No. ________

In The
Supreme Court of the United States

PHILIP A. MURPHY, JR.; SANDRA R. NOE; CLAIRE M. PALMER, Individually, and as Representatives of plan participants and plan beneficiaries of Verizon's Pension Plans involuntarily re-classified and treated as transferred into IDEARC's Pension Plans,

Petitioners,

v.

VERIZON COMMUNICATIONS, INCORPORATED; VERIZON EMPLOYEE BENEFITS COMMITTEE; VERIZON PENSION PLAN FOR NEW YORK AND NEW ENGLAND ASSOCIATES; VERIZON MANAGEMENT PENSION PLAN; SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, formerly known as Idearc Employee Benefits Committee; VERIZON CORPORATE SERVICES GROUP, INCORPORATED; VERIZON ENTERPRISES MANAGEMENT PENSION PLAN; VERIZON PENSION PLAN FOR MID-ATLANTIC ASSOCIATES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

CURTIS L. KENNEDY, ESQ.
Counsel of Record
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Tele: 303-770-0440
CurtisLKennedy@aol.com

ROBERT E. GOODMAN, JR., ESQ.
KILGORE & KILGORE LAWYERS
3109 Carlisle Street
Dallas, Texas 75204-1194
Tele: 214-969-9099
reg@kilgorelaw.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

Congress, in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., imposed fiduciary duties on individuals and entities administering pension plans in order to assure that they serve the best interests of plan participants and beneficiaries and avoid conflicts of interest. In this case, pension plan fiduciaries, flouting their fiduciary responsibilities and acting at the behest of the corporate employer sponsor, surreptitiously removed a class of 2,750 retirees from defined benefit pension plans and transferred them into newly-formed defined benefit pension plans against the will of both the retirees and the sponsor of the new benefit plans. The transaction was adverse to the interests of the retirees. Therefore, the questions presented are:

1. Whether, under ERISA Section 404(a)(1), pension plan fiduciaries may remove plan participants and beneficiaries from an ongoing pension plan without a plan amendment and without notice to or consent of plan beneficiaries.

2. Whether, under ERISA Section 406(b)(2), pension plan fiduciaries, while acting in their capacity as officers of the plan sponsor, may act in a transaction involving a pension plan on behalf of the corporate plan sponsor whose interests are adverse to the interests of plan participants and beneficiaries.

PARTIES TO THE PROCEEDINGS

Petitioners are Philip A. Murphy, Jr., Sandra R. Noe and Claire M. Palmer, individually, and as representatives of a certified class of plan participants and plan beneficiaries of Verizon's pension plans involuntarily transferred into Idearc's pension plans.

Respondents are Verizon Communications Inc., Verizon Employee Benefits Committee, Verizon Pension Plan for New York and New England Associates, Verizon Management Pension Plan, SuperMedia Employee Benefits Committee, formerly known as Idearc Employee Benefits Committee, Verizon Corporate Services Group, Incorporated, Verizon Enterprises Management Pension Plan and Verizon Pension Plan for Mid-Atlantic Associates.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The petitioners are all natural persons.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The Fifth Circuit's October 14, 2014 unpublished opinion is reprinted at App. 1 and is available at 587 Fed. Appx. 140 (5th Cir. 2014). The Fifth Circuit's unpublished order denying an en banc rehearing is reprinted at App. 75. The district court's order granting defendants' motion for summary judgment is reprinted at App. 20 and is reported at 2013 WL 5206451 (N.D. Tex., September 16, 2013).

STATEMENT OF JURISDICTION

The Fifth Circuit entered judgment on October 14, 2014 and denied a timely petition for rehearing en banc on November 19, 2014. (App. 75). This Petition was timely filed within 90 days of that ruling. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Question Presented 1 involves ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1), which states, in pertinent part:

> **(a) Prudent Man Standard of Care. –**
>
> **(1)** Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the

> interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . .

(emphasis original) 29 U.S.C. § 1104(a)(1).

Question Presented 2 involves ERISA Section 406(b)(2), which states:

> **(b) Transactions Between Plan and Fiduciary. –** A fiduciary with respect to a plan shall not –
>
> **(2)** in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries[.]

(emphasis original) 29 U.S.C. § 1106(b)(2).

Philip A. Murphy, Jr., Sandra R. Noe and Claire M. Palmer respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

This case concerns the surreptitious transfer of thousands of long-retired former employees out of secure ongoing defined pension benefit plans into less secure, newly established pension plans against the expressed wishes of the corporate sponsor of the new pension plans. The Employee Retirement Income Security Act of 1974 (ERISA) was enacted to protect the retirement benefits of millions of pension plan participants and their beneficiaries. 29 U.S.C. § 1001(a). ERISA Sections 404(a)(1) and 406(b)(2) are integral to the protection the statute provides. When the retirees were involuntarily transferred, pension plan fiduciaries blatantly violated these two ERISA provisions.

The Fifth Circuit summarily affirmed two rulings made by the district court severely undermining the fundamental protections afforded by ERISA Sections 404(a)(1) and 406(b)(2) to retirees who are participants in defined pension benefit plans. The relevant statutory provisions are straightforward. An ERISA fiduciary of a defined pension benefit plan is required to act "solely in the interest of the participants and beneficiaries" of the plan, and "for the exclusive purpose . . . of providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1). A fiduciary may not either in his or her "individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. § 1106(b)(2).

The lower courts' rulings conflict with the plain language of the cited statutory provisions. The lower courts ruled that there is no breach of fiduciary duty when retirees are unwillingly removed from an ongoing pension plan into a new pension plan sponsored by a newly-established corporate entity. That ruling directly conflicts with the Eighth Circuit's ruling 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). Also, the lower courts disregarded the plain wording of ERISA Section 406(b)(2) when ruling that a fiduciary is not prohibited from acting in his or her capacity as a corporate officer and conducting a transaction involving a defined pension benefit plan even when the transaction is not in the best interests of plan participants and beneficiaries. This ruling conflicts with this Court's ruling in *N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc*., 453 U.S. 322, 333-334, 101 S. Ct. 2789, 2796 (1981).

This Court should grant review and resolve a conflict between the Eighth Circuit and the Fifth Circuit as to whether a breach of ERISA Section 404(a)(1) fiduciary duty occurs when retirees are involuntarily transferred out of an ongoing defined benefit pension plan without the retirees' knowledge and consent.

Likewise, with respect to the plainly worded prohibition set forth in ERISA Section 406(b)(2), this Court should enforce uniformity with its decision in *Amax Coal*. A judge of the Sixth Circuit Court of Appeals opined that:

> In the plainest conceivable English, the section bars fiduciaries from taking certain actions even in their individual capacities; and yet, we are told, the section "applies only to those who act in a fiduciary capacity." (citation omitted). Perhaps I am missing something. . . . Loose language in one case hardens into a holding in another, and other courts follow suit. Eventually the caselaw takes on a life of its own, often lived at variance with the rules laid down in the statute itself. . . . Perhaps eventually the [Supreme] Court will take a § 1106(b)(2) case and decide whether the subsection means what it seems clearly to say.

DeLuca v. Blue Cross Blue Shield of Michigan, 628 F.3d 743, 751-752 (6th Cir. 2010) (Kethledge, J., dissenting).

