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

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

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

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Defendants.	§

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs William Lee and Joanne McPartlin, by and through their counsel, pursuant to the Court's November 29, 2012 order setting briefing schedule (Docket 12), submit this supplemental memorandum brief in support of their application for temporary restraining order ("Application") (Docket 6) and their motion for preliminary injunction (Docket 18) in connection with their Verified Complaint for Declaratory and Injunctive Relief Under ERISA (the "Complaint") (Docket 1). Plaintiffs incorporate their Appendix (Docket 1-1) containing pages 1-281, together with their Supplemental Appendix containing pages 282-300 filed concurrently herewith.

I. SUMMARY OF ARGUMENT

Plaintiffs challenge, on their own behalf and on behalf of approximately 41,000 other retirees participating in the Verizon Management Pension Plan (the "Plan"), Defendant Verizon Communications Inc.'s ("Verizon"), intended removal of the retirees' pensions from the Plan, pursuant to an agreement between Verizon and other Defendants, including The Prudential Insurance Company of America ("Prudential"). Under the agreement, the Plan would end its responsibility to provide pensions to such retirees and Prudential would issue an annuity substituting for such retirees' pension benefits (hereinafter "Verizon/Prudential annuity transaction"). Defendants, in their response to Plaintiffs' Application, have confirmed that, absent court order, the Verizon/Prudential annuity transaction will be consummated on or soon after December 10, 2012. (Docket 10, p. 2).

Defendants' intended conduct will evade the dictates of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001- 1461, and the uniform protection accorded by the Pension Benefit Guaranty Corporation ("PBGC") intended by Congress for participants and beneficiaries of defined benefit pension plans.

The loss of such federal protections is not what Plaintiffs and the putative class of management retirees bargained for when they loyally served Verizon and predecessor companies, including the entities comprising the former old Bell System. The retirees were not even given fair advance notice that a change like the Verizon/Prudential annuity transaction could happen, and certainly do not consent to the transfer of their pension obligations to an entity not subject to

ERISA and not backed by the PBGC. **(App. 243, Lee Aff. ¶ 8; App. 248, McPartlin Aff. ¶ 7; App. 263, Jones Aff. ¶¶ 10-11)1.**

Plaintiffs, in order to avoid the unanticipated and unconsented relegation of the retirees to such insecurity, are entitled to a temporary restraining order and preliminary injunction against consummation of the Verizon/Prudential annuity transaction.[2]

For the reasons stated in the Complaint, as verified through the appendix filed with it, Plaintiffs' Application, the memorandum brief supporting the Application and this supplemental memorandum brief, the pertinent facts and applicable law establish that this Court should issue a prohibitive injunction because Plaintiffs demonstrate: (1) a substantial threat that Plaintiffs will suffer imminent irreparable injury not subject to legal remedy if the injunction is not granted; (2) a substantial likelihood that Plaintiffs will prevail on the merits; (3) Plaintiffs' substantial injury outweighs any threatened harm to Defendants; and (4) granting a temporary restraining order and preliminary injunction will not disserve public policy or the public interest, but will strongly uphold them.

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1 "App. __" refers to the page number within the Plaintiffs' appendix filed with the Verified Complaint. Plaintiffs have submitted herewith a supplemental appendix continuing the pagination.

2 Contrary to the Court's misunderstanding reflected in the Order issued on November 29, 2012, Plaintiffs are not "willing to assume the risk that the transaction will go through if their TRO application fails, . . . (Docket 12 at pp 1-2). On November 30, 2012, Plaintiffs filed a motion for preliminary injunction, seeking an indefinite block to the consummation of the Verizon/Prudential annuity transaction.

II.
ARGUMENT

A. Standard for Temporary Restraining Order and Preliminary Injunction.

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

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

(1) That Plaintiffs will suffer irreparable harm absent an imminent injunction;[3]

(2) That there is a substantial likelihood that Plaintiffs will prevail on the merits of their claims;[4]

(3) That the injury faced by the Plaintiffs outweighs the injury that would be sustained by Defendants as a result of the injunctive relief requested;[5] and

(4) That the granting of the injunctive relief sought would not adversely affect public policy or the public interest.[6]

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

[4] *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931, 95 S.Ct. 2561, 2568 (1976) (focusing on likelihood of success on merits).

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

[6] *See DSC Comms.*, 81 F.3d at 600.

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

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

On October 17, 2012, the Verizon Board of Directors passed a resolution expressing the Board's intent that, "after 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) with respect to their pension benefits, and the Plan shall have no further obligation to make any payment with respect to any pension benefit of a Designated Participant, including with respect to any survivor, alternate payee, beneficiary, or other person claiming by or through the Designated Participant." **(App. 55).**

If the requested temporary and preliminary injunctive relief is not issued, Plaintiffs and the putative class members will suffer irreparable harm because the Verizon/Prudential annuity transaction will result in the immediate loss of all ERISA protections to Plaintiffs and putative class members with respect to their pension benefits under the Plan. In addition, all of the retirees will lose the uniform federal protection for payment of benefits under the Plan provided by the PBGC. Because the Verizon/Prudential annuity transaction is set to close on December 10, 2012 or soon thereafter, the injury that the retirees stand to suffer is also imminent.[7]

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

Finally, there is no legal remedy adequate to redress the injury.[8] ERISA does not provide a legal damages remedy for the loss of federal law protections. In fact, for countless retirees, depending upon the federal judicial circuit in which they live, as soon as their pension participation in the Plan ends, they will no longer even have standing to sue under ERISA, so as to challenge the very action that ended their participation in the Plan.[9]

Not only is there no legal remedy, any damages Defendants might offer for the harm to be caused to the Plaintiffs and putative class members cannot be accurately calculated, justifying injunctive relief on that additional ground.[10] One simply cannot attribute a definite, reliable value to the loss of ERISA protections, including Department of Labor oversight, the PBGC uniform protection and ready access to the federal courts which Plaintiffs and other retirees would suffer if Defendants are allowed to consummate the Verizon/Prudential annuity transaction.

Plaintiffs, on those grounds stated hereinbelow, meet the first prerequisite for obtaining injunctive relief.

