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

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

**DEFENDANTS' REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT**

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# INTRODUCTION

This Court has twice considered the legal theories underlying Plaintiffs' claims and found them wanting. While the Court granted Plaintiffs leave to plead their claims for a third time, the Second Amended Complaint fails to cure the defects that the Court previously identified. Notably, Plaintiffs' opposition does not point to specific factual allegations added to the latest iteration of the complaint and argue that any of the new allegations either compel or permit a different outcome this time around.

Instead, Plaintiffs' opposition argues that this Court's prior decisions were wrong – and does so without acknowledging that the Court has already considered the issues or grappling in any way with the Court's opinions. For example, Plaintiffs renew their challenge to Verizon's decision to enter into an annuity transaction as a fiduciary violation, without acknowledging that this Court already twice held that "Verizon did not engage in a fiduciary function when it amended the Plan." Dkt. 77 ("Prior Order"), at 9.

The result is that Plaintiffs largely re-hash the same arguments and cite the same cases as in their prior briefs. Plaintiffs neither bring to the Court's attention controlling authority that the Court overlooked nor identify new authority possibly warranting a different outcome now. Accordingly, for the reasons set forth in the Court's Prior Order and as explained below, the Court should once again dismiss Plaintiffs' claims, this time with prejudice and without leave to amend.[1]

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[1] Plaintiffs do not seek leave to replead in the event that the Court again dismisses their complaint. Nor do Plaintiffs take issue with the authority cited in Defendants' opening brief (at 6) denying leave to replead where plaintiffs "failed to cure deficiencies by amendments previously allowed." *Willard v. Humana Health Plan of Tex. Inc.*, 336 F.3d 375, 387-88 (5th Cir. 2003) (holding that "district court did not abuse its discretion in not allowing [the plaintiff] to amend his complaint for a third time").

## ARGUMENT

### I. Count IV Should Be Dismissed For Lack Of Standing.

This Court previously held that Plaintiffs failed "to establish the injury in fact necessary for Article III standing" for their Count IV claims. *See* Prior Order at 21-22. As the Court explained, "for the Non-Transferee Class to establish a particularized, concrete, and actual or imminent injury, it must show . . . an effect on its members' benefits payments." *Id.* at 20. Neither the Second Amended Complaint nor Plaintiffs' opposition attempts to demonstrate that the misuse of Plan assets alleged in Count IV had or is likely to have an effect on the Plan's ability to pay benefits to its remaining participants – nor could they plausibly do so. Instead, Plaintiffs simply argue that this Court's prior decision was incorrect. Plaintiffs are mistaken.

Plaintiffs assert that they need not demonstrate pecuniary harm because they seek only "disgorgement of Verizon's illicitly obtained benefit." Dkt. 82, at 23. This is wrong. "Obtaining restitution or disgorgement under ERISA requires that a plaintiff satisfy the strictures of constitutional standing by 'demonstrat[ing] individual loss.'" *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 200 (2d Cir. 2005); *accord Horvath v. Keystone Health Plan E., Inc.*, 333 F.3d 450, 456 (3d Cir. 2003) (claim by ERISA participant for disgorgement required proof of "individual loss").

Plaintiffs also assert that the alleged invasion of a "statutory right to proper management of Plan assets" is itself sufficient to create standing. Dkt. 82, at 25. As this Court already held, however, this "argument fails because 'it conflates statutory standing with constitutional standing.'" Prior Order at 22-23 (quoting *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013)). Nor is Plaintiffs' claim saved merely by the fact that they purport to bring it on behalf of the Plan. *See, e.g.*, *Glanton ex. rel ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1127 (9th Cir. 2006) ("[P]laintiffs point to *Massachusetts Mutual Life Insurance v.*

*Russell*, 473 U.S. 134, 142 n. 9 (1985), where the Court noted that ERISA plan beneficiaries may bring suits on behalf of the plan in a representative capacity. We have no quarrel with this proposition – *so long as plaintiffs otherwise meet the requirements for Article III standing*." (emphasis added)).[2]