The security of defined pension benefits of millions of Americans, and the legality of the practices of some of the nation's largest corporate sponsors, hang on the answer to the questions presented. Only this Court can resolve that uncertainty. Because a chief goal of ERISA is to establish uniformity of pension plan administration and carry out the intent of Congress to protect plan participants and beneficiaries, the issues raised cry out for this Court's intervention.

STATEMENT OF THE CASE

After years of declining revenues, Respondent Verizon Communications Inc. ("Verizon") decided in 2006 to spin off its obsolete yellow pages business segment referred to as Verizon Information Services ("VIS") to a new company named Idearc Inc. ("Idearc"). Among the questions raised was whether to transfer some of Verizon's retirees who were former VIS employees. In mid-March 2006, soon-to-become leaders of Idearc sent to Verizon corporate leadership a recommendation that should Verizon carry out the spinoff, Verizon should retain the retirees in Verizon's retirement plans.

About a month prior to making a public announcement about the proposed spinoff, Idearc's leaders received a memorandum from an outside consulting and actuarial firm performing due diligence on behalf of Idearc. The memorandum concluded that it was in the best interest of retirees for Verizon to continue providing coverage for VIS retirees' benefits. Idearc's executives themselves likewise sought to have the better-financed Verizon maintain responsibility for the retirees. Verizon, however, decided to transfer retirees to Idearc. This decision was imposed on Idearc. Verizon did not obtain a written opinion from either independent counsel or an independent fiduciary regarding the advisability of transferring retirees to Idearc. No one consulted with any of the retirees.

Verizon gave its Verizon Employee Benefits Committee ("Verizon EBC"), the named fiduciary of Verizon's pension plans, ultimate responsibility for transferring retirees out of Verizon pension plans into Idearc pension plans. The Verizon EBC was comprised of high level executive officers of Verizon. None of them sought the retirees' consent to be transferred. The retirees were simply transferred to Idearc without their knowledge or consent.

Six weeks after the retirees had been transferred, Verizon belatedly adopted pension plan amendments directing the transfer of retirees out of Verizon's pension plans into Idearc's pension plans. Another month later, Verizon first informed management retirees that they had been involuntarily transferred to an Idearc pension plan. Yet, another month later, Verizon first informed nonmanagement retirees that they had been transferred to an Idearc pension plan.

Verizon did not provide Idearc any funding for the retirees' health and welfare benefits, known as "other post employment benefits" ("OPEBs"). Following the spinoff, the retirees did not receive the same level of OPEBs they would have received had they remained as participants in Verizon's pension plans.

Not long after the spinoff, Idearc and its domestic subsidiaries filed for reorganization under Chapter 11 of the U.S. Bankruptcy Code. On November 25, 2009, Petitioners commenced this civil action. On January 4, 2010, Idearc exited bankruptcy proceedings and changed its name to SuperMedia Inc. ("SuperMedia").

While this civil action was pending, on March 18, 2013, SuperMedia and its domestic subsidiaries filed for reorganization under Chapter 11. On October 9, 2013, SuperMedia exited bankruptcy proceedings and became a wholly-owned subsidiary of Dex Media Inc.

Within their Second Amended Complaint, Petitioners claimed that the transfer of VIS retirees was not in the best interests of the retirees and, when the Verizon EBC facilitated the transfer of such retirees out of Verizon's pension plans into Idearc's pension plans, there was a clear breach of statutory duties, including those imposed by ERISA Sections 404(a)(1) and 406(b)(2).

ERISA Section 404(a)(1) imposes a general fiduciary duty on plan fiduciaries requiring them to protect the interests of participants and beneficiaries. ERISA Section 406(b)(2) prohibits fiduciaries with respect to a pension plan from acting in a transaction involving a plan on behalf of a party whose interests are adverse to the interest of the plan or its participants or beneficiaries. The Verizon EBC members, when removing retirees from Verizon pensions plans, were doing Verizon's bidding, acting contrary to the interests of retirees, and so violated ERISA Section 406(b)(2).

On September 16, 2013, the district court granted Respondents' motion for full summary judgment and denied the Petitioners' motion for partial summary judgment. (App. 73-74). The district court improperly ruled that no fiduciary duties were breached because the Verizon pension fiduciaries' actions were taken while acting in a settlor capacity. The district court determined that the pension plan fiduciaries were performing settlor functions when carrying out the transaction involving the pension plan. (App. 52, "If the entity or person in question is not performing fiduciary functions in connection with a particular transaction, then the entity is not a fiduciary to whom Section 406(b)'s prohibition applies."). The District Court improperly excused fiduciaries' participation in the transaction adverse to the interests of the retirees by erroneously ruling that ERISA Section 406(b)(2) does not apply to fiduciaries when not acting in a fiduciary capacity.

In a per curiam opinion, the Fifth Circuit summarily affirmed the district court's rulings with respect to the ERISA Section 404(a)(1) and 406(b)(2) claims. (App. 3) ("We affirm the grant of summary judgment on these claims for essentially the reasons expressed in the Memorandum Opinion and Order.").

REASONS FOR GRANTING THE PETITION

I. Review is warranted to establish uniformity among the Circuit Courts that an involuntary transfer of retirees out of an ongoing defined pension plan violates the plan fiduciaries' duty of loyalty under ERISA Section 404(a)(1).

In this case, the lower court's rulings directly conflict with a ruling of the Eighth Circuit addressing the same situation of an involuntary transfer of retirees out of an ongoing defined pension plan. This Court should grant review in order to establish uniformity among the federal courts that an involuntary transfer of retirees out of an ongoing defined pension plan violates the plan fiduciaries' duty of loyalty under ERISA Section 404(a)(1). This provision "imposes 'strict standards of trustee conduct . . . derived from the common law of trusts[.]'" *Fifth Third Bancorp v. Dudenhoeffer*, ___ U.S. ___, 134 S. Ct. 2459, 2465 (2014) (quoting *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc*., 472 U.S. 559, 570, 105 S. Ct. 2833 (1985).

The surreptitious transfer of retirees was addressed 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). In *Howe*, the trial court concluded that an employer violated its fiduciary duties under ERISA when it transferred retirees to the pension plan of a nearly-bankrupt company without informing the retirees of the change or obtaining their 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 Court's ruling in favor of the ten named individual plaintiffs.

Id., at 756. The *Howe* case proceeded to this Court, but the Court declined to review the cited portion of the Eighth Circuit's opinion because the petition for certiorari in *Howe* did "not sufficiently call into question the District Court's holding that Varity breached a fiduciary duty with respect to the Massey-Ferguson retirees whose benefit obligations had been involuntarily assigned to Massey Combines." *Howe*, 516 U.S. at 496, 116 S. Ct. at 1070. Herein, Petitioners directly have called this matter into question, and the lower courts' decisions fully contradict the Eighth Circuit's ruling.

When Verizon conducted the spinoff creating Idearc on November 17, 2006, Verizon's intent was for the retirees to be removed from Verizon's ongoing pension plans and transferred to Idearc's pension plans against the wishes of Idearc and the best interests of the retirees. At the time, there was no existing plan document providing for or directing the affected retirees to be removed from Verizon's pension plans and transferred elsewhere.