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

A temporary restraining order or preliminary injunction is only appropriate if there is a

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

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

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

substantial likelihood that Plaintiffs will prevail on the merits of one or more of their claims.[11]

As stated in the memorandum brief supporting Plaintiffs' Application, the required likelihood need not equate to absolute certainty for a preliminary injunction to issue. See *Cho v. Itco, Inc.*, 782 F.Supp. 1183, 1185 (E.D. Tex.1991); *Sebastian v. Tex. Dep't of Corrections*, 541 F.Supp. 970, 975 (S.D. Tex.1982). "It is enough that the movant[s] ... raise[ ] questions going to the merits so serious, substantial, and doubtful as to make them fair ground for litigation, and thus more deliberate investigation." See *Cho*, 782 F.Supp. at 1185 (citing *Sebastian*, 541 F.Supp. at 975). A showing of a substantial likelihood of success on the merits does not require that the movant prove his case. *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 n.11 (5th Cir. 1991). Even some likelihood of success can be enough where the factors, relating to harm, and other factors, exist and are compelling. See *Productos Carnic, S.A. v. Cent. Am. Beef and Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980) ("Where the other factors are strong, a showing of some likelihood of success on the merits will justify temporary injunctive relief."). Here, with respect to some or all of their claims, Plaintiffs easily demonstrate they have a substantial likelihood of prevailing on the claims asserted in the Complaint.

1. **There is a Substantial Likelihood that Plaintiffs Will Prevail on Count One — Violation of ERISA Section 102(b), Failure to Provide Required Disclosure in SPDs.**

For their Count One in the Complaint, Plaintiffs contend the Verizon EBC, the designated Plan administrator, violated ERISA Section 102(b). This claim is based upon the Verizon Defendant's failure to provide disclosure of the possibility of a change like the Verizon/Prudential annuity transaction in the summary plan descriptions ("SPDs") for the Plan.

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[11] *Doran v. Salem, Inc.,* 422 U.S. 922, 95 S.Ct. 2561, 2568 (1976).

There has been absolutely no disclosure of the fact that Verizon retained the right to sever relations with retirees and remove their federally protected pensions from the Plan and transfer the obligations to an insurance company, not federally regulated and not provided uniform protection by the PBGC. **(App. 242, Lee Aff. ¶ 4; App. 247, McPartlin Aff. ¶ 4; App. 261-62, Jones Aff. ¶ 5).**

ERISA Section 102(b) requires a pension plan administrator provide each plan participant with an SPD which describes the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b). The Department of Labor ("DOL") regulation promulgated under ERISA Section 102(b) further requires, in part, 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 the plan to provide on the basis of the description of benefits. . .

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 considered essential in informing employees and retirees of their rights, reasonable expectations and obligations under a pension plan.

Prior to the October 17, 2012 public announcement of the contemplated Verizon/Prudential annuity transaction, the Verizon EBC never met ERISA's requirement to disclose in the Plan's SPDs all circumstances that Verizon, as plan sponsor, contemplated may result in Plaintiffs' and the putative class members' ineligibility for or loss of Verizon sponsored pension plan benefits.

The text of the most recent SPD contained in the appendix in support of the Complaint includes no disclosure about the possibility of retirees' pensions being removed from the Plan and shifted into an insurance annuity contract. **(App. 20-22).** In none of the SPDs issued to the retirees is there any discussion, disclosure or notice that Verizon could unilaterally remove pensions for certain retirees from the Plan and send the entire obligation over to an insurance company and, thereby, make the retirees ineligible for continued receipt of Verizon sponsored pension benefits. That type of arrangement appears nowhere within the disclosures set forth in the SPDs last issued to Plaintiffs. **(See App. 20-22, the forfeiture clause within the 2007 SPD last issued to Plaintiffs and putative class).**

No average plan participant would understand from reading any of the SPDs that he or she could be removed from a Verizon sponsored pension plan and transferred to an insurance company. No such scenario can be envisioned from a reasonable review, reading and understanding of any of the SPDs.

The failure to provide Plaintiffs a SPD with a disclosure about the possibility of a transfer of pension obligations to an insurance company, the immediate loss, forfeiture or offset of Verizon sponsored pension benefits, is not a "technical violation," as may be argued by Verizon Defendants.

First, the failure is a statutory violation and breach of fiduciary duty. "The duty to disclose material information is the core of a fiduciary's responsibility, animating the common law of trusts long before the enactment of ERISA." *Eddy v. Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 750 (D.C. Cir. 1990). Verizon EBC, as plan administrator, was obligated to provide each Plaintiff and putative class member with such disclosure without any request being made by anyone. Since

there was no such disclosure, the SPDs given to the retirees "ha[d] the effect of failing to inform" the retirees of a key limitation on their right to recover benefits under their pension plans, a violation of 29 C.F.R. § 2520.102–3(b).

At least three retirees (both Plaintiffs and retiree C. William Jones) have testified that had he or she known about the undisclosed possibility of being surreptitiously transferred out of his or her Verizon sponsored pension plan, at the whim of the plan sponsor, each would have taken a different course of action and even used his or her influence to cause a legal challenge so as to prevent such action against himself or herself and other retirees. **(App. 242-43, Lee Aff. ¶ 5; App. 247-48, McPartlin Aff. ¶ 5; App. 262, Jones Aff. ¶ 7)**. By being uninformed, each was harmed because he or she did not know the possible consequences of such a change and each lost an opportunity to take appropriate preventive action.

Second, Defendants cannot argue that a general reservation of rights provision contained in the most recently issued SPD (dated January 2007) suffices to comply with the more detailed disclosure requirements mandated by ERISA Section 102(b).

Third, Defendants cannot argue that sending notice to Plaintiffs and other retirees informing them, after the fact, of Defendants' agreement to the Verizon/Prudential annuity transaction, serves to shield Verizon Defendants from liability for having not previously complied with ERISA Section 102(b).

While the violation of ERISA Section 102(b) by Verizon Defendants is undisputable, there is no provision of ERISA providing specific relief for violation of the statute. Therefore, general equitable relief is available for violation of the statute. The appropriate relief under ERISA

Section 502(a)(3)[12] is an injunction against the Verizon/Prudential annuity transaction due to the violation of ERISA Section 102(b), 29 U.S.C. § 1022(b), and the DOL regulation 29 C.F.R. § 2520.102-3-(*l*).

