan.

Verizon Defendants take the position that "pre-existing [Plan] provisions expressly authorized terminations and spin-offs." (Dkt. 79-1 at p. 18). In other filings, Verizon

Defendants have contended they had the right to conduct an annuity transaction during ongoing Plan operations under the Annuitization Regulation, 29 C.F.R. § 2510.3-3(d)(2)(ii). (Dkt entry 64-1, pp. 6-7; Dkt. 29, p. 12, citing provisions of the regulation that "the transfer of liabilities may occur when a plan terminates or when the annuity contract is purchased by an ongoing plan."). [1]

Permission to enter into the Verizon/Prudential annuity transaction, whether under the Plan or the Annuitization Regulation, does not avail Verizon Defendants in resisting Plaintiffs' claim under ERISA Section 102(b). Clearly, an annuity transaction was perceived by the Verizon Defendants as a then exiting circumstance that may have resulted in the loss of Plan benefits. Pursuant to the statute and regulation, that circumstance should have been disclosed in the SPDs. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993), *cert. denied*, 510 U.S. 870, 114 S.Ct. 196 (1993) ("Section 1022(b) relates to an individual employee's eligibility under then existing, current terms of the Plan. . .). [2] In fact, SPDs relating to the Plan only disclosed that participants might receive benefits in the form of an annuity contract issued by an insurance company in the event of a plan termination. (App. 18).

Congress enacted ERISA to ensure that "if a worker has been promised a <u>defined pension benefit</u> upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive <u>it</u>." (emphasis added). *Nachman Corp. v. Pension Ben.Guar. Corp.*, 446 U.S. 359, 375, 100 S.Ct. 1723, 1733 (1980). There was no alternate

[1] The Court previously noted that the Annuitzation Regulation does neither expressly authorize nor prohibit a plan sponsor from transferring retirees out of an on-going plan into an insurance provided annuity. (Dkt. 77, p. 8, n. 9).

[2] *Wise* did not concern defined pension benefits, but concerned welfare benefits and the right of a plan sponsor to change unvested benefits.

promise accepted by the retirees that they would receive either an ERISA-protected defined pension benefit or a state regulated insurance annuity, at the sole choice of the Plan sponsor, after retirement commenced and the Plan began to pay benefits. Therefore, the Verizon Defendants' conduct unfairly defeated the Transferee Class's legitimate expectation that all retirees would continue to receive benefits under the Plan so long as there was not a full termination affecting every Plan participant's rights.

There is, moreover, no legal support for Verizon Defendants' further argument that a generally worded reservation of rights provision permitting changes and amendments suffices to comply with the more detailed disclosure requirements mandated by ERISA Section 102(b) and the companion federal regulation. Thus, no SPD provided adequate notice to the Transferee Class that, during ongoing operation of the Plan, they might be transferred outside ERISA's regulatory regime and thus lose valuable federal rights and PBGC guarantee.

Count One is not a challenge to a change in the payor or sponsor of the Plan's benefits. Quite simply, Plan benefits are no longer being paid to the Transferee Class. The ERISA-governed and PBGC-protected Plan benefits have been substituted and replaced by a non-federal regulated group insurance annuity maintained fully outside of the Plan.

For all the reasons stated, Verizon Defendants' motion to dismiss Count One of the Second Amended Complaint must be denied.

II. **The Transferee Class Has Stated a Breach of Fiduciary Duty Claim**.

Count Two of the Second Amended Complaint alleges that the Verizon Defendants breached ERISA fiduciary duties owed to the Transferee Class. (Dkt. 78, SAC ¶¶ 90-117).

While ERISA allows a corporate employer to play multiple roles, such as both the plan sponsor and the plan fiduciary, ERISA does require the entity with two hats wear only one at a

time, and wear only the fiduciary hat when making fiduciary decisions. *Pegram v. Herdrich*, 530 U.S. 211, 225, 120 S.Ct. 2143, 2152 (2000) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-444, 119 S.Ct. 755 (1999); *Varity Corp. v. Howe*, 516 U.S. 489, 497, 116 S.Ct. 1065 (1996). In Count Two, the Transferee Class contends that the Verizon Defendants did not carry out a standard plan termination so as to assume the plan sponsor settlor role of making decisions regarding the creation or termination of the Plan. The annuity transaction which disposed of more than half of the Plan's assets, together with 41,000 Plan participants, occurred while the Plan was still operating, making the decision to enter into it one squarely within the definition of ERISA fiduciary functions. In Count Two, the Transferee Class further contends that the Verizon Defendants breached their fiduciary duties when implementing the Plan amendment directing the annuity purchase, including VIMCO's deliberative process and the decisions concerning the terms of the purchased annuity.

A. There is No Federal Regulation Countenancing the Transaction.

In enacting ERISA, Congress wanted to make sure "that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it. The [PBGC] termination insurance program is a major part of Congress' response to the problem." *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 375, 100 S.Ct. 1723, 1733 (1980). While it is true that a key feature of ERISA's voluntary retirement system is the ability of a corporate employer to engage in a plan merger, spin-off or standard termination (as distinguished to one forced by the insolvency of a plan), discrimination is not permitted.

There is no federal regulation that either contemplates or countenances the very situation that occurred here. Both the federal regulation and the interpretative bulletin referred to in

support of Verizon Defendants' memorandum brief in support of their motion to dismiss address only the situations where there is either an annuity purchase at the beginning of a person's retirement or an annuity purchase when a standard termination occurs, affecting all plan participants. 29 C.F.R. § 2510.3-3(d)(2)(ii) ("Annuitization Regulation"); 60 Fed. Reg. 12328 (March 6, 1995) ("Interpretative Bulletin"). Neither the Annuitization Regulation nor the Interpretative Bulletin provide any approval for the Verizon Defendants' actions, which circumvented the stringent requirements and PBGC oversight attendant to a standard plan termination, as contemplated by ERISA Section 4041(a)(1)(b), 29 U.S.C. § 1341(a)(1)(b). Verizon Defendants provide no case law authority construing the Annuity Regulation to cover any transaction other than a purchase of an insurance annuity by a pension plan at the onset of a participant's retirement or at the point of plan termination under ERISA Section 4041(a)(1)(b), 29 U.S.C. § 1341(a)(1)(b).