None of the cases cited by Plaintiffs is to the contrary.[3] For instance, in *Lee v. Engle*, 727 F.2d 113, 122 (7th Cir. 1984), where participants sought to recover profits made by plan fiduciaries as a result of alleged breaches of their fiduciary duties, the plan was an employee profit sharing trust, under which plaintiffs would directly benefit from any recovery on behalf of the plan. *See id.* at 116; *see also* 26 C.F.R. § 1.401-1(b)(1)(ii) (profit-sharing plan must provide a definite predetermined formula for allocating the contributions made to the plan among the participants and for distributing the funds accumulated under the plan). Under those circumstances, the plaintiffs had "a concrete stake in the outcome of the proceedings" sufficient to give rise to Article III standing, *AdvancePCS Inc.*, 465 F.3d at 1127, which may explain why the standing question was not even raised in *Lee*.

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[2] Plaintiffs cite a handful of cases purportedly standing for the proposition that "lack of harm is not relevant" to the question of standing in ERISA cases. Dkt. 82, at 27-28. As this Court already held, however, these cases "do not stand for the proposition that participants can sue for § 409 relief without showing particularized injury to themselves." Prior Order at 23 n.14. Rather, they stand only for the distinct and irrelevant proposition that ERISA's "prohibited transaction" rules, *see* 29 U.S.C. § 1106, establish certain "per se" proscriptions on "transactions that experience had shown to entail a high potential for abuse," irrespective of the reasonableness of the particular transaction in question. *E.g.*, *Donovan v. Cunningham*, 716 F.2d 1455, 1464-65 (5th Cir. 1983). None of the cases addresses Article III standing; none purports to absolve participants of the obligation to plead a constitutionally cognizable injury; and each involves allegations of an injury far more concrete and non-speculative than Plaintiffs alleged injury here.

[3] *Shaver v. Operating Engineers Local 428 Pension Trust Fund*, 332 F.3d 1198 (9th Cir. 2003), is especially inapposite. That case did not discuss or consider the question of Article III standing. The *Shaver* plaintiffs, moreover, did not seek "monetary relief"; rather, they sought "purely equitable relief," *e.g.*, "to have the trustees removed." *Id.* at 1203. Where, as here, the sole relief sought by Plaintiffs is monetary, a demonstration of actual or imminent "individual loss" is required. *See also* Prior Order at 23 n.14.

This case, by contrast, involves a defined benefit plan. A participant in a defined benefit plan has an interest only in his fixed future benefit payments, *not* the assets of the pension fund. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40 (1999). For this reason, the overwhelming weight of authority holds that participants in defined benefit plans have standing to assert claims for monetary relief on behalf of their plans only if the alleged breach of fiduciary duty has placed their right to future annuity payments in jeopardy. *E.g.*, *David*, 704 F.3d at 338; *Harley v. Minn. Mining & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002).

While acknowledging this authority, Plaintiffs argue that it is limited to circumstances in which the plan "had a surplus." Dkt. 82, at 28.[4] As this Court already held, however, the funded status of the Plan is not dispositive of the Article III standing issue. *See* Prior Order at 21. Rather, in order to allege a sufficiently concrete and particularized injury, Plaintiffs would need to have alleged that Verizon "is financially compromised and thus unable to adequately fund the Plan so that it may meet its future obligations to pay all vested benefits." Prior Order at 22 n.13 (quoting *Perelman v. Perelman*, No. 10-5622, 2013 WL 271817, at *5 (E.D. Pa. Jan. 24, 2013)). Because Plaintiffs made no such allegation, the Court should dismiss Count IV.[5]

## II. <u>Count II Should Be Dismissed For Failure To State A Claim.</u>

In Count II, Plaintiffs allege that Defendants breached fiduciary duties in connection with the Prudential annuity transaction. In large part, Plaintiffs seek to challenge fundamental Plan

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[4] Defendants have presented evidence that the Plan was not underfunded at the time of the Prudential annuity transaction. *See* Dkt. 64-2 (Hartnett Declaration); *see also* Dkt. 64-1, at 20; Dkt. 69, at 8; Dkt. 76, at 2-3. Should it become necessary, Defendants respectfully request the opportunity to renew their factual challenge to subject matter jurisdiction.