As multiple courts have recognized, it is fundamentally unfair for a plan sponsor to take adverse action against retirees with vested rights when there has been no forewarning or proper disclosure that the undisclosed adverse action against retirees could be taken in the future at the whim of either the plan sponsor or plan administrators. Courts have, accordingly, refused to allow plan administrators to use undisclosed provisions as a shield so as to deny participants' claims for benefits. See *Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1022 (7th Cir.1998) (holding that since SPD failed to satisfy ERISA's disclosure requirements, the undisclosed term could not be enforced against plan participant so as to deny coverage). Similarly, courts have recognized that where the SPD does not contain a benefit forfeiture clause, then such a forfeiture [even when contained in the underlying controlling plan document] will not be enforced against a participant. *Jensen v. SIPCO, Inc.*, 867 F.Supp. 1384, 1391 (N.D. Iowa 1993), *aff'd*, 38 F.3d 945 (8th Cir.1994), *cert. denied*, 514 U.S. 1050, 115 S.Ct. 1428 (1995); *James v. New York City Dist. Council of Carpenters' Benefits*, 947 F.Supp. 622, 628 (E.D. N.Y.1996).

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12 ERISA Section 502(a)(3) allows a participant to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3).

Since the SPDs issued to Plaintiffs and putative class members prior to the announcement about the Verizon/Prudential annuity transaction did not satisfy ERISA's disclosure requirements, this Court should estop Verizon Defendants from exercising undisclosed rights by prohibiting the Verizon/Prudential annuity transaction.

Given the undisputed fact of lack of adequate disclosure, and the recognized appropriateness of an injunctive remedy, Plaintiffs have not only established a substantial likelihood of success on the merits of their first claim for such relief, but a probability. Therefore, considering Plaintiffs' satisfaction of the other requirements for injunctive relief, this Court should grant Plaintiffs temporary and preliminary injunctive relief on their First Claim for Relief in the Complaint and prohibit Defendants from consummating the Verizon/Prudential annuity transaction until further order by the Court.

2. There is a Substantial Likelihood that Plaintiffs Will Prevail on Count Two — Violation of ERISA Section 404(a)(1), Breach of ERISA Fiduciary Duties.

For their Count Two in the Complaint, Plaintiffs are requesting from the Court a declaration that the Verizon/Prudential annuity transaction violates the Plan and the fiduciary duty of Defendants, other than Prudential, under the Plan and ERISA. The Court, again, has before it undisputed evidence in the appendix in support of the Complaint that the Plan does not permit the Verizon/Prudential annuity transaction and that it is not in the best interest of the affected retirees, such that Defendants, other than Prudential, have violated ERISA Section 401(a)(1), imposing a fiduciary duty upon them to act "with respect to a Plan solely in the interest of the participants." **(App. 23-36, 37-47, 54-59, 65-210, 241-281).**

An employer plan sponsor that also acts as a plan administrator is said to wear "two hats." When the employer acts in its fiduciary capacity, it must comply with ERISA's fiduciary duties.

ERISA Section 21(A) defines, in part, a plan "fiduciary" as one who "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets" or who "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). Accordingly, courts have typically distinguished between employer actions that constitute "managing" or "administering" a plan and those that are said to constitute merely "business decisions" that have an effect on an ERISA plan; the former are deemed "fiduciary acts" while the latter are not. It is firmly established, for example, that a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan, as opposed to a pension benefit plan. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78, 115 S.Ct. 1223, (1995) ("Employers or other plan sponsors are generally free under ERISA for any reason at any time, to adopt, modify, or terminate welfare plans."). Plan sponsors are generally free to make changes to welfare benefits due to Congress' considered decision that welfare benefit plans not be subject to a vesting requirement.

By contrast to the flexibility in modifying welfare plans, ERISA does not permit such action with respect to pension plans. ERISA provides for automatic vesting of pension plan rights and places strict limitations on an employer's ability to impair or transfer pension plan liabilities. See ERISA Sections 201, 208, 29 U.S.C. §§ 1051, 1058. This civil action involves exclusively pension plan liabilities.

a. The Governing Plan Documents Allowed Only Transfers of Assets and Liabilities to an IRS Qualified pension plan, Not a Transfer From the Federally Protected Pension Plan Into an Insurance Company.

In an ERISA case, the applicable plan documents governing the rights and obligations of a participant, beneficiary, administrator or fiduciary include a plan document and all related documents. Moreover, such plan documents are to be interpreted in a common sense, not specialized manner. See, e.g., *Walker v. Wal-Mart Stores, Inc.*, 159 F.3d 938, 940 (5th Cir. 1998) (per curiam) (stating that a court must "interpret ERISA plans' provisions as they are likely to be 'understood by the average plan participant,' consistent with ERISA's statutory drafting requirements") (quoting 29 U.S.C. § 1022(a)(1)). In this case, the Plan documents include the Plan, the master trust agreement governing the assets of the Plan, entitled the Bell Atlantic Master Trust[13] and the SPDs.[14] None of the controlling Plan documents authorize the Verizon/Prudential annuity transaction.

Prior to the contract for the Verizon/Prudential annuity transaction, the controlling terms of the Plan only allowed, in the absence of a complete termination of the Plan,[15] a transfer of pension assets into either another ERISA-regulated pension plan or trust qualified under Internal Revenue Code Section 401(a), 26 U.S.C. § 401(a). Specifically, Article 11.3 of the Plan states in relevant part:

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[13] The Bell Atlantic Master Trust was formerly called the NYNEX Master Trust **(App. 290, 297 ¶ 3).**

[14] Article 1.4 of the Plan expressly incorporates the terms of the master trust agreement. **(App. 289).**

[15] At all times, the Plan has contemplated extinguishment of pension liabilities through the purchase of insurance annuities *when* a complete *termination* of the Plan *occurs*. **(App. 33, Article 12.3 "Provision for Pensions After Plan Termination": (App. 33-34, Article 12.7 "Satisfaction of Liabilities on Plan Termination."** However, the Defendants intend for the Verizon/Prudential annuity transaction to occur, for the convenience of Verizon, without the complete Plan being terminated.

> . . . the Plan may be merged into or consolidated with another plan, and its assets or liabilities may be transferred to another plan. . . . . no such merger, consolidation, or transfer shall be consummated unless each Employee, Retired Employee, former Employee and Beneficiary under the [Verizon] Plan would, if the resulting plan then terminated, receive a benefit immediately after the merger, consolidation, or transfer, if the [Verizon] Plan had then terminated;. . .

(App. 30). Article 11.3 says nothing about a right to transfer the pensions of retired persons or other participants or beneficiaries out of the Plan over to an insurance company. Article 11.3 has not been amended. Article 11.3 does not permit the suggestion that Verizon has the right to either remove, sell, trade, barter, or transfer retirees and treat them as if they were mere property rights. Retired persons, plan participants, have none of the characteristics of either assets or liabilities.