B. The Verizon Defendants' Disposition of 41,000 Plan Participants and Almost Half of the Plan's Assets Were Fiduciary Functions.

Plaintiffs Lee and McPartlin submit that the removal of the Transferee Class together with over $8.5 billion in Plan assets pursuant to the annuity transaction was a fiduciary function and not a mere plan design function, as posited by the Verizon Defendants. "In general, 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 which consist of such actions as the administration of the plan's assets." See *Hughes*, 525 U.S. at 443, 119 S.Ct. at 763; *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-891, 116 S.Ct. 1783, 1789-1790 (1996) (holding that "[O]nly when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration, does a person become an [ERISA] fiduciary").

In this instance, the decision to amend the Plan wasn't concerned with changing the benefit formula or choosing which group of present and future workers could qualify for benefits, a run of the mill amendment involving the form and benefit structure of a pension plan, as occurred in both the *Hughes* and *Spink* cases. Rather, in this instance, the plan amendment was a proxy for exercising fiduciary control over allocation and disposition of more than half of the Plan's assets and nearly 40% of the fully qualified Plan participants, 41,000 of the total almost 100,000. Put simply, Verizon Defendants disposed of over $8.5 billion of Plan assets and kept the depleted Plan as an ongoing enterprise.

When Verizon decided to enter into the agreement for the Prudential annuity transaction, it was not an ordinary, but an extraordinary, corporate decision. When Verizon agreed to exchange pension plan assets in an ongoing plan for a group insurance annuity, Verizon was accordingly acting in a fiduciary capacity under ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), because it was specifically exercising authority and control respecting management or disposition of plan assets." [3]

The plain meaning of ERISA Section 3(21)(A) is that the act of choosing to transfer Plan assets to Prudential and choosing the group of Plan participants to be assigned to the Prudential annuity while the Plan continued to exist must be regarded as a "management" or "disposition"

[3] ERISA § 3(21)(A), states, in part, that a fiduciary is one who "(I) [E]xercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of [plan] assets." 29 U.S.C. § 1002(21)(A)(I). Individuals may acquire fiduciary status if they exercise the fiduciary functions set forth in ERISA § 3(21)(A). *Mertens v. Hewitt Assocs*., 508 U.S. 248, 262, 113 S.Ct. 2063 (1993) ("ERISA ... defines 'fiduciary' not in terms of formal trusteeship, but in functional terms of control and authority over the plan ...."); see 29 C.F.R. §§ 2509.75-8, 2510.3-21 (describing various functions that do create fiduciary status, such as exercising discretion with respect to purchasing, selling, disposing securities or property on behalf of the employee benefit plan.).

of a plan assets.[4] In carrying out the transaction, Verizon exercised control over both the Verizon Employee Benefits Committee and Verizon Investment Management Corporation with respect to management and disposition of Plan assets and Plan participants. The Verizon Defendants as a whole thus had a duty of prudence and loyalty.

The statute is always the starting point. ERISA states the duty of prudence as follows:

> [A] fiduciary shall discharge his duties with respect to a plan solely the interest of the participants and beneficiaries and— . . .
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . .

ERISA Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). The prudent man rule was borrowed from the common law of trusts. Bogert expresses the prudent man rule in language nearly identical to that of ERISA, stating: "In his management of the trust, the trustee is required to manifest the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question." G. Bogert and G. Bogert, *The Law of Trusts and Trustees* § 541, p. 167 (2d rev. ed. 1993). [5]

Verizon Defendants mistakenly contend that their conduct must be viewed as involving plan design in the wake of the Supreme Court's decision in *Beck v. PACE International Union*,

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[4] "Management" is defined as "the act or art of managing, as ... the conducting or supervising of something ... especially the executive function of planning, organizing, coordinating, directing, controlling, and supervising any ... activity with responsibility for results." Webster's Third New International Dictionary 1372 (2002). "Disposition" is defined as "the act or power of disposing ... [as in] placing elsewhere, a giving over to the care or possession of another, or a relinquishing." *Id*. at 654.

[5] The U. S. Supreme Court has long favored Bogert as an aid in interpreting the fiduciary provisions of ERISA by reference to the common law of trusts. See, e.g., *Firestone Tire and*

551 U.S. 96, 127 S.Ct. 2310 (2007). *Beck* involved an employer's decision to completely end its defined benefit pension plans by undertaking a standard termination. The Supreme Court made clear that "an employer's decision *whether* to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations.") (emphasis original). *Id.*, 551 U.S. at 101, 127 S.Ct. at 2315. The Verizon/Prudential annuity transaction under attack by the retirees did not involve either a termination or merger of the Plan. While not all of Verizon's business activities involve plan management or administration, Verizon's decision to jettison $8.5 billion of Plan assets, together with 41,000 retirees, while continuing with operation of the Plan, goes far beyond a settler function under either *Beck* or the other decisions noted. Thus, the holding in *Beck*, and the holdings of the other cases, are not dispositive here.

The Verizon Defendants cannot point to any court decision that declares a corporation can simply boot a group of retirees out of an ERISA-protected and PBGC-guaranteed defined benefit plan, yet keep the plan ongoing for everyone else. The situation here is unprecedented and the Court is faced with a case of first impression.

The selection of an annuity provider is also indisputably a fiduciary function. See 29 CFR §§ 2509.95–1, 4041.28(c)(3). The decisions whether to purchase a group insurance annuity within an ongoing plan and which already retired persons to assign to the annuity are also properly viewed as fiduciary in nature. Here, the Prudential annuity transaction had everything to do with managing Plan participants and disposing of Plan assets. Hence, the transaction raises the question whether the Plan fiduciaries were freed from fiduciary responsibilities by simply

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Rubber Co. v. Bruch, 489 U.S. 101 (1989), *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), *Varity Corp. v. Howe*, 516 U.S. 489 (1996), *Conkright v. Frommert*, 559 U.S. 506 (2010).

implementing the mandates of a plan amendment, as Verizon Defendants characterize their actions.