[5] The Court should also again dismiss Plaintiffs' claim that settlor expenses were improperly charged to the Plan as too conclusory to state a claim. *See* Dkt. 79-1, at 8; *see also* Prior Order at 12 (Plaintiffs do "not specify which aspects of the extra $1 billion of expenditures were unreasonable, or how they were unreasonable.").

design decisions made by Verizon in its settlor capacity, such as the decisions to enter into an annuity transaction and to remove members of the Transferee Class from ongoing participation in the Plan. For substantially the reasons set forth in this Court's Prior Order, and as explained in Part II.A, these claims fail because such decisions are "[e]xcluded from fiduciary responsibility" under ERISA. Prior Order at 10. Plaintiffs remaining claims seek to challenge the Plan fiduciaries' *implementation* of the settlor decision to enter into an annuity transaction. For the reasons explained in Part II.B, these challenges likewise fail to state a claim.

### A. The Decision To Enter Into An Annuity Transaction And Remove Class Members From The Plan Was Made By Verizon In Its Settlor Capacity.

This Court previously held that "Verizon was not acting in a fiduciary capacity when it amended the Plan to direct the purchase of an annuity for [members of the Transferee Class]." Prior Order at 11. Ignoring this prior holding, Plaintiffs again argue that the decision to enter into the Prudential annuity transaction "was a fiduciary function." Dkt. 82, at 7. No change in controlling authority since the time of the Court's prior decision warrants a different conclusion on this purely legal question.

While Plaintiffs acknowledge that the decision to amend a pension plan is not subject to ERISA fiduciary duties, they contend that Verizon's decision to enter into the Prudential annuity transaction was a fiduciary function because Verizon was "exercising authority and control respecting management or disposition of plan assets." Dkt. 82, at 8 (citing 29 U.S.C. § 1002(21)(A)). This cannot be right. The Supreme Court has made clear that the decision to terminate an ERISA plan is a settlor function, and *that* decision plainly involves the "allocation" and "disposition" of plan assets every bit as much as Verizon's decision to enter into the Prudential annuity transaction. *See Beck v. PACE Int'l Union*, 551 U.S. 96, 103 (2007) (plan termination involves distributing plan assets, typically by paying lump sums or purchasing

annuity contracts). Similarly, in *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 436-37, 444 (1999), the Supreme Court held that "ERISA's fiduciary duty requirement simply is not implicated" by the decision to adopt pension plan amendments (i) allocating "surplus [plan] assets to fund noncontributory benefits" and (ii) providing "significant additional retirement benefits" to a subset of participants, despite the fact that both amendments in some sense involve the "allocation" and "disposition" of plan assets.

Plaintiffs assert that it was a breach of ERISA fiduciary duties for Verizon to transfer retirees' benefits to Prudential without their consent. *See* Dkt. 82, at 15-16. Their sole support for this argument is *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994). Although *Howe* held that it was a breach of fiduciary duty to transfer the welfare benefit obligations for retired employees to a new employer without their consent, that holding was overruled by subsequent 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). Contrary to Plaintiffs' suggestion (at 15), the Supreme Court has expressly "extended to pension benefit plans" its holding in *Schoonejongen* that the adoption of plan amendments is not subject to ERISA's fiduciary duties. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). Moreover, 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).[6]

[6] Although Plaintiffs complain (at 14 & n.8) that they "lost" a number of procedural protections (*e.g.*, the right to PBGC insurance coverage and ERISA annual disclosures) in connection with the Prudential annuity transactions, ERISA clearly permits employers to make the settlor decision to remove employees' benefits from an ERISA-governed plan, and thus to terminate the employees' rights to the procedural protections afforded under ERISA. 29 U.S.C. (continued…)

Plaintiffs further assert that the Prudential annuity transaction violated their "grandfathered rights" under a provision of a predecessor NYNEX pension plan requiring consent to plan changes that "adversely affect the rights" of employees. *See* Dkt. 82, at 16. This Court has already held that this provision is inapplicable because the annuity transaction did not "adversely affects the rights" of Plaintiffs "'to any benefit or pension.'" Dkt. 44, at 9.[7]

Finally, Plaintiffs argue that the decision whether to hold the annuity contract "within the ongoing Plan" – and thus to retain members of the Transferee Class as Plan participants – was a fiduciary decision. Dkt. 82, at 13. For substantially the reasons set forth in Verizon's opening brief, this argument fails for two separate reasons.