Also, prior to the contract to the Verizon/Prudential annuity transaction, the Plan's controlling terms allowed for Plan assets to be used only for providing Plan benefits and defraying Plan expenses, not for purchasing annuities held outside the Plan. Article 8.5 of the restated Plan[16] states, in pertinent part, ". . all Company contributions to the Pension Fund and all property of the Pension Fund, including income from investments and other sources, shall be used for the exclusive benefit of Employees, Retired Employees, former Employees, and Beneficiaries and shall be used to provide benefits under the Plan and to pay reasonable expenses of administering the Plan and the Pension Fund, except to the extent such expenses are paid by the Company." **(App. 25)**. Article 8.5 of the restated Plan has not been amended.

Also, prior to the contract for the Verizon/Prudential annuity transaction, the master trust agreement which is part of the Plan provided there could be no diversion of trust assets. Section 2 of the Bell Atlantic Master Trust states:

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16 The Plan was most recently restated at the end of year 2009. **(App. 23).**

> **No Diversion.** Except as may otherwise be permitted by law and as provided in this Section 2, at no time prior to the satisfaction of all liabilities with respect to participants and their beneficiaries in a Plan, and the portion of the Trust allocable to such Plan, shall any part of the allocable share of a Plan in the Trust be used for, or diverted to, any purposes other than for the exclusive benefit of such participants and their beneficiaries and for defraying taxes, fees and other expenses of administration of the Trust in the manner and to the extent provided in Section 11 of this Agreement.

(App. 294). This provision in the master trust agreement has not been amended and will be violated by the Verizon/Prudential annuity transaction, and the transaction will result in the diversion of approximately $7.5 billion to Prudential without there first being satisfaction of all liabilities to all participants and beneficiaries who will remain in the Plan. Upon receipt of the trust funding to be sent by Verizon Defendants, Prudential will be allowed to retain any monies that are left over after making annuity payments to the transferred retirees. That future scenario will be contrary to the aforesaid terms of the Plan.

Prior to the contract for the Verizon/Prudential annuity transaction, the Plan's controlling terms did not allow for the forfeiture of a retired employee's pension benefit payable under the Plan and replacement by an insurance annuity that is held outside the Plan, unregulated by ERISA and unprotected by the PBGC, except in connection with a complete termination of the Plan. **(App. 33, Article 12.3 "Provision for Pensions After Plan Termination": App. 33-34, Article 12.7 "Satisfaction of Liabilities on Plan Termination.").**

In order to move forward with the Verizon/Prudential annuity transaction, Verizon has purported to amend the Plan to insert a new Article 8.3(b), to be effective December 7, 2012. **(App. 60-62).** The new purported Plan amendment directs the Plan to purchase one or more annuity contracts to pay all pension benefits earned by designated retirees (i.e., Plaintiffs and putative class members – approximately 41,000 persons who retired prior to January 1, 2010 and

are receiving payment in the form of an annuity under the Plan) and, thus, extinguish the designated participants' rights to pension benefits payable under the Plan and extinguish the Plan's obligation to make pension payments to the designated retirees. (***Id.***).

The new purported Plan amendment, Article 8.3(b), however, does not overcome other provisions of the Plan remaining therein which preclude the Verizon/Prudential annuity transaction. The new purported Plan amendment creates an ambiguity concerning the authority under the Plan for the Verizon/Prudential annuity transaction because it conflicts with Articles 8.5, 11.3, 12.3 and 12.7 of the Plan and the limited disclosures made in the SPDs issued to Plaintiffs and putative class members prior to August 24, 2012.

Moreover, the hastily-concocted Plan amendment, under the Plan itself, cannot affect the right of Plaintiffs and others who ended employment and commenced retirement before January 1, 2002. Article 1.2 of the Plan states:

> those provisions of the Plan (or, if appropriate, any plan merged into the Plan) that are effective as of a date before January 1, 2002, and that were not otherwise in effect under the restatement by this instrument shall nonetheless be applied to determine the right to a Pension of an Employee who terminates his employment with the Affiliates on or after the effective date of such provision. (Emphasis added).

(App. 288). 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 each Plaintiff 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 Plaintiffs' consent, Defendants' consummation of the Verizon/Prudential annuity transaction, resulting in the loss of all federal protections, will, accordingly, violate Plaintiffs' grandfathered contractual rights under the NYNEX Management Pension Plan and violate existing terms and rules of the Plan that are protective of the retirees.

Defendants cannot argue they have the right to override the long standing mandate that Plaintiffs' consent be obtained before making the contemplated change to their pension benefits. The NYNEX Management Plan contains precise language requiring the consent of Plaintiffs, and such language is contractually controlling and cannot be unilaterally overridden, at the whim of Defendants. *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 938 (citing *Bryant v. International Fruit Products Co., Inc.*, 793 F.2d 118, 123 (6th Cir.) ("An agreement that provides that an act can occur in no event and under no circumstances cannot be converted into one that permits the act by a series of amendments that first deletes the reference to the prohibition and then adds a provision permitting the forbidden act."), *cert. denied*, 479 U.S. 986, 107 S.Ct. 576, 93)).

The Court must rule the contemplated transaction will violate ERISA Section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), and the appropriateness of that ruling necessitates the requirement as to Plaintiffs' Second Claim for Relief of a substantial likelihood of success.

b. Verizon Defendants Violated the ERISA Fiduciary Duty of Loyalty and Duty to Act in the Best Interests of the Retirees.

Under ERISA, the Verizon EBC, VIMCO and Plan administrators have a duty of loyalty to Plaintiffs and Class members, a duty long recognized by the federal courts.

> Although officers of a corporation who are trustees of its pension plan do not violate their duties as trustees by taking action which, after careful and impartial investigation, they reasonably conclude best to promote the interests of participants

> and beneficiaries simply because it incidentally benefits the corporation or, indeed, themselves, their decisions must be made with an eye single to the interests of the participants and beneficiaries. Restatement of Trusts 2d s 170 (1959); II Scott on Trusts s 170, at 1297-99 (1967) (citing cases and authorities); Bogert, The Law of Trusts and Trustees s 543 (2d ed. 1978). This, in turn, imposes a duty on the trustees to avoid placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan.