Plaintiffs contend that, if an amendment to a pension plan requires the purchase of a group insurance annuity, at the very least, plan fiduciaries must have first notified, consulted with and obtained the consent of, the affected retirees. When executing the Plan amendment's directive, the deliberative process of choosing one or more annuity providers should likewise have involved dialogue with the affected retirees. VIMCO and the Plan fiduciaries breached fiduciary duties by imprudently selecting a single group annuity provider, thus placing everyone in jeopardy of losing retirement benefits based upon the fortunes of a single insurer. It would have been best, more prudent, not to put all of the Plan's eggs in one basket but to contract with several or more insurance providers. The Transferee Class should have been allowed a choice in the matter. Different carriers necessarily afford different degrees of security. A prudent fiduciary would seek the retirees' consent and give them a voice and choice in the matter.

No doubt, both VIMCO and the appointed Independent Fiduciary, by acting secretively in total silence while deliberating about the annuity transaction, breached the well-established fiduciary duty to communicate with the potentially affected fiduciaries before entering into the Verizon/Prudential annuity transaction. It is undisputable that ERISA and its accompanying regulations essentially call for a "meaningful dialogue between the plan administrators and their beneficiaries." *Booton v. Lockheed Medical Benefit Plan*, 110 F. 3d 1461, 1463 (9th Cir. 1997). "There is nothing extraordinary about this; it's how civilized people communicate with each other regarding important matters." *Id.* The Transferee Class should have had some say in the matter considering their transfer into an insurance annuity was such a drastic departure from the

decades-long ERISA-governed pension regime in which the affected retirees participated.[6] But, there was no consideration of the retirees' wishes.

Verizon stands out as the lone business entity within this country that has neither consulted with its retirees nor allowed them a choice when making a decision to change from a defined benefit pension plan into an insurance provided annuity. The Court is requested to take judicial notice of the SEC filings made respectfully by both Ford Motor Company and General Motors Corporation, both revealing that when the pension plan sponsor decided to "de-risk" a defined pension benefit plan they prudently consulted with and allowed affected retirees a choice.[7]

VIMCO is a body serving as the designated plan fiduciary in control of Plan assets. While VIMCO must act in compliance with duly constituted plan amendments, it is not beholden to act in accordance with a corporate sponsor's wishes expressed in a Board resolution which is not a Plan amendment. Thus, contrary to Verizon Defendants' argument, VIMCO was not restrained by the Board's resolution stating that "[a]fter the annuity purchase, individuals who receive annuity certificates shall no longer be participants in or beneficiaries of the Plan under the Department of Labor's regulation at 29 C.F.R. § 2510.3-3(d)(2)(ii)." (See Defendants' brief, Dkt. 79-1, at p. 12, n. 8). Indeed, nowhere does the operative Plan amendment incorporate the terms of the Board's resolution. (App. 60-62).

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[6] It should be no solace for the Verizon Defendants that VIMCO appointed a so-called "Independent Fiduciary" to carry out the preordained mission to choose Prudential as the sole annuity provider. The Independent Fiduciary did not consider the wishes of the affected retirees.

[7] See: http://www.sec.gov/Archives/edgar/data/37996/000115752312002199/0001157523-12-002199-index.htm (Ford's Form 8-K filed April 27, 2012); http://www.sec.gov/Archives/edgar/data/1467858/000146785812000036/0001467858-12-000036-index.htm (GM's Form 8-K filed June 1, 2012).

In general, when a plan or policy requires the performance of an act of plan management or administration in a specific manner, ERISA's fiduciary duties are not implicated. However, the applicable Plan amendment in this instance did not dictate that either only Prudential would be the annuity provider or that the group annuity be purchased and maintained outside of the Plan. It is the Transferee Class's contention that since the Plan amendment permitted some leeway in how the annuity transaction would be structured, then the discretionary choice on how to perform the annuity transaction is cabined by ERISA's fiduciary duties. No doubt, in accordance with the terms of the Plan amendment directing VIMCO to select an annuity provider, VIMCO had the discretion and could have required Prudential to provide the Transferee Class members the same sort of annual disclosures as required by ERISA, which the retirees were accustomed to receiving. But no such term is in the group annuity contract. Likewise, VIMCO could have dictated that Prudential insure that every retiree, regardless of state residency, have the same maximum insurance level protection equivalent to that provided by the PBGC for participants of a defined pension benefit plan. But no such terms are set forth in the group annuity contract. VIMCO, as fiduciary for the affected retirees, failed to act in the best interest of the Transferee Class.

Since implementation of the decision to purchase a group insurance annuity and the transfer of retirees was a fiduciary function, it would have been most prudent for the Plan fiduciaries to insist that any group annuity purchased with Plan assets be maintained within the ongoing Plan so as to maintain the affected retirees' uniform level of PBGC protection and the same panoply of ERISA rights and protections as afforded to all other retirees who remained in the ongoing Plan. By allowing thousands of retirees to be treated differently from others in the annuity transaction, Plan fiduciaries breached their duty of impartiality, a "duty to administer the

trust in a manner that is impartial with respect to the various beneficiaries of the trust." Restatement, Trusts, Third § 79.

C. **The Annuity Transaction Diminished the Overall Value of the Retirees' Pension Benefit and Was Done Without the Retirees' Consent**.

The Verizon Defendants contend that since the annuity transaction resulted in the transferred retirees receiving the same monthly payment, the retirees' suffered no loss in benefits. That is not true. It cannot be disputed that while each retiree was in the Plan, he or she received not only a monthly payment but was also the beneficiary of an annual premium paid by the Plan to the PBGC so as to provide each retiree a uniform guarantee. That very PBGC guarantee has substantial value and it has been taken away without the retirees' consent. Furthermore, while in the Plan, each retiree's pension payment was, without question, protected from all creditors claims' and fully exempt from any bankruptcy estate. Now, all of that protection has been lost. The Transferee Class has lost numerous other federal legal rights still enjoyed by the retirees in the ongoing Plan.[8] The transferred retirees "must rely primarily (if not exclusively) on state-contract remedies if they do not receive proper payments or are otherwise denied access to their funds." *Beck*, 551 U.S. at 106, 127 S.Ct. at 2318.