ERISA Section 404(a)(1)(D) requires a plan fiduciary to act "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV." This Court emphasized the importance of the plan documents rule in *Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865 (2009). In *Kennedy*, this Court declared that " . . . ERISA forecloses any justification for enquiries into nice expressions of intent, in favor of the virtues of adhering to an uncomplicated rule. . . ." *Id.,* 129 S. Ct. at 875. A court should reject efforts to stray from the express terms of a pension plan, regardless of whom those express terms may benefit. *Allison v. Bank One-Denver*, 289 F.3d 1223, 1236 (10th Cir. 2002).

On November 17, 2006, all Petitioners had vested rights to continue as participants in Verizon's pension plans, yet they were impermissibly transferred out of

Verizon's pension plans. Verizon only belatedly, on December 22, 2006, subsequently adopted plan amendments stating the retirees were no longer eligible, as of November 17, 2006, to participate in Verizon's pension plans. Such action taken to retroactively defeat the transferred retirees' rights was wrongful because courts have consistently held that attempts to backdate plan amendments and apply them retroactively so as to defeat plan participants' rights are ineffective to amend the plan. *Confer v. Custom Engineering Company*, 952 F.2d 41 (3rd Cir. 1991); *Member Svcs. Life Ins. Co. v. Amer. Nat'l Bank & Trust Co. of Sapulpa*, 130 F.3d 950, 954-956 (10th Cir. 1997); *Winterrowd v. American General Annuity Ins.*, 321 F.3d 933 (9th Cir. 2003).

The involuntary transfer of the retirees without their knowledge and consent was a breach of fiduciary duty of loyalty. As stated in *Donovan v. Bierwith*, 680 F.2d 263, 271 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1069, 103 S. Ct. 488 (1982):

> 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.

See also *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). Other courts have ruled that this statutory provision imposes an unwavering duty on an ERISA plan fiduciary "to make decisions with single-minded devotion to a plan's participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation." *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 946 (6th Cir. 1990) (quoting *Morse v. Stanley,* 732 F.2d 1139, 1145 (2nd Cir. 1984)).

When Verizon decided to transfer the unsuspecting retirees against the will of Idearc, the Verizon pension plan fiduciaries were faced with a true conflict of interest and, consequently, the plan fiduciaries should have (1) secured the appointment of persons or an entity free from a conflict of interest, and (2) informed the soon to be transferred retirees that Idearc might not be a reliable source of pension and welfare benefits and that the retirees might need to make alternative arrangements for retirement benefits that they had become accustomed to receiving as participants in Verizon's employee benefit plans. See *Holdeman v. Devine*, 474 F.3d 770, 782-783 (10th Cir. 2007) (remanding and instructing the trial court to consider those issues). Such action to protect the best interests of the retirees should have been undertaken in view of the fact that Verizon did not provide Idearc any funding for the retirees' health and welfare benefits.

Before the Idearc spinoff was conducted, the Verizon EBC could have sought an advisory opinion from the United States Department of Labor, but did not. Certainly, in order to avoid the conflict of interest, the Verizon EBC and plan administrators should have engaged the services of an independent, outside advisor before carrying out the transfer of the retirees. *Bussian, supra*, 223 F.3d at 300 ("fiduciary must consider any potential conflict of interest" when considering the transfer of assets to an insurance annuity). When conducting a pension plan spinoff, the fiduciaries should not treat the matter any less casually than they would when selecting an insurance annuity provider. When deciding the overall welfare of plan participants, ERISA fiduciaries are " . . . obliged at a minimum to engage in an intensive and scrupulous independent investigation . . . to insure that they act in the best interests of the plan beneficiaries." *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1013 (10th Cir. 2004) (citation omitted). In this case, the lower courts did not address this failure.

ERISA's fiduciary duty standards require "higher than marketplace" standards of conduct. *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105, 115, 128 S. Ct. 2343, 2350 (2008). Verizon's decision to transfer the retirees was a cram down, not an arm's length transaction. Verizon imposed its will on Idearc and the unsuspecting retirees. Here, despite pleas from Idearc executives not to transfer retirees, Verizon pension plan fiduciaries went forward and secretly transferred retirees without their consent, and then, only later, changed the terms of Verizon's pension plans in an effort to retroactively authorize the adverse action they had already taken against the retirees. Since they acted in advance of any plan document authorization, at the behest of the employer, and against the interests of pension plan participants, Verizon plan fiduciaries violated ERISA Section 404(a)(1).

This Court should reverse the lower courts' rulings determining Verizon pension fiduciaries' conduct did not violate the fiduciary duty of loyalty and requirement to act in the retirees' best interests imposed by ERISA Section 404(a)(1).

II. Review is warranted to establish that ERISA Section 406(b)(2) prohibits pension plan fiduciaries from acting in any non-fiduciary capacity with respect to a transaction involving a pension plan on behalf of the plan sponsor whose interests are adverse to the interests of plan participants and beneficiaries.

Here, Verizon was a party to the spinoff transaction and, as employer and plan sponsor of the employee benefit plans, by definition, a party in interest under 29 U.S.C. § 1002(14)(C).[1] The spinoff transaction involved the Verizon pension plans. Even before there was any enabling plan amendment to remove the retirees from Verizon's employee benefit plans, however, Verizon expected the Verizon EBC, the named fiduciary of Verizon's pension plans, to implement Verizon's decision to transfer the retirees into Idearc pension plans.

The linchpin legal issue before the district court was whether pension plan fiduciaries may act in their capacity as corporate officers and conduct a transaction involving a defined benefit pension plan on

[1] ERISA Section 3(14) states, "[t]he term 'party in interest' means, as to an employee benefit plan – (C) an employer any of whose employees are covered by such plan." 29 U.S.C. § 1002(14)(C).

behalf of the corporate sponsor whose interests are adverse to the interests of plan participants and beneficiaries, without running afoul of ERISA Section 406(b)(2). ERISA Section 406(b)(2), 29 U.S.C. § 1106(b)(2), prohibits a fiduciary, while acting in any capacity, from engaging in a transaction involving a pension plan on behalf of a party whose interests are adverse to the interests of the plan's beneficiaries or participants. The lower courts adopted the Respondents' contention that, when pension plan fiduciaries were taking action on behalf of the corporation involving the pension plan and inclusion of the unsuspecting retirees in the spinoff transaction, they were not acting in a fiduciary capacity, but were acting in a corporate settlor capacity. The lower courts erred in ruling that ERISA Section 406(b)(2) was inapplicable to this case simply because the named fiduciaries, when carrying out the pension plan transaction for the benefit of the corporation, were not acting in a fiduciary capacity. The language of the statute is straightforward. Congress has clearly stated that a pension fiduciary cannot act in any capacity under those circumstances.

The lower courts disregarded the unequivocal language of ERISA Section 406(b)(2) by erroneously concluding that it only applies to fiduciaries when acting in a fiduciary capacity. The district court's ruling contravenes and effectively *rewrites* ERISA Section 406(b)(2), so that it states:

> . . . – A fiduciary with respect to a plan shall not – . . .