Donovan v. Bierwirth, 680 F.2d 263, 271 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488 (1982); *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 294 (5th Cir. 2000). A fiduciary must discharge plan responsibilities as a "prudent man," solely in the interest of the participants and beneficiaries (not the sponsoring employer) and for the exclusive purpose of providing benefits to participants and their beneficiaries and of defraying the reasonable expenses of the plan, in accordance with the lawful terms of the plan's controlling documents. ERISA § 404(a), 29 U.S.C. § 1104(a). The duty is analogous to the common trust law duty of "undivided loyalty". E.g., *McDonald v. Provident Indem. Life Ins. Co.*, 60 F.3d 234, 237 (5th Cir. 1995), *cert. denied*, 516 U.S. 1174, 116 S.Ct. 1267 (1996); *Eaves v. Penn*, 587 F.2d 453,457 (10th Cir. 1978).

Plaintiffs and all putative class members have vested rights to continued participation in the Plan. Defendants have not obtained consent from any Plaintiff or any other retiree to transfer him or her to Prudential, and that lack of consent means that the Verizon/Prudential annuity transaction cannot proceed as a matter of fiduciary duty under the circumstances in which it is occurring. 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).[17] 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. Similarly, herein, Plaintiffs and putative class members, retirees with vested benefits, should have first been consulted and then their consent obtained before the Defendants reached agreement to the Verizon/Prudential annuity transaction. Plan fiduciaries an administrators have breached their duty of loyalty to Plaintiffs and putative class members.

Defendants may argue that no fiduciary duties under ERISA are implicated based on case law involving the sale or division of a corporate entity. But the case law only concerns nonvested contingent benefits. For example, in *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893 (1987), the Eleventh Circuit upheld the trial court's decision that a sale of a corporate division which had an adverse impact on employees' rights to

[17] The *Howe* case proceeded to the Supreme Court, 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.

future contingent nonvested benefits did not implicate ERISA fiduciary duties. Notably different was the fact that the courts were not grappling with any retirees' vested rights and the appellate court specifically stated:

> We emphasize that the only "interests" at stake in this case are contingent and non-vested future retirement benefits. There is no dispute that Amoco has fulfilled and continues to fulfill its obligations with respect to vested retirement benefits earned under the Standard Plan.

Id., at 1471. Other courts have held that normal business decisions with potential collateral effects on prospective, non-vested contingent benefits need not be made in the interest of plan participants. *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir.1988), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893 (1987). See also *Sengpiel v. B.F. Goodrich Company*, 156 F.3d 660 (6th Cir. 1998), wherein the court held that "BFG's decision to spin off its tire division and to transfer a share of its welfare benefit liabilities approximately equivalent to the portion of its business devoted to tires does not constitute discretionary plan administration according to the plan's terms or management of its assets." *Id.*, at 666.

In *Systems Council EM-3, Intern. Broth. of Elec. Workers, AFL-CIO v. A.T.&T. Corp.*, 972 F.Supp. 21 (D. DC 1997) , the plaintiffs were both current workers and retirees who made a challenge, pursuant to ERISA Section 208,[18] concerning the percentage of surplus pension assets retained by AT&T when spinning off and creating Lucent Technologies, Inc. The trial court noted "[p]laintiffs make it clear that their challenge is to AT & T's allocation of plan assets and

[18] ERISA. Section 208 states: "A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan ... unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated)." 29 U.S.C. § 1058.

liabilities resulting from the spin-off of Lucent and its benefit plans." *Id.*, at 29. The trial court determined those acts were not fiduciary in nature, ruling " it is well settled that ERISA's fiduciary duties do not apply to the allocation and transfer of assets pursuant to a spin-off." (citation omitted). *Id.*, at 30. The trial court's dismissal of the claims was affirmed. *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376 (DC Cir. 1998) (holding AT&T was not acting in a fiduciary capacity when it allocated pension and welfare plan assets and liabilities between the AT&T pension plan and the Lucent pension plan).

Plaintiffs' and putative class members' pensions are not being transferred into another ERISA-regulated and PBGC-protected pension plan; they are being taken off the entire ERISA grid. Plaintiffs directly challenge the unauthorized and non-consensual transfer of their pensions. No such challenge was made in the *Systems Council EM-3* case.

Not only does the transfer of the retirees' pensions out of the Plan without their consent violate ERISA Section 404(a)(1)(A) duties, it also violates ERISA Section 404(a)(1)(C) duties.

ERISA Section 404(a)(1)(C) requires "diversifying the investments of the plan so as to minimize the risk of large loses, unless under the circumstances it is clearly prudent not to do so." Verizon plans to remove over $7.5 billion of Plan assets and invest all of it with a lone insurer, Prudential. Prudential is not too big to fail.[19] If the current economic situation has

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[19] As of the end of year 2011, Prudential formally disclosed in its annual statement that it had approximately $246.8 billion in assets with an estimated $238.6 billion in liabilities, revealing it, then, had a surplus of approximately $8 billion overall, or a less than a 4% financial cushion. In the same annual statement, Prudential reported $7.7 billion in investments tied to other ("non-agency") mortgage-backed securities and a combined concentration in affiliated debt or equity investments of $8.9 billion and more than $15 billion in exposure to commercial mortgages. In addition, in Note 11B to its 2011 annual statement to state insurance commissioners, Prudential reported $2.8 billion in assets pledged to the Federal Home Loan Bank of New York, of which $0.9 billion is reflected as borrowed money. Finally, on Schedule S, Part 3, Section 1 of the same annual statement, Prudential records a "reserve credit" for

taught retirees anything, it is that the funded status of a behemoth insurer can change in an instant and cause devastating economic harm for the whole country.

While Verizon may argue that its purchase of a group annuity is not an investment of the Plan's assets because the change completely removes affected retirees' pensions from the Plan, that argument only has validity if the entire Plan is terminated. Verizon's over-reliance on a single risky investment is the bane of a failure to diversify. The Verizon/Prudential annuity transaction is not one to facilitate the standard termination of a pension plan. Therefore, ERISA Section 404(a)(1)(C)'s statutory fiduciary standard is applicable.

This case presents a situation highly distinguishable from that situation addressed in *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 294 (5th Cir. 2000), where the appellate court noted that RJR's purchase of insurance annuities did not implicate the statute because the purchase was made to facilitate a standard termination of RJR's vastly over-funded defined benefit pension plan. Here, on the other hand, where the Plan will remain in existence for over half of the existing participants, the Verizon/Prudential annuity transaction does represent a use of Plan assets subject to scrutiny under ERISA Section 404(a)(1)(C). Should the Verizon Defendants invest $7.5 billion, a very substantial portion of Plan assets, into a single group insurance annuity, the transaction should be declared, *per se*, a failure to diversify.