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[8] 29 U.S.C. §1001(b) declares that it is the policy of the statute to protect the interests of participants and their beneficiaries "by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. §1132(a) (1)(B) grants participants and beneficiaries the right to commence a "civil action" and provides that "the district courts shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties." 29 U.S.C. §1132(e)(2) then makes it easy for participants and beneficiaries to file a civil action by creating one of the most liberal venue provisions in federal law. An action may be brought "in the District Court where the plan is administered, where the breach took place, or where a defendant resides or may be found." In their motion to dismiss, the Verizon Defendants pay no attention to the Transferee Class's loss of ready access to the federal courts and their other lost ERISA rights such as annual disclosures and fiduciary accountability.

Verizon Defendants did not obtain consent from any retiree to transfer him or her to Prudential's annuity. In *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir.1994), *aff'd on other grounds*, 516 U.S. 489, 116 S.Ct. 1065 (1996), the trial court summarily concluded that an employer violated its fiduciary duties under ERISA when it transferred its obligation to pay retirees' benefits to another company without obtaining the retirees' consent. The Eighth Circuit affirmed that determination, ruling:

> As we have indicated, these employees were simply "transferred" to MCC without their knowledge or consent. They were given no explanation, they were not asked for permission, and they were not even informed of the "transfer" until MCC went into receivership. Such a complete disregard of the rights and interests of beneficiaries is a clear breach of fiduciary duty in violation of Section 1104(a)(1), and the named individual plaintiffs have a right of action for redress under Section 1132(a)(3). An obligor (here, M-F and Varity) cannot free itself of contractually created duties without the consent of the persons to whom it is obligated. Restatement (2d) of Contracts, Section 318(3), comment d. M-F and Varity cannot unilaterally relieve themselves of obligations to the individual retirees. Their attempt to do so is of no legal effect, and we uphold the District Court's ruling in favor of the ten named individual plaintiffs.

Id., at 756. The Eighth Circuit found a breach of fiduciary duty in the fact that retirees' benefit obligations were transferred to the new company without their consent. The *Howe* case decision proceeded to the Supreme Court and was affirmed, but the Justices declined to review this portion of the Eighth Circuit's opinion only because it construed the petition for certiorari as not having raised the issue. Although in a later case, the Supreme Court ruled that employers "are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate *welfare* plans, *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 78, 115 S.Ct. 1223, 1228 (1995) (emphasis added), the Supreme Court has neither taken the position nor ruled that an employer is free to do what the Verizon Defendants did with respect to an ongoing *pension* plan.

Article 1.2 of the Plan dictates that the terms of the pension plan in effect whenever each Plaintiff retired to govern his or her respective rights. When Plaintiff Lee and Plaintiff McPartlin retired, each was protected by the following provision set forth within subpart (c) of Article 15.1 of the NYNEX Management Pension Plan:

> (c) ***General Benefit Protection***.
> 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. (emphasis added).

(App. 286). Lacking both Plaintiff Lee's and Plaintiff McPartlin's consent, the Verizon Defendants' consummation of the Prudential annuity transaction, resulting in the loss of all federal protections, accordingly violated their grandfathered rights under the NYNEX Management Pension Plan. The entire Transferee Class, all with vested benefits, should have first been consulted and then their consent obtained before the Verizon Defendants reached agreement to the annuity transaction.

For all the reasons stated, Verizon Defendants' motion to dismiss Count Two of the Second Amended Complaint must be denied.

III. The Transferee Class has Stated an ERISA Section 510 Claim.

Count Three of the Second Amended Complaint alleges that the Verizon Defendants violated ERISA Section 510. (Dkt. 78, SAC ¶¶ 118-129). Specifically, the Transferee Class alleges that the Verizon/Prudential annuity transaction violated Section 510 in that Verizon was motivated by a desire to deprive the Transferee Class of the right to continued participation in the ongoing Plan, otherwise deprive them of their rights under ERISA and deprive them of the PBGC uniform guarantee of their benefits. The Transferee Class contends they had a right to continued participation in the Plan until such time as the Plan was terminated, and that Verizon

had no legitimate business justification for removing them from the Plan, but giving preferential treatment to other groups of retirees who were allowed to remain in the Plan. As a result of the annuity transaction, 41,000 management retirees were expelled from the Plan while over 6,000 other similarly situated management retirees and at least 50,000 other Plan participants were unaffected.

ERISA Section 510, "Interference with Protected Rights," make illegal such discrimination among similarly situated classes of plan beneficiaries. It reads in pertinent part: "It shall be unlawful for any person to discharge, fine, suspend, *expel*, discipline, or *discriminate* against a participant or beneficiary. . . for the purpose of interfering with the attainment of any right to which such participant my become entitled under the plan, [or] for exercising any right to which he is entitled to under the provisions of an employee benefit plan, this title or Welfare and Pension Plans Disclosure Act." (emphasis added). 29 U.S.C. § 1140. The Fifth Circuit's own review of ERISA's legislative history "found nothing to suggest that Congress intended to protect the pension and welfare benefits of active employees any more strenuously than that of retirees." *Heimann v. National Elevator Industry Pension Fund*, 187 F.3d 493, 508 (5th Cir. 1999), *overruled on other grounds*, *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003). Instead, Congress's aim was to safeguard equally the rights of all participants. The Fifth Circuit has declared:

> ERISA's basic purpose is "to strengthen and improve the protections and interests of participants and beneficiaries of employee pension and welfare plans." s. Rep, No. 93-127. See also, H.R. Rep. No. 95-533, stating that the "primary purpose of the bill is the protection of individual pension rights[.]" ERISA's basic purposes, plain words and legislative history, require a reading of §§ 510 and 502(a)(3) that

> provides all participants and beneficiaries, including former employees, former union members, and retirees with a remedy for economic retaliation because of participants' and beneficiaries' exercise of pension plan rights. (citation omitted).