*First*, the decision whether to hold the annuity contract as a Plan asset is a settlor decision that was made by Verizon, not (as Plaintiffs allege) a fiduciary decision that was delegated to VIMCO. *See* Prior Order at 10-11. As the Supreme Court made clear in *Beck*, 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 plan design decision that belongs to the settlor of the plan. *See* 551 U.S. at 101.[8] Thus, regardless of whether this decision was made

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§ 1341 (authorizing plan terminations); *Beck*, 551 U.S. at 97 (noting that "terminating a plan through purchase of annuities formally severs ERISA's applicability to plan assets and employer obligations"). In any event, the "deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing." *Summers v. Earth Island Inst.*, 555 U.S. 488, 495-97 (2009). Plaintiffs have not alleged and could not allege that they personally suffered any concrete harm as a result of the Prudential annuity transaction.

[7] Plaintiffs' effort to give a broader reading to the Plan provision they cite is also contradicted by other provisions of the same 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 is not a change for which consent is required under the NYNEX Plan.

[8] Plaintiffs attempt to distinguish *Beck* by observing that it involved a plan termination rather than an annuity transaction. Dkt. 82, at 10. This distinction, however, is immaterial. *Beck* (continued…)

by Verizon's board of directors (and it was) or was delegated to some other entity, it was a settlor decision "immune from ERISA's fiduciary obligations." *Id.*[9]

*Second*, contrary to Plaintiffs' unsupported assertions, the October 17 Plan amendment in fact *required* that members of the Transferee Class cease to be participants in the Plan upon the purchase of the annuity contract, and so did *not* vest any discretion in VIMCO in that regard. In their opening brief, Defendants established that the amendment mandated that the annuity transaction be structured in such a way that, under Department of Labor and PBGC regulations, members of the Transferee Class would cease to be plan participants under ERISA upon the conclusion of the transaction. *See* Dkt. 79-1, at 10-12. Notably, Plaintiffs' opposition entirely ignores this argument. Because the Plan amendment did not vest the Plan fiduciaries with the discretion to hold the annuity contract as a Plan asset (and thus maintain the Transferee Class as participants in the Plan), the Plan fiduciaries cannot be subject to fiduciary liability for not doing so. *See* 29 U.S.C. § 1002(21)(A) ("a person is a fiduciary with respect to a plan [only] to the extent" he exercises "discretionary authority" with respect to the plan); *see also* Dkt. 82, at 13

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stands for the proposition that decisions regarding whether to remove plan liabilities from the ERISA system and replace them with insurance annuities are settlor rather than fiduciary decisions under ERISA. *See Beck*, 551 U.S. at 101 ("an employer's decision *whether* to terminate an ERISA plan is a settlor function immune from ERISA's fiduciary obligations"). Nothing in *Beck* turned on the precise mechanism by which the settlor terminated participants' interests in an ERISA plan.

[9] ERISA defines fiduciaries in functional terms. *See, e.g.*, *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). Thus, the question whether a given decision was a fiduciary one turns principally on the type of decision in question, rather than on who made it. Here, because the decision whether or not to terminate participation of the Transferee Class from participation in the Plan is a paradigmatic settlor function, the decision is immune from fiduciary liability regardless of who actually made it.

(conceding that "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").[10]

**B. Plaintiffs Fail To State A Claim That Defendants Violated Any Fiduciary Duties Owed To Participants In Implementing The Annuity Transaction.**

Plaintiffs assert that Defendants violated fiduciary duties in *implementing* the settlor decision to undertake an annuity transaction by (i) failing to "consult[] with" participants prior to purchasing the annuity, (ii) failing to impose additional disclosure and other obligations on Prudential in connection with the transaction, and (iii) selecting Prudential as the sole annuity provider. *See* Dkt. 82, at 10-13. For the following reasons, these assertions fail to state a claim.