> (2) [in his *fiduciary* capacity] act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

Both the district court and the appellate court overstepped their proper role of interpreting the statute as written. "[W]hen [a] statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Sebelius v. Cloer*, ___ U.S. ___, 133 S. Ct. 1886, 1896 (2013) (internal quotation marks and brackets omitted). A court must "assum[e] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251, 130 S. Ct. 2149, 2156 (2010). When the text of the statute is clear, that is the "end of the matter." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 409, 113 S. Ct. 2151, 2157 (1993) (quoting *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 2781 (1984)). The statutory text here is pellucid: Congress directly prohibited pension plan fiduciaries from acting in any capacity – either fiduciary or non-fiduciary – in a transaction involving a pension plan on behalf of a party having interests adverse to the interests of plan participants and beneficiaries.

By enacting ERISA Section 406(b)(2), Congress intended to prevent the fiduciary from "being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries." *N.L.R.B. v. Amax Coal Co., a Div. of Amax, Inc.*, 453 U.S. 322, 333-334, 101 S. Ct. 2789, 2796 (1981). Concerning the purpose and meaning of ERISA Section 406(b)(2), and the breadth of the provision's coverage, ERISA's drafters stated:

> . . . [T]he labor provisions (but not the tax provisions) prohibit a fiduciary from acting in any transaction involving the plan on behalf of a person (or representing a party) whose interests are adverse to the interests of the plan or of its participants or beneficiaries. *This prevents a fiduciary from being put in a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries*.

(emphasis added). Joint Explanatory Statement of the Committee on Conference, House Conference Report No. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 5038, 5089. Pension plan fiduciaries should "avoid placing themselves in a position where their acts as officers and directors of the corporation will prevent their functioning with the complete loyalty demanded of them as trustees of a pension plan." *Donovan v. Bierwith*, 680 F.2d 263, 271 (2nd Cir. 1982), *cert. denied,* 459 U.S. 1069, 103 S. Ct. 488 (1982).

Clearly, ERISA Section 406(b)(2) "is a blanket prohibition against a fiduciary's 'act[ing] on behalf of' or 'represent[ing]' a party with interests 'adverse to the interests of the plan' in relation to a transaction with the plan." *Reich v. Compton*, 57 F.3d 270, 287-288 (3rd Cir. 1995). Furthermore, that statutory subsection "applies regardless of whether the transaction is 'fair' to the plan." *Id*. at 288. In *Lowen v. Tower Asset Management, Inc*., 829 F.2d 1209, 1213 (2nd Cir. 1987), the appellate court noted that section 406(b) needs to be "broadly construed." (citing *Leigh v. Engle*, 727 F.2d 113, 126 (7th Cir. 1984) ("The entire statutory scheme of ERISA demonstrates Congress' overriding concern with the protection of plan beneficiaries, and we would be reluctant to construe narrowly any protective provisions of the Act.")). Liability under ERISA Section 406(b)(2) is imposed even where there is "no taint of scandal, no hint of self-dealing, no trace of bad faith," *Cutaiar v. Marshall*, 590 F.2d 523, 528 (3rd Cir. 1979). In *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040, 104 S. Ct. 704 (1984), the appellate court noted that the *per se* prohibition in section 406(b) is consistent with the remedial purpose of ERISA, for "at the heart of the fiduciary relationship is the duty of complete and undivided loyalty to the beneficiaries of the trust." *Id.*, 716 F.2d at 1238 (citations omitted). The only logical reading of ERISA Section 406(b)(2) is, thus, that fiduciaries shall not take certain actions even in their individual or other non-fiduciary capacities.

The circuits have recognized that a fiduciary is required to "refrain from conduct that would involve or create a conflict between its fiduciary duties and personal interests." *Kujanek v. Houston Poly Bag I, Ltd.*, 658 F.3d 483, 488 (5th Cir. 2011). That being the case, the Verizon EBC members should not have taken part in the behind-the-scenes efforts to secretly, and without legal authority, involuntarily remove retirees from Verizon's employee benefit plans and transfer them into Idearc's employee benefit plans. Instead, the Verizon EBC members should have recused themselves from participating in the spinoff transaction. They should have been advocating and promoting that the retirees maintain their enrollment and participation in Verizon's employee benefit plans.

Herein, the district court concluded that this Court's rule articulated in *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S. Ct. 1783 (1996) that amending a plan is not a fiduciary function, "applies to Section 406(b)." (App. 52, n.7). However, this case is readily distinguishable from *Lockheed*, in which the challenge involved an employer's amendment of a pension plan and a subsequent change to its benefits structure, not action taken by plan fiduciaries *before* a plan amendment came into existence. In *Lockheed*, this Court ruled "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Id.,* 116 S. Ct. at 1789. In *Lockheed*, there was no legally cognizable basis to challenge the employer's conduct, and, accordingly, ERISA Section 406(b)(2) was not at issue. Here, the challenge concerns actions taken by the named pension plan fiduciaries *before* any enabling plan amendments came into existence, a situation directly putting in issue ERISA Section 406(b)(2).

Both prior to and on the spinoff date, the Verizon EBC endeavored to assist and promote the financial interests of Verizon by transferring Petitioners out of Verizon's pension plans despite the nonexistence of pension plan terms that would allow such action. The action was taken so as to eliminate the corporation's obligations to the retirees. ERISA Section 406(b)(2) required the pension plan fiduciaries to refrain from acting in a transaction that either pitted their personal interests or their loyalties to the corporation against the retirees' best interests. Clearly, the fiduciaries placed themselves in a position with dual loyalties, and so dishonored their primary ERISA duty of loyalty in failing to act exclusively for the benefit of the pension plans' participants and beneficiaries.

In short, when ruling upon Petitioners' Count Three of the Second Amended Complaint, the lower courts erred when interpreting ERISA Section 406(b)(2).[2] The Fifth Circuit wrongly affirmed the district court which had erroneously relied upon *DeLuca*

---

[2] The erroneous disposition of Petitioners' Count Three was compounded by the fact there was *no* ruling on Petitioner's additional contention that ERISA 406(b)(3) was violated when, as a result of the spinoff being consummated, Verizon EBC members received valuable consideration for their own personal account.

v. Blue Cross Blue Shield of Michigan, 628 F.3d 743, 748 (6th Cir. 2010), holding that, in order for there to be liability for a violation of ERISA Section 406(b)(2), the defendant fiduciary had to have been acting in his or her *fiduciary capacity*. In *DeLuca*, Judge Kethledge issued a well-grounded dissenting opinion and noted that:

> In the plainest conceivable English, the section bars fiduciaries from taking certain actions even in their individual capacities; and yet, we are told, the section "applies only to those who act in a fiduciary capacity." (citation omitted). Perhaps I am missing something. . . . Loose language in one case hardens into a holding in another, and other courts follow suit. Eventually the caselaw takes on a life of its own, often lived at variance with the rules laid down in the statute itself. . . . Perhaps eventually the [Supreme] Court will take a § 1106(b)(2) case and decide whether the subsection means what it seems clearly to say.

Id., at 751-752. See *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 1149 (1992) (explaining that Congress "says in a statute what it means and means in a statute what it says there.").

The Fifth Circuit erred by summarily approving the district court's decision to disregard the plain wording of the statute. The lower courts were improperly dismissive of the statutory mandate prohibiting a fiduciary, while acting in his individual or any other non-fiduciary capacity, in a transaction involving a pension plan on behalf of a party with interests adverse to the interests of the plan's participants and beneficiaries.

The only correct reading of ERISA Section 406(b)(2) is, thus, that fiduciaries shall simply not take the actions specified in that provision of ERISA, whether or not acting as fiduciaries in doing so, given their status as ERISA fiduciaries.