Heimann, 187 F.3d at 508. [9]

By choosing to remove from the Plan the pensions of approximately 41,000 retirees and entering into the Prudential annuity transaction without there being a complete termination of the Plan, Verizon, the Verizon EBC and VIMCO necessarily had the specific intent to violate ERISA, to discriminate against and expel Plaintiffs and the putative class of retirees from ongoing participation in the Plan and to interfere with retirees' rights and protections accorded by the terms of the Plan and ERISA. The retirees' statutory rights under ERISA and PBGC protection could have been preserved had Verizon Defendants either transferred the retirees into another ERISA-regulated defined benefit plan or purchased the group annuity as an asset in the ongoing Plan. No reason has been suggested by Verizon Defendants while neither satisfactory alternative was pursued.

The primary Plan right interfered with by the Verizon/Prudential annuity transaction was the Transferee Class's right to continued participation in the Plan until such time as their respective vested pension benefits were directly paid to them in full. The current SPD for the Plan states, in pertinent part:

> ***When participation ends***
> You are a plan participant as long as you have a vested benefit [i.e. accrued] in the plan that has not been paid to you in full. (emphasis in original). **(App. 19)**.

Clearly, the SPD reflects that, until all pension benefits from the Plan are paid to the retiree – i.e., received by the retiree – he or she will continue participating in the ongoing Plan. Without their

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[9] *Heimann's* analysis with respect to a different legal issue, ERISA preemption and removal of a state filed action, was subsequently overruled. *Arana,* 338 F.3d. at 440.

consent and in violation of the Plan, Plaintiffs' and putative class members' rights to receive a full distribution of their respective vested pension benefits were defeated. Before the retirees' full benefits were paid directly to the retirees, they were expelled from the Plan.

The expulsion and discrimination against the Transferee Class is by its terms a violation of Section 510. Verizon Defendants cannot credibly argue otherwise, including by arguing the issue on the basis that Prudential has stepped into Verizon's shoes as Plan sponsor. Prudential has no role with respect to the Plan and is not subject to either ERISA or the PBGC.

The Verizon Defendants argue there has been no ERISA Section 510 violation only by misapplying the Fifth Circuit's seminal ERISA Section 510 case. *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir.1991), *cert. denied sub nom. Greenberg v. H & H Music Co.*, 506 U.S. 981, 113 S.Ct. 482 (1992), concerned a welfare benefit "to which an employee may have conceivably become entitled." The appellate court held that an employer could amend the plan so as to reduce the lifetime maximum benefit available for Acquired Immune Deficiency Syndrome ("AIDS") claims from $1,000,000.00 to $5,000.00. While this plan amendment affected only those plan members who wished to make AIDS related claims, and thus, in a sense, "discriminated" against those plan members with AIDS, the appellate court held it did not violate Section 510 because the change applied to all plan members. *McGann*, 946 F.2d at 404.

By contrast in this case, Verizon Defendants have not applied a uniform change to all Plan participants. Notwithstanding the fact that the Plan had almost 47,000 retirees of equal status, all receiving fixed monthly annuity payments, the Verizon Defendants expelled 41,000 retirees from the Plan and kept within the ongoing Plan 6,000 previously similarly situated management retirees.

Verizon Defendants do not advance any legitimate, nondiscriminatory reason for dividing the retirees and maintaining full ERISA protection for a group of 6,000 retirees while not doing so for the other 41,000 retirees. Such a purely partial transfer of retirees out of an ongoing pension plan in the middle of their retirement years demonstrates a discriminatory intent and thwarts Congress's aim to safeguard equally the rights of all Plan participants. *Heimann,* 187 F.3d at 508.

The Fifth Circuit has not directly addressed the legal issue of whether ERISA Section 510 may be utilized to challenge a discriminatory pension plan amendment. *Hines v. Mass. Mut. Life Ins. Co.*, 43 F.3d 207, 210 n.5 (5th Cir. 1995). In their latest memorandum brief in support of their motion to dismiss, Dkt. 79-1 at p. 17, Verizon Defendants, however, misrepresent the holding of three appellate court decisions in an attempt to support their proposition that ERISA Section 510 cannot be the basis for challenging a discriminatory plan amendment. *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491 (3rd Cir.1994), *cert. denied*, 513 U.S. 1149, 115 S.Ct. 1099 (1995); *Mattei v. Mattei*, 126 F.3d 794 (6th Cir. 1997); and *Deeming v. American Standard, Inc.,* 905 F.2d 1124 (7th Cir. 1990). None of the three cases supports the Verizon Defendants' position.

In *Haberern*, the defendant employer had altered the terms of its ERISA welfare plan so as to reduce life insurance coverage for <u>all</u> persons over the age of fifty-six, while raising coverage for all others under age fifty-six, an amendment that resulted in hurting the plaintiff alone, the only person over age fifty-six. In deciding whether this sort of "discrimination" was actionable under ERISA Section 510, the Third Circuit adopted the employer's argument that "while [§ 1140] prohibits discrimination against a plan participant for the purpose of interfering with the attainment of plan rights, it does not prohibit plan amendments which affect only one

person," *Haberern*, 24 F.3d at 1502. In this case approximately 41,000 more than one individual is involved.

In *Mattei v. Mattei*, 126 F.3d 794 (6th Cir. 1997), the widow brought suit against her daughter and her deceased husband's estate for refusing to make payments to her as retaliation since she had exercised her rights to receive certain death benefits under a pension plan. The underlying dispute in *Mattei* did not, however, involve a plan amendment. The Verizon Defendants cite to mere dicta not pertaining to the decision's holding. (Dkt. 79-1, p. 17). In a divided opinion, the result was actually a ruling that the widow's state law claim was properly brought under ERISA Section 510. *Mattei,* 126 F.3d. at 806.