*First*, Plaintiffs argue that the Plan fiduciaries violated a "well-established fiduciary duty to communicate with the potentially affected [retirees] before entering into the Verizon/Prudential annuity transaction." *Id.* at 11. Plaintiffs, however, invent this "well-established" duty out of whole cloth. They cite a Ninth Circuit decision for the proposition that "ERISA and its accompanying regulations essentially call for 'meaningful dialogue between the plan administrators and their beneficiaries.'" Dkt. 82, at 11 (quoting *Booton v. Lockheed Med. Benifit Plan*, 110 F.3d 1461, 1463 (9th Cir. 1997)). The quoted language from *Booton*, however, relates specifically to ERISA's claims procedure regulations, which by their terms require Plan fiduciaries to provide detailed information to participants when their claims for plan benefits are denied. *See* 29 C.F.R. § 2560.503-1(f). Nothing in *Booton*, the ERISA statute or any

[10] Plaintiffs also assert that the Plan fiduciaries had the discretion to give members of the Transferee Class the "choice" between a Prudential annuity, remaining in the Plan and receiving a lump sum distribution. *E.g.*, Dkt. 82, at 12-13 & n.7; SAC ¶ 145. This is incorrect. These are fundamental design decisions that were appropriately made by Verizon it its settlor capacity. Moreover, the Plan amendment adopted by Verizon (i) did not authorize lump sum payouts, and (ii) specified whose benefits would be transferred to an annuity provider. *See* Pls. Appx. 61-62. Thus, the Plan fiduciaries did not have any discretion to offer participants lump sums or the option of remaining in the Plan.

Department of Labor regulation, however, imposes on fiduciaries the obligation to "consult[] with" participants in the course of considering Plan amendments. *See generally* 29 U.S.C. § 1104(a) (prescribing standard of care applicable to fiduciaries without reference to any duty to consult plan participants). Indeed, Defendants are not aware of *any* authority supporting Plaintiffs' novel suggestion that such an obligation exists.

*Second*, Plaintiffs suggest that ERISA fiduciary duties require plan fiduciaries to seek to impose ERISA's disclosure obligations (and PBGC-equivalent benefit protections) on insurance companies in connection with annuity transactions. *See* Dkt. 82, at 13. Plaintiffs, however, fail to explain the source of the purported duty to attempt to impose these ERISA-specific terms on non-ERISA insurance benefits. Notably, while the transfer of benefit obligations to insurance companies under ERISA is commonplace, not a single case, statute or regulation holds that plan fiduciaries violate ERISA fiduciary duties by failing to impose ERISA's disclosure and requirements on insurance companies that become responsible for pension annuities.[11]

*Third*, Plaintiffs assert that the Plan fiduciaries "breached fiduciary duties by imprudently selecting a single group annuity provider." Dkt. 82, at 11. This assertion, however, is far too conclusory to state a claim.

The question whether a fiduciary violated duties in connection with the selection of an annuity provider focuses not "on the quality of the selected annuity" but on "how the fiduciary acted in his selection":

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[11] The Department of Labor has set forth its views regarding a fiduciary's obligations in connection with a purchase of annuities. *See* Interpretive Bulletin 95-1 (codified as 29 CFR § 2509.95-1) ("IB 95-1"); *see also Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 298 (5th Cir. 2000) (discussing IB 95-1). Notably, IB 95-1 does *not* suggest that fiduciaries have a duty to require insurers to provide "the same sort of annual disclosures as required by ERISA" or to "have the same maximum insurance level protection equivalent to that provided by the PBGC," as Plaintiffs now assert. Dkt. 82, at 13.

> The relevant inquiry in any case is whether the fiduciary, in structuring and conducting a thorough and impartial investigation of annuity providers, carefully considered . . . [all] relevant [factors] under the particular circumstances it faced at the time of decision. If so, a fiduciary satisfies ERISA's obligations if, based upon what it learns in its investigation, it selects an annuity provider it "reasonably concludes best to promote the interests of [the plan's] participants and beneficiaries."

*Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 298-99 (5th Cir. 2000) (citation omitted). Even if the fiduciary does not follow a prudent process, moreover, "ERISA's obligations are nonetheless satisfied if the provider selected would have been chosen had the fiduciary conducted a proper investigation." *Id.* at 300.

Here, Plaintiffs do not argue that the Plan fiduciaries failed to conduct a thorough or impartial investigation before selecting Prudential as the sole annuity provider. They acknowledge, moreover, that VIMCO retained an independent fiduciary to represent the interests of Plan participants in connection with the transaction. *See id.* at 299 & n.15 (suggesting that the appointment of an independent fiduciary "goes a long way toward satisfying the duty of loyalty"). Thus, Plaintiffs have entirely failed to allege the sort of flawed decision-making process or self-dealing required to state a claim for breach of fiduciary duty in connection with the selection of Prudential as the sole annuity provider.