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liabilities transferred to a 100% owned captive insurance company known as Prudential NJ Captive Insurance Company. **(App. 266-67, Stone Aff. ¶ 4)**. In light of these multiple disclosed risks, Prudential's ability to withstand a liquidity crisis or another economic downturn is not at all certain. A Prudential insolvency could create major disruptions in payments flowing to the retirees.

To compound Defendants' breaches of fiduciary duty in shedding the pension obligations in question, Verizon is taking advantage of the group of 41,000 retirees least able to defend themselves. Verizon is not engaging in the same or similar action with respect to nonmanagement retirees or management retirees formerly represented by unions. Retirees formerly represented by unions during employment are not included in the proposed annuity transaction. **(App. 3-4, Lee Aff. ¶ 9).** Also not included are certain retiree participants of the Plan formerly employed by MCI Corporation, which group of retirees Verizon is obviously concerned, because they may have rights inconsistent with Verizon's intentions. Verizon is only moving swiftly against management retirees who lack a formalized bargaining representative or other such protection. ***(Id.).*** There is no just reason for Plan fiduciaries to allow abandonment of all federal rights and protections afforded to 41,000 retirees, while maintaining the same federal rights for more than 60,000 retirees and active workers allowed to stay within the Plan.

Finally, the abdication of Verizon Defendants' fiduciary duty in the Verizon/Prudential annuity transaction is apparent in the loss of federal protection for the retirees resulting from the transaction. Plaintiffs and all potential class members have Plan benefits that are insured or guaranteed by the PBGC up to a monthly limit of $4,353.41, or approximately $55,800 per year per retiree who is at least age 65 years, and that annual protection is for an unlimited number of consecutive years.[20] The protected annual rate is higher for retirees over age 65. If the Verizon/Prudential annuity transaction occurs, the affected retirees will lose all federal protection and be placed into an inferior safety-net, not governed by a uniform federal law, but governed by

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[20] The PBGC's maximum benefit guarantee is set each year under provisions of ERISA. The PBGC posts at its website its maximum monthly guarantee tables: http://www.pbgc.gov/wr/benefits/guaranteed-benefits/maximum-guarantee.html#2012

non-uniform laws relating to insurance guaranty associations of 50 separate states.

All fifty states and two territories have a guaranty association that is supposed to protect policyholders in the event that a life insurance company becomes insolvent or impaired. **(App. 268, Stone Aff. ¶ 8)**. However, as indicated by Plaintiffs in the Complaint, state guaranty association relief varies from state to state and benefits are not provided in a uniform fashion. Most state guaranty associations categorize annuity policies as either "allocated" or "unallocated" with significantly greater protection for allocated policies. Allocated contracts provide benefits directly to individuals within the certain coverage limits varying from state to state. Unallocated contracts are held by the corporate employer or retirement plan trustees and the "policyholder" is considered to be the group. Guaranty fund limits for unallocated group policies generally range from $1 million to $5 million in total and the determination of which contracts are allocated versus unallocated varies from state to state and courts have not definitively or uniformly determined how these concepts apply. **(App. 268, Stone Aff. ¶ 9)**.

Assuming that the Prudential annuity falls into the category of an allocated contract allowing for individual coverage, as opposed to a group limited amount of lump sum coverage allowed for an unallocated contract, once Plaintiffs' and the other affected retirees' pension benefit is removed from the Plan and transferred by Verizon to Prudential, each retiree will lose all federal protection through the PBGC, to be replaced, in the event of the inability of Prudential to make payments to them, by the following insufficient and varying insurance guaranty coverage amounts determined by the retirees' respective states of residence. These limits are as follows:

- Eight states and one territory – AK, AZ, IN, MA, MS, MO, NH, NV and Puerto Rico – limit coverage for annuity holders in case of a default or shortfall to a lifetime maximum of $100,000;

- Twenty eight states – CA, CO, DE, HI, ID, IL, IA, KS, KY, LA, ME, MD, MI, MN, MT, NE, NM, ND, OH, RI, SD, TN, TX, UT, VT, VA, WV, WY – limit coverage for annuity holders in case of a default or shortfall to a lifetime maximum of $250,000;

- Ten states – AL, AR, FL, GA, NC, OK, OR, PA, SC, WI and the District of Columbia – limit coverage for annuity holders in case of a default or shortfall to a lifetime maximum of $300,000; and

- Four states – CT, NJ, NY and WA – limit coverage for annuity holders in case of a default or shortfall to a lifetime maximum of $500,000.[21] **(App. 269-70, Stone ¶ 11)**.

There are also other uncertainties. Individual coverage limits under state guaranty statutes vary from $100,000 to $500,000 per person and are generally determined by the state of residency at the time of impairment or insolvency of an insurance company. **(App. 270, Stone Aff. ¶ 12)**. Most state guaranty associations are underfunded or unfunded, relying on future premium assessments to fund unknown liabilities. **(*Id.*)**. State guaranty association coverage amounts and rules of the game can be subject to change without notice. **(App. 270, Stone Aff. ¶ 14)**. Relocating retirees may unwittingly divest themselves of guaranty association coverage. For example, an annuitant living in Connecticut with $500,000 of potential coverage, after relocating residence to Arizona, could find himself or herself with just $100,000 of coverage. [22] **(App. 270, Stone Aff. ¶ 15)**.

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[21] If the annuity to be issued pursuant to the Verizon/Prudential annuity transaction is regarded as unallocated, the coverage amounts may be even more limited in certain states.

[22] The annuitant "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 v. PACE Intern. Union,* 551 U.S. 96, 106, 127 S.Ct. 2310, 2318 (2007).

In addition to the patchwork nature of state guaranty funds, putative class members who already hold a Prudential annuity may be further damaged by the Verizon/Prudential annuity transaction as coverage amounts are per person, not per policy. **(App. 270, Stone Aff. ¶ 13).**

Retirees and their spouses, especially those who reside in states with the lowest protection levels, will be seriously harmed and left with as little as two years pension benefit replacement in case of default by Prudential on its annuity obligation. **(App. 271, Stone Aff. ¶ 17).**

Moreover, state guaranty funds have been known to assert their subrogation rights as priority claims and net out coverage amounts against remaining estate assets. This means that the actual dollar amount of benefits funded out of the individual state guaranty association coffers themselves are invariably less than the fund limits they promote. **(App. 270-271, Stone Aff. ¶ 16).**

Should the Verizon/Prudential annuity transaction be consummated, Prudential could choose to re-sell or transfer to another unknown insurance company all or part of its annuity responsibilities for the Plaintiffs and the putative class of transferred retirees, further diluting and eviscerating the present ERISA-regulated and PBGC-insured rights of Plaintiffs and putative class members. A description placed on the Prudential website simply says "the Verizon Management Pension Plan will purchase a group annuity contract from Prudential."