In *Deeming v. American Standard, Inc.,* 905 F.2d 1124 (7th Cir. 1990), the appellate court noted in deciding the case, that the precise parameters of ERISA Section 510 had not yet been determined and stated that an ERISA Section 510 claim requires "an allegation that the employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way." *Id.*. at 1127. Subsequently, in *Feinberg v. RM Acquisition, LLC*, 629 F.3d 671 (7th Cir. 2011), the same appellate court ruled that the *Deeming* "language is dictum," disagreeing that the statute is limited to employer-employee situations and declaring that "[t]here is more to the statute." *Id.*, at 675.

In the wake of the Fifth Circuit's *McGann* decision, courts within the Fifth Circuit have held that an employer should provide uniform treatment to participants in a retirement plan. *Carrabba v. Randalls Food Markets, Inc*., 145 F.Supp.2d 763 (N.D. Tex. 2000) (citing *Frontier Airlines, Inc. v. Frontier Airlines, Inc., Pilot's Pension Board (In re Frontier Airlines, Inc.*), 84 B.R. 724, 729 (Bkrtcy. D. Colo.1988) ("ERISA contemplates equality of treatment among the covered employees of equal employment status"). In *Taylor v. Bank One, Texas, N.A.*, 137 B.R.

624 (S.D. Tex. January 15, 1992), the court ruled the employer violated ERISA Section 510 by attempting to exclude one group of retirees while maintaining plan participation for another group of retirees, stating

> Bank One has not attempted to apply a uniform change to all ERISA plan participants. Rather, it has attempted to exclude the Subject Participants entirely, while still providing benefits to the Bank One Participants. *McGann* does not sanction such activity. Indeed, *McGann* makes it clear that section 510 prohibits discrimination "motivated by a desire ... to deprive an employee of an existing right to which he may become entitled."

Id., 137 B.R. at 643. These rulings are in conformity with the Supreme Court's pronouncement that plan participants and beneficiaries be treated fairly. *Varity Corp. v. Howe*, 516 U.S. 489, 506, 116 U.S. 1065, 1075 (1996) (citing Bogert & Bogert, Law of Trusts and Trustees § 543, at 218-219 (duty of loyalty requires trustee to deal fairly and honestly with beneficiaries); 2A Scott & Fratcher, Law of Trusts § 170, pp. 311-312 (same); Restatement (Second) of Trusts § 170 (same).

In light of the cited authorities, Verizon Defendants' motion to dismiss Count Three of the Second Amended Complaint must be denied.

IV. **The Non-Transferee Class Has Stated an ERISA Breach of Fiduciary Duty Claim**.

Count Four of the Second Amended Complaint is brought, pursuant to ERISA Section 502(a)(2) by Plaintiff Pundt and the Non-Transferee Class for the sole benefit of the Plan. (Dkt. 78, ¶¶ 130-136). 10 Specifically, the Non-Transferee Class alleges that the Prudential annuity

[10] ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides that a plan participant may bring a civil action against fiduciaries for breaches of their duties of loyalty and prudence as articulated in ERISA § 409(a). Plaintiff Pundt does not bring suit under § 502(a)(2) to recover personal damages for misconduct, but rather he seeks recovery on behalf of the Plan. *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 105 S.Ct. 3085 (1985). Notably, ERISA Section 502(a)(2) does not give direct standing to a pension plan; there must be someone to bring suit on behalf of the plan.

transaction depleted the Plan's actuarial funding (assets by comparison with predictable obligations) to a dangerously low approximately 66% level (*id.*, ¶ 45) while, at the same time, to facilitate the transaction, approximately $1 billion of Plan assets was applied towards expenses, not for administering the ongoing Plan, depleted or otherwise, but merely for settlor expenses associated with the transaction, including commissions and legal fees generated by many third parties, including consultants to the Verizon/Prudential annuity transaction. This depletion of the Plan and this incurrence by the Plan of expenses which should have been paid out of Verizon operating revenues are the heart of Count Four. (*Id.*, ¶ ¶ 114-115, 132). The Non-Transferee Class also contends the group annuity contract purchased by the Plan should have remained in the Plan as part of the Plan's portfolio of assets. (*Id.*, ¶¶ 133-35). The Non-Transferee Class requests the Court grant equitable and remedial relief for the benefit of the Plan, including an order requiring reversal of any transfer of Plan assets by VIMCO from Verizon's master trust to Prudential and restoration of all losses to the Plan and Master Trust. (*Id.*, ¶ 136, Prayer, ¶ B.7-9). All relief is sought for the benefit of the Plan.

A major component of Count Four is that Verizon Defendants used Plan assets, not for the benefit of Plan operations, but for the economic benefit of Verizon, which chose to have Prudential take over its pension responsibilities for the Transferee Class. In essence, the Non-Transferee Class asserts a claim for disgorgement of Verizon's illicitly obtained benefit. Generally, disgorgement claims for breach of fiduciary duty do not require that a plaintiff personally suffer a financial loss, as relief in a disgorgement claim "is measured by the defendant's profits." Restatement (Third) on Restitution and Unjust Enrichment § 51 cmt. a (2011); see also id. § 43 cmt. d (stating a claim based on a breach of the duty of loyalty may be brought "without regard to economic injury"); id. (providing examples where fiduciary is liable

for gains even though plaintiff suffered no loss). This is because disgorgement claims seek not to compensate for a loss, but to "deprive[ ] wrongdoers of ill-gotten gains." *Commodity Futures Trading Comm'n v. Am. Metals Exchange Corp*., 991 F.2d 71, 76 (3rd Cir.1993) (quotation omitted). See *S.E.C. v. Huffman*, 996 F.2d 800, 802 (5th Cir.1993) ("[D]isgorgement is ... an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs" rather than "aim to compensate the victims of the wrongful acts ...." (citations omitted)). A requirement that there be some showing of personal loss of a plan beneficiary who is defending the financial integrity of a pension plan would allow fiduciaries to retain ill-gotten profit—exactly what disgorgement claims are designed to prevent—so long as the breaches of fiduciary duty do not immediately, as opposed to prospectively, harm the plan or beneficiaries.