Plaintiffs have also failed to allege facts rendering plausible the suggestion that a hypothetical prudent person would have selected more than one annuity provider "had [he] conducted a proper investigation." *Id.* at 300. While the Second Amended Complaint alleges that the Plan fiduciaries "imprudently" selected Prudential as the "single group annuity provider," this allegation is far too conclusory to state a claim. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Absent any factual allegations suggesting that there were other annuity providers (or combinations of annuity providers) that would have

provided greater safety for the annuities provided to members of the Transferee Class, Plaintiffs "have not nudged their claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

## III. Count III Should Be Dismissed For Failure To State A Claim.

In Count III, Plaintiffs allege that the Prudential annuity transaction ran afoul of Section 510 of ERISA, which makes it unlawful to "expel" or "discriminate against" plan participants "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the provisions of an employee benefit plan." 29 U.S.C. § 1140. Count III fails to state a claim for multiple, independent reasons.

According to Plaintiffs, the "primary Plan right interfered with by the Verizon/Prudential annuity transaction was the Transferee Class's right to continued participation in the Plan." Dkt. 82, at 18. This Court, however, has already held that members of the Transferee Class did not have any such "right to continued participation in the Plan." *See* Prior Order at 15. In their brief, moreover, the *only* authority cited by Plaintiffs purportedly establishing the existence of this "right" is a Verizon SPD stating that "[y]ou are a plan participant as long as you have a vested benefit in the plan that has not been paid to you in full." Dkt. 82, at 18. This Court previously considered this SPD language and rejected Plaintiffs' argument:

> [T]he SPD's description of being a plan participant until "vested benefits in the plan" are paid in full does not prevent an amendment that removes a beneficiary from the plan in compliance with ERISA and the plan's provisions. This SPD language instead simply means that while beneficiaries are in the plan, they are participants until their benefits are paid in full. Plaintiffs' reading would conflict with ERISA regulations that state: "An individual is not a participant covered under an employee pension plan" if, for example, the entire benefit rights are fully guaranteed by an insurance company. 29 C.F.R. § 2510.3-3(d)(2)(ii) (2012).

Prior Order at 18 (quoting *Lee I*, 2012 WL 6089041, at *6 n.13). Accordingly, this Court should once again hold that Plaintiffs did not have a continued right to participate in the Verizon Plan.[12]

Plaintiffs' Section 510 claim also fails because they have not alleged any facts to support the claim that the Verizon Defendants had a "specific intent to discriminate among plan beneficiaries on grounds . . . proscribed by section 510." *McGann v. H & H Music Co.*, 946 F.2d 401, 408 (5th Cir. 1991). While Plaintiffs conclusorily allege that Defendants had a "specific intent" to discriminate against members of the Transferee Class, they have failed to "'nudg[e]' [their] claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Iqbal*, 556 U.S. at 683 (citations omitted) (first alteration in original).

Finally, a third basis for dismissing Count III is that plan amendments are not actionable under Section 510 of ERISA. Contrary to Plaintiffs' assertions, numerous appellate decisions hold that Section 510 may not be used to challenge the enactment of a plan amendment. *Mattei v. Mattei*, 126 F.3d 794, 800 (6th Cir. 1997); *Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan*, 24 F.3d 1491, 1504 (3d Cir. 1994); *Deeming v. Am. Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990); *see Hines v. Mass. Mut. Life Ins. Co.*, 43 F.3d 207, 210 (5th Cir. 1995) (noting circuit court decisions holding that "plan amendments by themselves cannot be actionable under § 510" but declining to reach the question).[13]

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[12] Plaintiffs also argue that Defendants interfered with the purported right of the Transferee Class to PBGC insurance and to procedural protections afforded under ERISA. *See* Dkt. 82, at 18. However, as Defendants pointed out in their opening brief, the loss of ERISA procedural rights and PBGC-guaranteed benefits is a necessary consequence of the loss of the purported "right" to continued participation in the Plan. *See* Dkt. 79-1, at 16. Because members of the Transferee Class do not have a right to continued participation in the Plan, it follows *a fortiori* that they do not have a right to attendant ERISA and PBGC protections.