In sum, the sample redacted form of group annuity contract attached to the heavily redacted Definitive Purchase Agreement makes it difficult if not impossible to determine what type and how much guaranty association coverage would apply to the 41,000 retirees in the event Prudential became insolvent or impaired. **(App. 268-69, Stone Aff. ¶ 10).**[23]

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[23] Plaintiffs and all putative class members have to date not been made privy to certain details of the transaction, such as any of the analyses conducted by either Prudential and

Should the Verizon/Prudential annuity transaction be consummated, Plaintiffs and all other approximately 41,000 retirees will lose all ERISA protected rights, including mandated annual financial disclosures and ready access to the federal courts. Prudential will not be subject to ERISA's fiduciary duties standards, minimum funding standards and disclosure requirements. Basic data regarding the funded status of a pension annuity, changes in assets and liabilities, and the amount that annuitants would stand to lose if an underfunded annuity was terminated, are vitally important to retirees. Prudential will not be required to disclose to any transferred retiree how his or her annuity funding is invested and who is in charge of the underlying investments, as Verizon is required to do with respect to the Plan. **(App. 268, Stone Aff. ¶ 7)**.

For all the reasons stated, Verizon Defendants' conduct towards Plaintiffs and the putative class members, all carried out without the retirees' consent and contrary to the specific requirements of the Plan, has and will violate ERISA's fiduciary duty of loyalty and requirement to act in the best interests of the retirees, in accordance with ERISA Section 404(a)(1)(A) and ERISA Section 404(a)(1)(C). Because that is the case, Plaintiffs have established a likelihood of success on the merits of their Second Claim for Relief for violation of ERISA fiduciary duties.

3. **There is a Substantial Likelihood that Plaintiffs Will Prevail on Count Three — Violation of ERISA Section 510, Interference With Protected Rights.**

For their Count Three in the Complaint, Plaintiffs claim that the Verizon/Prudential

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Verizon, any consultants or the so-called 'independent fiduciary" retained by Verizon, the Verizon EBC and VIMCO, to purportedly justify it. Besides highly redacting the "Definitive Purchase Agreement" which agreement affects the pension rights of 41,000 retirees **(See generally, App. 65-210)**, Verizon's stated position is that it need not give any of the retirees the courtesy of a fully informative response to their more specific inquiries about the subject matter, because "[t]he requested information is not required to be provided under ERISA Section 104(b)(4)." **(App. 14,** reflecting response to some putative class members' list of questions sent to Verizon; **App. 240,** list of retirees' questions asked of Verizon senior leadership).

annuity transaction discriminates against 41,000 retirees and interferes with their rights under the Plan and under ERISA in violation of ERISA Section 510, 29 U.S.C. § 1140. As reflected in the appendix in support of the Complaint **(App. 60-62, Plan amendment, App 65-210, "Definitive Purchase Agreement")**, 41,000 management retirees are being excluded from the Plan while over 6,000 other similarly situated management retirees and at least 50,000 other Plan participants are unaffected.

ERISA Section 510, "Interference with Protected Rights," make such discrimination illegal. 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, 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). 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).

Id., at 508. Accordingly, contrary to any argument to be made by Defendants, retirees are not excluded from ERISA Section 510's prohibition against discrimination.

By choosing to remove from the Plan the pensions of approximately 41,000 retirees and entering into the Verizon/Prudential annuity transaction without there being a complete termination of the Plan, Verizon, the Verizon EBC and VIMCO had and continue to have 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. Certainly, the Verizon/Prudential annuity transaction will not serve to facilitate the retirees' protections under ERISA. If the transaction is allowed to go forward, Verizon, the Verizon EBC and VIMCO will have, accordingly, violated ERISA Section 510, 29 U.S.C. § 1140.

The primary Plan rights that the Verizon/Prudential annuity transaction interferes with are Plaintiffs' and putative class members' rights to continued participation in the Plan until such time as their respective vested pension benefits are paid 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 received by the retiree, he or she will continue participating in the Plan. Without their consent and in violation of the Plan, Plaintiffs' and putative class members' rights to receive a full distribution of their respective vested pension benefits are being defeated.

Given that the Verizon Defendants' violation of ERISA Section 510 is so clear, Plaintiffs have satisfied the substantial likelihood of success requirement as to their Third Claim for Relief.

4. There is a Substantial Likelihood that Plaintiffs Will Prevail on Count Four — Claim for Appropriate Equitable Relief.

For their Count Four in the Complaint, Plaintiffs request, pursuant to ERISA Sections 502(a)(2) and (a)(3), 29 U.S.C. §§ 1132(a)(2) and (a)(3), appropriate equitable relief, including temporary, preliminary and permanent injunctive relief, ordering Defendants to maintain the status quo and not remove Plaintiffs and putative class members from continued participation in the Plan. In the alternative, Plaintiffs request an order requiring Defendants to give Plaintiffs and each putative class member an elective choice of either: (1) keeping his pension benefit in the Plan; (2) receiving a lump sum distribution of Plan pension benefits; or (3) selecting Prudential or some other issuer of an annuity equivalent to his or her existing pension benefits under the Plan.

In *Heimann*, the Fifth Circuit observed:

> Unlike four of § 502's six subsections, § 502(a)(3) is not focused on specific areas or types of defendants. See *Varity Corp*., 516 U.S. at 512, 116 S.Ct. 1065. As the Supreme Court pointed out, § 502(a)(3) and (5) "create[ ] two 'catchalls,' [to protect the interests of participants and beneficiaries] providing 'appropriate equitable relief' for 'any' statutory violation [,]" whereas the others address particular evils, "i.e., the first (wrongful denial of benefits and information), the second (fiduciary obligations related*505 to the plan's financial integrity), the fourth (tax registration), and the sixth (civil penalties)." Id. Further, "these 'catchall' provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Id. As well, the legislative history describes these enforcement provisions as intended to " 'provide both the Secretary and participant and beneficiaries with broad remedies for redressing or preventing violations of [ERISA][.]' " Id. (citing s. Rep. No. 93-127, p. 35 (1973, 1 Leg. Hist. 621; h.R. Rep. No. 93-533, at 17, 2 Leg. Hist. 2364)).