Therefore, this Court should grant the petition and clarify that ERISA Section 406(b)(2) prohibits a pension plan fiduciary from acting in any capacity with respect to a transaction involving a pension plan that favors corporate interests adverse to the interests of plan participants and beneficiaries.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CURTIS L. KENNEDY, ESQ.
Counsel of Record
8405 E. Princeton Avenue
Denver, Colorado 80237-1741
Tele: 303-770-0440
CurtisLKennedy@aol.com

ROBERT E. GOODMAN, JR., ESQ.
KILGORE & KILGORE LAWYERS
3109 Carlisle Street
Dallas, Texas 75204-1194
Tele: 214-969-9099
reg@kilgorelaw.com

Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13-11117

PHILIP A. MURPHY, JR.; SANDRA R. NOE; CLAIRE M. PALMER, Individually and as Representative of plan participants and plan beneficiaries of Verizon's Pension Plans involuntarily re-classified and treated as transferred into IDEARC's Pension Plans,

Plaintiffs-Appellants

v.

VERIZON COMMUNICATIONS, INCORPORATED; VERIZON EMPLOYEE BENEFITS COMMITTEE; VERIZON PENSION PLAN FOR NEW YORK AND NEW ENGLAND ASSOCIATES; VERIZON MANAGEMENT PENSION PLAN; SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, formerly known as Idearc Employee Benefits Committee; VERIZON CORPORATE SERVICES GROUP, INCORPORATED; VERIZON ENTERPRISES MANAGEMENT PENSION PLAN; VERIZON PENSION PLAN FOR MID-ATLANTIC ASSOCIATES,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:09-CV-2262

(Filed Oct. 14, 2014)

Before KING, GRAVES, and HIGGINSON, Circuit Judges. PER CURIAM:*

This suit arises from the November 17, 2006 spin-off of Verizon Communications Inc.'s information services unit into a new corporation called Idearc, Inc., which subsequently evolved into SuperMedia, Inc. The spin-off is described in greater detail in *U.S. Bank National Association v. Verizon Communications, Inc.,* No. 13-10752, 2014 WL 3746476, ___ F.3d ___ (5th Cir. 2014). In 2009, several retirees whose pension benefits were transferred from Verizon pension plans to Idearc pension plans as part of the spin-off – Appellants Philip A. Murphy, Jr., Sandra R. Noe, and Claire M. Palmer – brought a class action suit against Appellees – Verizon, the Idearc (and later the SuperMedia) pension plans, and the Verizon pension plans – asserting a variety of claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.* The claims arose from the Verizon Appellees' alleged breach of their duties to the plan during the spin-off, as well as Appellees' alleged failure to turn over certain documents and disclose certain information to the retirees.

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. Appellants' ERISA Claims

The district court resolved Appellants' claims under ERISA Sections 406(b)(2) and (b)(3), 29 U.S.C. §§ 1106(b)(2) and (b)(3), ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1),[1] and ERISA Section 102(b), 29 U.S.C. § 1022(b), in a thorough and well-reasoned Memorandum Opinion and Order filed September 16, 2013, granting Appellees' motions for summary judgment and denying Appellants' partial motion for summary judgment. We affirm the grant of summary judgment on these claims for essentially the reasons expressed in the Memorandum Opinion and Order.

Appellants' claims under ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4), and ERISA Section 404(a)(1), 29 U.S.C. § 1104(a)(1), relating to Appellees' failure to produce certain documents, were dismissed under Rule 12(b)(6) in a separate Memorandum Opinion and Order filed October 18, 2010. We address those claims below.

A. ERISA Section 104(b)(4)

Under ERISA Section 104(b)(4), plan administrators must, "upon written request of any participant or beneficiary, furnish a copy of the latest updated

---

[1] Appellants assert two claims under ERISA Section 404(a)(1) – one for breach of fiduciary duties stemming from the transfer of the pensions, and another with respect to Appellees' alleged failure to produce certain documents. The latter claim is discussed in more detail below.

summary[ ] plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated." 29 U.S.C. § 1024(b)(4). If a plan administrator fails to comply with this requirement, the district court has discretion to impose a penalty of up to $110 per day. 29 U.S.C. § 1132(c)(1)(B); 29 C.F.R. § 2575.502c-1.

Appellants contend that the documents they sought from Appellees fall under Section 104(b)(4)'s catch-all clause, *i.e.,* that they constitute "other instruments under which the plan is established or operated." 29 U.S.C. § 1024(b)(4). As an initial matter, in their first amended complaint, Appellants alleged that Appellees failed to turn over a variety of documents including actuarial reports, IRS approvals and qualifications, and investment guidelines. However, in their opening brief on appeal, Appellants discuss only Appellees' failure to produce investment guidelines as supporting a violation of Section 104(b)(4). Therefore, we will only consider Appellants' claims with respect to these documents, as arguments not raised in an opening brief on appeal are waived. *See Steering Comm. v. Wash. Grp. Int'l, Inc.* (*In re Katrina Canal Breaches Litig.*), 620 F.3d 455, 459 n.3 (5th Cir. 2010).

This circuit has not directly addressed the scope of Section 104(b)(4)'s catch-all clause. However, other circuits have – and they have differed in their interpretations of the clause. The Sixth Circuit has adopted what appears to be a minority view, construing the clause broadly. In *Bartling v. Fruehauf Corp.,* 29 F.3d 1062 (6th Cir. 1994), a company informed its employees of its pending sale and replaced a previous pension plan for its employees with a new plan. The original plan's participants requested certain plan-related documents, some of which the company refused to provide. *Id.* at 1065-66. The participants sued, arguing that they were entitled, under Section 104(b)(4), to: (1) actuarial valuation reports; (2) portions of the purchase agreement relating to pension and welfare benefits; and (3) the calculation procedure used to compute benefits. *Id.* at 1069. The Sixth Circuit concluded on appeal that "[b]ecause an actuarial valuation report is *required* for every third plan year, § 1023(d), these reports are indispensable to the operation of the plan." *Id.* at 1070. The court further noted that "the purpose of ERISA's disclosure requirements is to ensure that 'the individual participant knows exactly where he stands with respect to the plan.'" *Id.* at 1070 (quoting *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 118 (1989)). Therefore, "all other things being equal, courts should favor disclosure where it would help participants understand their rights." *Id.* The Sixth Circuit also found that the plan administrator was required under Section 104(b)(4) to produce the calculation procedure for computing benefits, although the court did not provide any explanation as to why such documents fell under the catch-all provision. *Id.* at 1071. Finally, the court held that the plan administrator was not required to provide the purchase agreement, because it did not exist at the time that the original plan was terminated. *Id.* at 1070.[2]

In *Hughes Salaried Retirees Action Committee v. Administrator of the Hughes Non-Bargaining Retirement Plan* ("*Hughes*"), 72 F.3d 686 (9th Cir. 1995) (en banc), the Ninth Circuit applied a slightly narrower construction of the catch-all clause, concluding that a plan was not required to produce, under Section 104(b)(4), a list of the names and addresses of all retired participants of the plan. The court rejected the participants' argument that such a list was an instrument "under which the plan is established or operated" allegedly because the plan could not operate without it. *Id.* at 689 (quoting 29 U.S.C. § 1024(b)(4)). According to the Ninth Circuit, interpreting Section 104(b)(4) to require the disclosure of all documents that are "critical to the operation of the plan" lacks a limiting principle, and would mandate the disclosure of personal information about participants. *Id.* at 690 (internal quotation marks omitted). The court concluded that "[t]he relevant documents are those