Accordingly, the nature of disgorgement claims under ERISA, as recognized in the cited cases and others like them, dictate that a financial loss to the plaintiff as such is not required for a plaintiff's standing as such a loss is not an element of a disgorgement claim. Despite the fact that the Non-Transferee Class' claim is in the nature of a disgorgement claim, the Verizon Defendants erroneously insist that the class representative, Plaintiff Pundt, must show personal harm before he can carry forward with Count Four.

A. Plaintiff Pundt Has Article III Standing Based On The Invasion Of His Statutory Right To Proper Management Of Trust Assets Held On His Behalf.

There can be no dispute that Plaintiff Pundt, as a participant in the Plan, has statutory standing to bring Count Four on behalf of the Plan. However, Verizon Defendants contend Count Four must be dismissed on the grounds that Plaintiff Pundt lacks Article III standing because he has not suffered a personal "injury in fact" sufficient to confer Article III standing. Plaintiff Pundt has alleged losses to Plan assets held on his behalf as a direct result of the fiduciary

mismanagement of Plan assets in violation of ERISA. The invasion of his statutory right to proper management of Plan assets gives him a concrete, personal stake in the case and, hence, the "injury in fact" required for Article III standing.

Article III requires a party seeking to invoke federal court jurisdiction to demonstrate an "injury in fact," a causal relationship between the injury and the challenged conduct, and likelihood of redressibility. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 (1992). "Injury in fact" exists when: (1) there is "an invasion of a legally protected interest;" (2) the "invasion" is "concrete and particularized"; and (3) the "invasion" is "actual or imminent, not conjectural or hypothetical." *Id*. The Supreme Court has long recognized that the "injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Lujan*, 504 U.S. at 578, 112 S.Ct. at 2145 (quoting *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206 (1975), and *Linda R.S. v. Richard D*., 410 U.S. 614, 617, n.3, 93 S.Ct. 1146, 1148, n.3 (1973)); see also *Massachusetts v. EPA*, 549 U.S. 497, 516, 127 S.Ct. 1438 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," so long as it "identifie[s] the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit.").

ERISA gives Plaintiff Pundt and all other employee benefit plan participants legally protected interests in the Plan and requires fiduciaries to hold Plan assets in trust for the exclusive benefit of the plan's participants. ERISA Sections 403, 404, 29 U.S.C. §§ 1103, 1104. Plaintiff Pundt has the right to have the Plan assets managed solely in the interests of Plan participants and beneficiaries with prudence, loyalty, and no self-dealing. ERISA Section 404, 29 U.S.C. § 1104.

Under ERISA Section 502(a)(2), Congress has identified the injury it seeks to vindicate, i.e., losses to a pension plan resulting from a fiduciary breach, ERISA Section 409, 29 U.S.C. § 1109, and identified the persons entitled to bring suit, i.e., participants and beneficiaries, such as Plaintiff Pundt, fiduciaries, and the Secretary. 29 U.S.C. § 1132(a)(2); *Massachusetts*, 549 U.S. at 516, 127 S.Ct. at 1452-53. Congress purposefully required plan fiduciaries to hold plan assets in trust for the exclusive benefit of participants, thereby creating a beneficial interest in the trust that is correlative to the plan trustee's fiduciary duties. ERISA Sections 403, 404, 29 U.S.C. §§ 1103, 1104.

The Non-Transferee Class alleges, among other things, that Verizon Defendants violated the clear and explicit Plan requirement that all funding be applied so as to benefit Plan participants and beneficiaries. The Non-Transferee Class also alleges that Verizon Defendants violated ERISA Section 404(a)(1) when they paid expense with Plan assets, not for the administration of the Plan and the exclusive benefit of the Plan participants and their beneficiaries, but in order to avoid having to use corporate revenues which should have been spent. The deprivation of their statutory rights and Plan protections gives rise to a sufficiently concrete and particularized injury to allow Plaintiff Pundt and the Non-Transferee Class to seek injunctive relief, even if they cannot establish that pecuniary harm has occurred to anyone in particular. To hold otherwise would leave the Plan participants powerless to rein in the fiduciaries' allegedly imprudent behavior until after actual damage had been done.

> Requiring a showing of loss in such a case would be to say that the fiduciaries are free to ignore their duties so long as they do no tangible harm, and that the beneficiaries are powerless to rein in the fiduciaries' imprudent behavior until some actual damages had been done. This result is not supported by the language of ERISA, the common law, or common sense.

Shaver v. Operating Eng'rs Local 428 Pension Trust Fund, 332 F.3d 1198, 1203 (9th Cir. 2003).

In addition, under 29 U.S.C. § 1109(a), ERISA provides that a plan can recover against fiduciaries regardless of whether or not the plan suffered an economic financial loss. See *Leigh v. Engle*, 727 F.2d 113, 122 (7th Cir.1984) ("ERISA clearly contemplates actions against fiduciaries who profit by using trust assets, even where the plan beneficiaries do not suffer direct financial loss."). "The purpose behind this rule is to deter the fiduciary from engaging in disloyal conduct by denying him the profits of his breach." *Amalgamated Clothing & Textile Workers Union v. Murdock*, 861 F.2d 1406, 1411 (9th Cir.1988) (citing G. Bogert and G. Bogert, The Law of Trusts and Trustees § 543, at 218 (2d ed.1978). ERISA does not require either a plan participant or beneficiary to suffer a personal financial loss in order to bring a suit against a fiduciary for breach of the duty to act in the best interest of plan participants and beneficiaries. ERISA provides that a fiduciary "shall ... discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... for the exclusive purpose of ... providing benefits to participants and their beneficiaries" and that the fiduciary "shall not ... deal with the assets of the plan in his own interest or for his own account." 29 U.S.C. §§ 1104(a)(1), 1106(b) (emphases added).