Heimann, 187 F.3d at 504-05.

Verizon, the Verizon EBC, VIMCO and Prudential should maintain the status quo and not carry out the contemplated removal of 41,000 retirees from the Plan. None of the Defendants will take such action absent a directive and order issued by the Court. Should the Verizon/Prudential

annuity transaction be consummated, the public policies expressed by Congress and set forth within ERISA will be thwarted. Short of a complete termination of the Plan approved by the PBGC, ERISA simply does not permit Verizon's pension payment obligations for 41,000 retirees to be transferred to an insurance company, and the consequential canceling of Verizon's obligation to pay PBGC required annual premium payments on account of such participants. Should the Verizon/Prudential annuity transaction be consummated, the PBGC's overall mission will be impaired. A very wealthy, solid Fortune 5 U.S. corporation will no longer annually contribute millions of dollars in premiums to the PBGC, as needed by the PBGC in order to protect the financial security of numerous other U.S. employer defined benefit pension plans.[24]

The Fifth Circuit has observed and ruled that there is no limitation on the set of proper defendants to an ERISA Section 502(a)(3) action. *Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 354 (5th Cir. 2003), *cert. denied*, 541 U.S. 1072, 124 S.Ct. 2412 (2004). In view of the Defendants' contract for the Verizon/Prudential annuity transaction, each Defendant must concede it is a proper defendant party. Each Defendant is needed to effectuate an order either maintaining the status quo or giving the Plaintiffs and each putative class member an elective choice of either: (1) keeping his pension benefit in the Plan; (2) receiving a lump sum distribution of Plan pension benefits; or (3) selecting Prudential or some other another insurance issuer of an annuity equivalent to his or her existing Plan benefits.

[24] For each of the 41,000 management participants Verizon plans to remove from the Plan by the end of 2012, Verizon will avoid an obligation to make a $42 payment to the PBGC on February 28, 2013. Thus, beginning in 2013, the PBGC's total loss of recurring annual premium revenues from Verizon will be $1,722,000.00.

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

Plaintiffs request a temporary restraining order and preliminary injunction in the form of a prohibitory injunction that freezes the status quo and is intended to "preserve the relative positions of the parties until a trial on the merits can be held." See *Wenner v. Tex. Lottery Comm'n*, 123 F.3d 321, 326 (5th Cir.1997) (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)). Generally, the status quo is defined as the " 'last peaceable uncontested status' existing between the parties before the dispute developed." See *Nova Health Sys. v. Edmondson*, 460 F.3d 1295, 1298 n. 5 (10th Cir.2006) (quoting 11A Wright, Miller & Kane, Federal Practice and Procedure § 2948 (2d ed.1995)). The only harm, if any, that will result to Defendants from the issuance of a temporary restraining order is a requirement to maintain administration of the Plan as before Defendants entered into the agreement for the Verizon/Prudential annuity transaction. Certainly, a harm involving loss of federal protections provided by ERISA and the uniform guarantee provided by the PBGC outweighs mere delay to Defendants in consummating a transaction violating ERISA.

E. The Requested Temporary Restraining Order Will Promote Clear Public Policy and the Public Interests.

In enacting ERISA and creating the PBGC, Congress was very much concerned about protecting retirees enrolled in defined pension benefit plans. ERISA reflects a carefully calibrated balance between the rights of employers and the rights of retirees with a goal of giving security to hard earned pension benefits. The Verizon/Prudential transaction is an unprecedented attack against the entire ERISA-governed and PBGC-protected scheme set in place by Congress and puts retirees back where they would have been before ERISA was enacted in 1974. Indeed, the Verizon/Prudential annuity transaction violates Congressional intent when enacting ERISA and

creating the PBGC. "Congressional purpose is the 'ultimate touchstone' of the Court's inquiry." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). ERISA provides retirees with a guarantee that their retirement will be governed by a single, federal set of rules that guarantees "efficiency, predictability, and uniformity." *Conkright v. Frommert*, __ U.S. __, 130 S. Ct. 1640, 1649 (2010).

There can be no doubt that Congress sought to bring retirees' pensions under federal regulatory control, and that, if the Verizon/Prudential annuity transaction is permitted to go forward, the retirees' pensions will be removed from federal regulatory control and place the retirees in a morass of uneven and unpredictable state regulatory control, the very situation that ERISA was intended to preempt. In fact, ERISA Section 544, the preemption provision of ERISA, was specifically intended to remove the traditional role of states in controlling retirement issues. The Verizon/Prudential annuity transaction, therefore, takes all affected retirees back in time before 1974.

ERISA was enacted to give employees and retirees a predictable, uniform legal framework that would encourage them to work for their benefits. The Verizon/Prudential annuity transaction disrupts that uniformity, upsets settled expectations, and threatens to frustrate a key component of earned pensions, the uniform protection provided by the PBGC's guaranty. The Court should take this opportunity to make clear that requiring Defendants to maintain the status quo for the retirees' pensions in the Plan is squarely within the scope of "appropriate equitable relief" under ERISA Section 502(a)(3). The Verizon/Prudential annuity transaction scheduled to close during December 2012 should be stopped consistent with the public policy and public interest served by ERISA.

F. No Bond Should be Required

No security should be required for the issuance of a temporary restraining order or preliminary injunction against consummation of the Verizon/Prudential annuity transaction. The Fifth Circuit has made clear that it is well within the discretion of the district court to decide that, under the circumstances, no security is required. See *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir.1996) ("In holding that the amount of security required pursuant to Rule 65(c) 'is a matter for the discretion of the trial court,' we have ruled that the court 'may elect to require no security at all.' " (quoting *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir.1978))).

WHEREFORE, Plaintiffs William Lee and Joanne McPartlin, individually and on behalf of a putative class of approximately 41,000 similarly situated retirees, request the Court to enter an order as follows:

> Defendants are hereby restrained and enjoined as follows:
>
> Defendants are restrained from consummating the terms of the "Definitive Purchase Agreement" dated October 17, 2012 and restrained from removing the pensions of Plaintiffs and other retirees from the Verizon Management Pension Plan from the date of this order until further order of this Court.

Plaintiffs request such other and further relief as the Court deems just and appropriate.

DATED this 3rd day of December, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2012, 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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