---

[2] In *Allinder v. Inter-City Prods. Corp.* (*USA*), 152 F.3d 544 (6th Cir. 1998), the Sixth Circuit held that a plan administrator's failure to complete a form necessary for a plan participant to file a long-term disability insurance claim did not violate Section 104(b)(4). In reaching this holding, the court distinguished documents "used in the *ministerial day-to-day processing* of individual claims," which are not covered under Section 104(b)(4), from "documents that provide or contain information *concerning the terms and conditions of the participant's policy*," which are covered. *Id.* at 549. Notably, the panel in *Allinder* did not cite that court's previous holding in *Bartling,* 29 F.3d 1062.

documents that provide individual participants with information about the plan and benefits." *Id.* Applying that standard, the court explained that, "[u]nlike the documents specifically listed in § 104(b)(4) . . . participants' names and addresses provide no information about the plan or benefits." *Id.*[3]

The majority of courts, however, have adopted an even stricter construction of the catch-all clause, concluding that it applies only to formal legal documents. In *Faircloth v. Lundy Packing Co.,* 91 F.3d 648, 653 (4th Cir. 1996), a divided panel of the Fourth Circuit determined that, because the language of Section 104(b)(4) was "clear and unambiguous," it did not need to rely on legislative history. *Id.* at 653. The court, defining "instrument" as "[a] formal or legal document in writing, such as a contract, deed, will, bond, or lease," *id.* (quoting Black's Law Dictionary 801 (6th ed. 1990)), concluded that the clause "encompasses only formal or legal documents under which a plan is set up or managed," *id.* at 654. The Fourth Circuit rejected the Sixth Circuit's holding in *Bartling* that courts addressing requests under Section 104(b)(4) should apply a "presumption of disclosure." *Id.* (citing *Bartling,* 29 F.3d at 1070). The court also

[3] *See also Shaver v. Operating Eng'rs Local 428 Pension Trust Fund,* 332 F.3d 1198, 1202 (9th Cir. 2003) (concluding that "other instruments" refers to "legal documents that describe the terms of the plan, its financial status, and other documents that restrict or govern the plan's operation" and that itemized lists of plan expenditures need not be disclosed because they "relate only to the manner in which the plan is operated").

stated that the Ninth Circuit's suggestion in *Hughes* that plan administrators must turn over documents that provide participants "documents that provide information about the plan and benefits," conflicts with Congress's decision not to "use[ ] language to that effect." *Id.* (citing *Hughes,* 72 F.3d at 690). Even applying its stricter test, the court found that the petitioners were entitled to the plan's funding and investment policies because, "[a]s described in the [plan], the funding and investment policies set forth [the employer]'s obligations to fund the [plan] and explain the responsibilities regarding investing the assets of the [plan]." *Id.* at 656.[4]

The Second Circuit, applying a similar construction of the clause, concluded that a plan administrator was not required to produce copies of a plan's actuarial reports because the term "instrument . . . connotes a formal legal document." *Bd. of Trs. of the CWA/ITU Negotiated Pension Plan v. Weinstein,* 107 F.3d 139, 142, 145 (2d Cir. 1997).[5] Following *Faircloth*

[4] The court concluded, however, that: (1) appraisal and valuation reports of company stock which "simply derive the value of [the company's] stock"; (2) an IRS determination letter showing that the Plan was tax-qualified; (3) minutes of trustee meetings; (4) the cost-sharing policy; and (5) the trustee expense policy did not fall within the catch-all clause because the requests were either too broad or vague, the documents did not exist, or the plan was not set up or managed under those documents. *Id.* at 653-56.

[5] As further support for this construction, the court noted that the enumerated documents listed in Section 104(b)(4) were all "formal documents," *id.* at 143, and found that the term

(Continued on following page)

and *Weinstein,* several other circuits have interpreted the catch-all provision similarly. *See Brown v. Am. Life Holdings, Inc.,* 190 F.3d 856, 861-62 (8th Cir. 1999) (construing "other instruments" as meaning "not any document[s] relating to a plan, but only formal documents that establish or govern the plan" and concluding that there was no Section 104(b)(4) claim for failure to provide corporate actions replacing administrative committee members, meeting minutes, and written communications between the committee and trustee); *Ames v. Am. Nat'l Can Co.,* 170 F.3d 751, 758 (7th Cir. 1999) (noting that "[o]ther courts of appeals have found that the use of the term 'instruments' implies that the statute reaches only formal legal documents governing a plan" and agreeing "with our sister circuits that [a contrary] interpretation would make hash of the statutory language, which on its face refers to a specific set of documents: those under which a plan is established or operated");[6] *Doe*

"instrument" was used in other sections of ERISA "to connote a formal governing document," *id.*

[6] The Seventh Circuit has also concluded that superseded plan documents do not fall under Section 104(b)(4)'s disclosure obligations. *See Huss v. IBM Med. & Dental Plan,* 418 F. App'x 498, 510 (7th Cir. 2011) (unpublished); *Shields v. Local 705, Int'l Bhd. of Teamsters Pension Plan,* 188 F.3d 895, 903 (7th Cir. 1999). However, according to the Seventh Circuit, "[w]hen a claims administrator mistakenly relies on an expired version of the plan document, a set of internal guidelines, or any other extraneous document in lieu of the governing plan language and, indeed, cites the language of that document as controlling to the participant, then the participant must have access to that document in order to understand what the claims administrator

(Continued on following page)

v. Travelers Ins. Co., 167 F.3d 53, 60 (1st Cir. 1999) (holding that mental health guidelines were not "'other instruments,' a phrase that in context refers to the formal legal documents that underpin the plan" because the plan administrator "was not bound to use them, nor did patients have any legal rights under them").

We agree with the majority of the circuits which have construed Section 104(b)(4)'s catch-all provision narrowly so as to apply only to formal legal documents that govern a plan. As other courts have noted, such a construction is consistent with the plain meaning of the term "instrument," *i.e.,* "[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a statute, contract, will, promissory note, or share certificate." Black's Law Dictionary 918 (10th ed. 2014); *see also* Webster's Third New International Dictionary 1172 (1961) (defining "instrument" as "a legal document (as a deed, will, bond, lease, agreement, mortgage, note, power of attorney, ticket on carrier, bill of lading, insurance policy, warrant, writ) evidencing legal rights or duties esp. of one party to another"). Moreover, the other documents specifically listed in Section 104(b)(4) – plan descriptions, annual reports, terminal reports, bargaining agreements, trust agreements, and contracts – are all formal documents that either provide plan

---

is doing and to effectively assert his rights under the plan." *Mondry v. Am. Family Mut. Ins. Co.,* 557 F.3d 781, 800 (7th Cir. 2009).

participants and beneficiaries with notice of their rights and obligations or are the foundational documents under which a plan is created and governed. *See Weinstein,* 107 F.3d at 142-43. "[O]ther instruments" should be interpreted similarly because, under the statutory canon *ejusdem generis,* "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." *Hall St. Assocs., L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 586 (2008).