Moreover, the Fifth Circuit and other appellate courts have held that ERISA statutory violations are *per se* violations, for which lack of harm is not relevant because Congress sought to categorically bar certain actions and to remedy fiduciary violations. *Donovan v. Cunningham*, 716 F.2d 1455, 1464-65 (5th Cir. 1983); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1213 (2nd Cir. 1987); *National Securities Systems, Inc. v. Iola*, 700 F.3d 65, 94 & n.24 (3rd Cir. 2012); *Chao v. Hall Holding Co.*, 285 F.3d 415, 439 (6th Cir. 2002); *Patelco Credit Union*

v. Sahni, 262 F.3d 897, 911 (9th Cir. 2001); *Etter v. J. Pease Const. Co., Inc*., 963 F.2d 1005, 1010 (7th Cir. 1992). By the nature of the holdings of these decisions, the decisions assumed constitutional standing and correctly recognized that Congress expected participants would have such standing to allege prohibited transactions regardless of whether they individually experienced pecuniary harm.

As noted in Verizon Defendants' brief, several appellate courts have found plaintiffs to be without Article III standing. However, this was because the alleged breaches of fiduciary duty occurred when the pension plan had a surplus and resulted in no economic harm. See *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906–07 (8th Cir.2002) (holding that an ERISA plaintiff lacked standing because the plan portfolio had a surplus and thus did not experience actual injury); *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013) (upholding dismissal of plaintiffs' claim regarding purportedly improper and excessive fees paid by the overfunded pension plan since any recovery by the plaintiffs' would have absolutely no effect on the plaintiffs' entitlement to benefits).

In contrast, Count Four centers around conduct that put the Plan at-risk, and Plan assets were used to pay expenses that should have been borne by Verizon corporate revenues. About $1 billion from Plan assets was used by Verizon not for administration of the ongoing Plan but for establishment of the ongoing group life insurance annuity, including payment of legal fees, consultant fees actuarial and accounting fees, none serving to benefit the ongoing Plan and the Non-Transferee Class.

In their latest brief, Verizon Defendants chose not to cite any specific legal authority for their Article III standing argument, instead incorporating by reference their arguments in their prior memorandum brief, arguing Count Four should be dismissed because Plaintiff Pundt has

not alleged he suffered any personal harm. However, even if there was no direct harm to Plaintiff Pundt, when the Verizon Defendants engaged in the annuity transaction and used Plan funds to pay expenses that should have been charged to corporate revenues, Pundt, as a member of the Non-Transferee Class, met the test of Article III standing. All of the Plan assets continued to be held in trust for the benefit of all Plan participants and beneficiaries, and the fiduciary duties Verizon Defendants allegedly violated are owed to the Non-Transferee Class of participants and beneficiaries. To put it another way, since Congress gave statutory standing to Plaintiff Pundt to recover plan losses, enforce the terms of the Plan, enforce the provisions of ERISA and to seek other "appropriate relief," 29 U.S.C. § 1132(a)(2), the only "injury-in-fact" necessary is that to the Plan. No more is needed to establish the "injury-in-fact" required for Plaintiff Pundt to have Article III standing.

B. Count Four States A Claim That the Plan Funds Were Improperly Used To Pay Verizon Corporate Expenses.

In Count Four of the Second Amended Complaint, Plaintiff Pundt alleges the Plan was charged with expenses that should have been charged to Verizon corporate revenues. In connection with the annuity transaction, Verizon transferred to Prudential and Prudential agreed to assume responsibilities for Plan liabilities of $7.4 billion. However, Verizon gave Prudential Plan assets of almost $8.5 billion. Plaintiff Pundt contends "the extra $1 billion payment was applied towards expenses, not for administering the ongoing Plan, but for settlor expenses, including commissions and legal fees generated by many third parties, including consultants to the Verizon/Prudential annuity transaction, thus, violating Section 8.5 and the terms of the Master Trust. There was a breach of the general ERISA duty to use Plan monies to pay only reasonable expenses of Plan administration. Those expenses and fees should have been charged

to Verizon's operating revenues, not charged to the Plan and Master Trust." (emphasis original) (Dkt. 78, ¶ 132).

A plan sponsor does not have license to treat plan assets as an interest free loan to pay corporate plan sponsor expenses. The annuity transaction was carried-out at the convenience of the settlor and did not involve the ongoing administration of the Plan. The DOL takes the position that "[e]xpenses incurred in connection with the performance of settlor functions would not be reasonable expenses of a plan as they would be incurred for the benefit of the employer and would involve services for which an employer could reasonably be expected to bear the cost in the normal course of its business operations. DOL Advisory Opinion 2001-01A: http://www.dol.gov/ebsa/regs/aos/ao2001-01a.html. There has been neither an allegation nor evidence presented that all of the extra billion dollars paid by the Plan to the Prudential were for both necessary and reasonable expenses incurred by the Plan. There are numerous unresolved fact issues that cannot be determined when ruling on the pending Rule 12(b)(6) motion to dismiss.

C. Count Four States A Claim That the Group Annuity Should Have Remained in the Ongoing Plan.

In Count Four of the Second Amended Complaint, Plaintiff Pundt alleges "[I] would have been in the best interests of all remaining Plan participants not transferred to Prudential (the "Non-Transferee Class") for the group annuity contract purchased by the Plan to have remained in the Plan as part of the Plan's portfolio of assets. The Verizon Defendants breached their fiduciary duty to the Non-Transferee Class when implementing the settlor's decision to purchase a single group annuity and remove that purchase from the ongoing Plan's financial portfolio." (Dkt. 78, ¶ 133). Upon information and belief, the annuity transaction depleted the Plan's

portfolio of fixed income securities (i.e., bonds and U.S. Treasuries) and private equity investments. (Dkt 30, Nebens' Declaration, pp. 36-37 of 53, ¶ 7). Verizon Defendants cannot dispute the fact that the annuity transaction left the Plan in a far less stable financial condition, a situation that is not in the best interests of the Non-Transferee Class, and that could have been avoided by the annuity being purchased by the Plan.

Accordingly, Verizon Defendants' motion to dismiss Count Four of the Second Amended Complaint must be denied.

CONCLUSION

For all the foregoing reasons, the Court should deny Docket No. 79, the Verizon Defendants' Motion to Dismiss the Second Amended Complaint.

DATED this 29TH day of August, 2013. Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August, 2013, a true and correct copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system and causing a copy to be emailed to Defendants' counsel as follows:

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