[13] Plaintiffs rely on two district court cases that purportedly support their Section 510 argument. That reliance is entirely misplaced. One of the cases was subsequently overruled by the Fifth Circuit, *see Taylor v. Bank One Tex.*, No. 92-7160, 1993 WL 152149, at *1 (5th Cir. (continued…)

Here, the factual predicate for Plaintiffs' discrimination claim is the inclusion of the Transferee Class – but not other Plan participants – as part of the annuity transaction. But decisions regarding which participants to include in the transaction were made by Verizon, as reflected in the October 17 Plan amendment. Because the decision to amend a plan cannot give rise to a claim under Section 510, Plaintiffs' discrimination claim fails as a matter of law.

## IV. Count I Should Be Dismissed For Failure To State A Claim.

This Court previously held that Plaintiffs failed to state a claim for violation of the summary plan description ("SPD") disclosure requirements set out in Section 102(b) of ERISA and accompanying regulations. *See* Prior Order at 5-7. For the unrebutted reasons set forth in Defendants' opening brief, none of the changes made by Plaintiffs to their most recent complaint could justify a different conclusion now. And, for the reasons explained below, Plaintiffs' contrary legal arguments fail for at least two independent reasons.

*First*, the transfer of Plaintiffs' benefit obligations to Prudential did not constitute a "circumstance[] which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b). As this Court has recognized, because the amount of Plaintiffs' benefits did not change as a result of the Prudential annuity transaction, it simply was not a circumstance that needed to be disclosed under Section 102(b) of ERISA. *See* Prior Order at 5.

According to Plaintiffs, a Department of Labor regulation requires disclosure in an SPD of the circumstances under which a participant "might lose eligibility for benefits *provided by the Plan* as a result of an annuity transaction." Dkt. 82, at 3 (emphasis in original) (citing 29 C.F.R. § 2520.102-3(*l*)). As this Court previously explained, however, this argument "mistakenly

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Apr. 22, 1993), and the other did not involve Section 510 claims at all, *see Carrabba v. Randalls Food Mkts., Inc.*, 145 F. Supp. 2d 763, 770 (N.D. Tex. 2000).

interprets the regulation's language . . . to mean that a change in the payer of plan benefits is a circumstance that results in a loss of plan benefits provided by the plan, even if those benefits are provided in full." Prior Order at 6. Because the regulation does not require disclosure of the mere fact that "the *source* of the benefits" may change and because the *amount* of Plaintiffs' benefits undisputedly was not reduced, their disclosure claim fails as a matter of law. *Id.* at 7 (emphasis in original); *see also Murphy v. Verizon Commc'ns Inc.*, No. 3:09-CV-2262-G, slip op. at 39 (N.D. Tex. Sept. 17, 2013) ("A challenge to the identity of the payor and administrator of benefits is a challenge to something peripheral to the substantive benefits themselves. . . .").

*Second*, Section 102(b) relates only "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, 135 (3d Cir. 1993). Thus, while SPDs generally must disclose existing plan provisions under which benefits may be offset, 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 amendment was adopted).

In response, Plaintiffs argue that because "an annuity transaction was perceived by the Verizon Defendants as a then exi[s]ting circumstance that may have resulted in the loss of Plan benefits, . . . that circumstance should have been disclosed in the SPDs." Dkt. 82, at 4. This argument, however, improperly conflates the separate questions of (i) whether ERISA authorizes Plan amendments calling for annuity transactions, and (ii) whether pre-existing Plan terms expressly authorized such transactions. *See* Prior Order at 5 n.7. Because SPDs need only disclose pre-existing plan terms, not the possibility of future plan amendments, Plaintiffs' disclosure claim fails as a matter of law.

## CONCLUSION

The Court should dismiss the Second Amended Complaint.

Respectfully submitted,

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Dated: September 17, 2013 *Attorneys for the Verizon Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on September 17, 2013, I caused a true and correct copy of the foregoing to be served on all counsel in this action via the Court's electronic filing system pursuant to Local Rule 5.1(d). Those counsel are:

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