With that construction in mind and assuming, without deciding, that investment guidelines could, under certain circumstances, constitute "other instruments" under Section 104(b)(4), Appellants' claim for the investment guidelines at issue here fails. Although Appellants conclusorily alleged in their first amended complaint that the investment guidelines are "'instrument[s]' under which the pension plan is 'established or operated,' within the meaning of ERISA Section 104(b)(4)," we "are not bound to accept as true a legal conclusion couched as a factual allegation." *See Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotation marks omitted). As the lower court correctly noted, Appellants neither specifically pleaded that the guidelines are binding on the plans at issue here, nor attached to the complaint portions of the plans or guidelines indicating the guidelines' mandatory effect. Because the guidelines are not alleged to be binding, they do not "define[ ] rights, duties, entitlements, or liabilities." Black's Law Dictionary 918 (10th ed. 2014).

Our holding is not inconsistent with that reached in *Faircloth,* 91 F.3d 648, in which the Fourth Circuit determined that the investment policies at issue constituted "other instruments" under Section 104(b)(4). There, the plan "contemplate[d] the establishment of funding and investment policies." *Id.* at 656. Indeed, it was clear in that case that the "funding and investment policies set forth [the employer]'s obligations to fund the [plan] and explain[ed] the responsibilities regarding investing the assets of the [plan]." *Id.* Here, in contrast, Appellants failed to allege that the investment guidelines set forth any such rights or obligations.

Appellants also point to a Department of Labor (DOL) bulletin interpreting ERISA Section 404(a)(1)(D), which requires that "a fiduciary . . . discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D). According to the DOL bulletin, "[s]tatements of investment policy issued by a named fiduciary authorized to appoint investment managers would be part of the 'documents and instruments governing the plan." 29 C.F.R. § 2509.08-2 (2008) (quoting 29 U.S.C. § 1104(a)(1)(D)).[7] Appellants

---

[7] Appellants actually cite an earlier 1994 DOL bulletin on this topic. *See* 29 C.F.R. § 2509.94-2. However, the 2008 bulletin cited above "modifies and supersedes" the earlier bulletin. 29

(Continued on following page)

do not argue that we are required to afford this bulletin deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). In any event, such deference is not warranted, as the agency was construing a different statute than the one at issue here. *See id.* at 843 (holding that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction *of the statute*" (emphasis added)); *see also Torres-Valdivias v. Holder,* No. 11-70532, 2014 WL 4377469, at *6, ___ F.3d ___ (9th Cir. 2014) ("Because . . . the outcome here is not directly controlled by [a Board of Immigration Appeals (BIA) decision], which address[es] different INA provisions, we may not grant the BIA . . . *Chevron* deference" (footnote omitted)). The two statutes – though similar – differ in one material respect. Section 104(b)(4) concerns only "*instruments* under which the plan is established or operated," 29 U.S.C. § 1024(b)(4) (emphasis added), while Section 404(a)(1)(D) applies to "*documents and instruments* governing the plan," 29 U.S.C. § 1104(a)(1)(D) (emphasis added). Thus, the latter is broader than the former and may not necessarily be limited to formal legal documents. *See, e.g.,* Black's Law Dictionary 587 (10th ed. 2014) (defining "document" as "[s]omething tangible on which words, symbols, or marks are recorded").

C.F.R. § 2509.08-2. In any event, the relevant portions of both bulletins are virtually identical.

Appellants' reliance on our decision in *Laborers National Pension Fund v. Northern Trust Quantitative Advisors, Inc.,* 173 F.3d 313 (5th Cir. 1999), is similarly unavailing. In that case – in which we too were interpreting Section 404(a)(1)(D), as opposed to Section 104(b)(4) – we held that Section 404(a)(1)(D) required that the investment managers at issue make investment decisions in accordance with certain investment guidelines. *Id.* at 318-20. However, contrary to Appellants' contention, we did not establish as a matter of law that fiduciaries must always operate a pension in accordance with investment guidelines. Rather, we concluded that Section 404(a)(1)(D) applied only because "[t]he parties treated the [investment policy] as part of the plan documents." *Id.* at 319. In reaching this conclusion, we looked to the specific language used in the investment guidelines. *Id.* at 318-19. Here, in contrast, the lower court was not able to make such a determination, as Appellants failed to attach or quote from either the plan or the investment guidelines in their first amended complaint.

Therefore, because Appellants did not adequately plead that the investment guidelines were mandatory, the lower court did not err in dismissing the Section 104(b)(4) claim.

B. ERISA Section 404(a)(1)

Appellants also challenge the lower court's conclusion that Section 404(a)(1) creates no additional disclosure obligations beyond those found in Section 104(b)(4), thus warranting the former claim's dismissal.[8] This court's precedent confirms that, in fact, Section 404(a)(1)'s fiduciary duty may obligate at least responsive disclosure of relevant plan materials upon a specific request by a plan member. *See Kujanek v. Houston Poly Bag I, Ltd.,* 658 F.3d 483, 488-89 (5th Cir. 2011). In dismissing Appellants' claim that SuperMedia breached its Section 404(a)(1) duty, the lower court overlooked our *Kujanek* decision when it held that "ERISA section 404(a)(1) . . . does not create additional disclosure obligations beyond those found in ERISA section 104(b)(4)."

In this case, however, Appellants' claim for disclosure pursuant to Section 404(a)(1) is moot because they have already received all requested relief. *See McGoldrick Oil Co. v. Campbell, Athey & Zukowski,* 793 F.2d 649, 653 (5th Cir. 1986) (finding no justiciable dispute in an action seeking to compel production of documents when defendant offered to produce the requested documents); *Kramer v. JP Morgan Chase*

---

[8] Section 404(a)(1) specifies that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries," and "for the exclusive purpose of providing benefits to participants" and "defraying reasonable expenses of administering the plan." 29 U.S.C. § 1104(a)(1)(A). Such duties shall be discharged "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." *Id.* § 1104(a)(1)(B).

Bank, N.A., 574 Fed. App'x 370, 376 (5th Cir. 2014) (unpublished) (finding claim moot because plaintiff sought only declaratory relief, which had already been given); 13B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3533.2 (3d ed.) ("[A]n offer to settle for all the relief the plaintiff might win by judgment may moot the action."). In the Amended Complaint, Appellants sought statutory damages for an alleged violation of Section 104(b)(4). For its alleged breach of fiduciary duty under Section 404(a)(1), however, Appellants sought only "equitable relief including injunctive relief ordering both Defendant Verizon EBC and Defendant Idearc EBC to disclose the information and produce the documents each has in its respective possession that is responsive to Plaintiffs' request for information." Although statutory damages may be available for a Section 404(a)(1) claim, Appellants did not seek damages for this claim. Having sought only production of the requested documents as a remedy for its Section 404(a)(1) claim, and conceding that they have received the requested documents, Appellants have therefore received all relief they sought for the alleged breach of fiduciary duty.

Since the claim is moot, there is no need for us to resolve the tension, if any, in our case law regarding the extent of disclosure obligations under Section 404(a)(1). *Compare Ehlmann v. Kaiser Found. Health Plan of Tex.,* 198 F.3d 552, 555-56 (5th Cir. 2000) (holding that under Section 404(a)(1), the court would not "add to the specific disclosure requirements that

ERISA already provides" but noting it was not deciding "what sort of disclosure, if any, that Section 404 might require given a specific inquiry from a plan member or given some other special circumstance"), *with Kujanek,* 658 F.3d at 488-89 (holding that by withholding plan documents and rollover information that a plan participant specifically requested, the fiduciary "failed to act in [the plan participant's] best interest and 'for the exclusive purpose of providing benefits to participants'" as required by Section 404(a)(1)).

II. Conclusion

For the foregoing reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 13-11117

D.C. Docket No. 3:09-CV-2262

PHILIP A. MURPHY, JR.; SANDRA R. NOE; CLAIRE M. PALMER, Individually and as Representative of plan participants and plan beneficiaries of Verizon's Pension Plans involuntarily re-classified and treated as transferred into IDEARC's Pension Plans,

Plaintiffs-Appellants

v.

VERIZON COMMUNICATIONS, INCORPORATED; VERIZON EMPLOYEE BENEFITS COMMITTEE; VERIZON PENSION PLAN FOR NEW YORK AND NEW ENGLAND ASSOCIATES; VERIZON MANAGEMENT PENSION PLAN; SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, formerly known as Idearc Employee Benefits Committee; VERIZON CORPORATE SERVICES GROUP, INCORPORATED; VERIZON ENTERPRISES MANAGEMENT PENSION PLAN; VERIZON PENSION PLAN FOR MID-ATLANTIC ASSOCIATES,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

Before KING, GRAVES, and HIGGINSON, Circuit Judges.

JUDGMENT

(Filed Oct. 14, 2014)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: NOV 28 2014

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PHILIP A. MURPHY, JR., ET AL.,	)	
Plaintiffs,	)	
	)	CIVIL ACTION NO.
VS.	)	
VERIZON COMMUNICATIONS, INC., ET AL.,	)	3:09-CV-2262-G
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

(Filed Sep. 16, 2013)

Before the court are (1) the Verizon defendants' motion for summary judgment (docket entry 77), (2) the defendant Supermedia Employee Benefits Committee ("SEBC")'s motion for summary judgment (docket entry 80), and (3) the plaintiffs' motion for partial summary judgment (docket entry 81). For the reasons stated below, the Verizon defendants' motion is granted, the defendant SEBC's motion is granted, and the plaintiffs' motion is denied.

I. INTRODUCTION

A. Nature of the Case

This suit arises out of Verizon Communications Inc. ("Verizon")'s November 17, 2006 spinoff (the "spinoff") of a business unit known as Verizon Information Services ("VIS") into a new publicly-traded company, Idearc, Inc. ("Idearc"). VIS was responsible for Verizon's operations in the directories business. *See* Second Amended Complaint for Proposed Class Action Relief Under ERISA ("Second Amended Complaint") ¶ 36 (docket entry 64). One of the consequences of the spinoff was that certain Verizon retirees, formerly employed by VIS and covered under Verizon's pension and health and welfare benefits plans, were transferred to pension and health and welfare benefits plans that had been created in the spinoff, to be administered by Idearc and its corporate affiliates. *Id.* ¶¶ 46-47. During the recession that affected the U.S. economy beginning in late 2007, Idearc experienced severe financial distress. By early 2009, Idearc commenced reorganization proceedings in the Northern District of Texas under Chapter 11 of the United States Bankruptcy Code. *See* Defendant. SuperMedia Employee Benefits Committee's Brief in Support of its Motion for Summary Judgment ("SuperMedia Brief") at 5 (docket entry 82). Idearc emerged from these proceedings on December 31, 2009, under the name SuperMedia, Inc. ("SuperMedia"). *Id.*

Representatives of the retirees who were transferred from Verizon's to Idearc's (subsequently SuperMedia's) plans brought this suit in late 2009 for themselves and on behalf of the transferred retirees as a class. *See generally* Complaint for Proposed. Class Action Relief Under ERISA ("Original Complaint") (docket entry 1). The central claim in the original complaint, which carries through to the currently operative second amended complaint, was that the involuntary transfer of retirees from Verizon's allegedly more financially secure pension plans to Idearc's allegedly less-secure plans breached fiduciary duties in violation of the Employee Retirement Income Security Act of 1974 ("ERISA"), codified at 29 U.S.C. §§ 1001-1461. *See* Original Complaint ¶¶ 39-40, 88-106; *see also* Second Amended Complaint ¶¶ 175-208 (the "fourth claim for relief"). The second amended complaint also alleges (1) that the manner in which Verizon and SuperMedia dealt with certain administrative claims relating to the transfer of retirees violated ERISA's provision for a "full and fair hearing" of beneficiaries' denied claims for benefits, *id.* ¶¶ 115-32 (the "first claim for relief"), (2) that the Verizon pension plans' summary plan descriptions ("SPDs") failed to conform to ERISA's requirements, *id.* ¶¶ 133-49 (the "second claim for relief"), (3) that Verizon violated ERISA provisions prohibiting fiduciaries from engaging in certain transactions adverse to beneficiaries' interests, *id.* ¶¶ 150-74 (the "third claim for relief"), (4) that SuperMedia (at the time, Idearc) failed to furnish the retirees with new SPDs in a timely manner following the transfer, *id.* ¶¶ 209-21 (the "fifth claim for relief"), (5) that the plaintiffs are entitled to appropriate equitable relief under ERISA Section 502, *id.* ¶¶ 222-31 (the "sixth claim for relief") (6) and that the plaintiffs have unfulfilled claims for benefits under Verizon's plans, *id.* ¶¶ 232-38 (the "seventh claim for relief").

B. Relevant Background Facts

On November 17, 2006, Verizon completed transactions that consummated the spinoff of VIS into the new, independent, publicly-traded company known as Idearc. Second Amended Complaint ¶¶ 36, 44. In connection with that spinoff, Verizon executed an Employee Matters Agreement ("EMA") with Idearc. *Id.* ¶ 46. The EMA transferred Verizon's liability for paying the plaintiffs' pension and welfare benefits to Idearc. *Id.* ¶ 47.

The plaintiff Philip A. Murphy, Jr. ("Murphy") is one individual affected by the EMA's transfer of liabilities. Murphy was an employee in the directories business of NYNEX, a predecessor of Verizon, at the time of his retirement in December 1996. *Id.* ¶ 6; *see also* Memorandum of Law in Support of the Verizon Defendants' Motion for Summary Judgment ("Verizon Brief") at 18 (docket entry 78). After his retirement, he received a service pension.[1] Second Amended Complaint ¶ 6. At the time of the spinoff, Murphy was a "participant," for ERISA purposes, of the Verizon Pension Plan for New York and New England Associates. *Id.* ¶ 7. Subsequent to the spinoff, he became a

[1] Murphy, Noe, and Palmer were all participants in NYNEX's pension plans at the time of their retirement. Verizon Brief at 18. When NYNEX merged with Bell Atlantic, all three became participants in Bell Atlantic pension plans. *Id.* Bell Atlantic subsequently merged with GTE to become Verizon in 2000. *Id.* at 8, 18. It was that merger that brought the three named plaintiffs into Verizon's pension plans. *Id.* at 18.

participant of the SuperMedia Pension Plan for Collectively Bargained Employees. *Id.*

The plaintiff Sandra R. Noe ("Noe") is another individual affected by the transfer. Noe was also an employee in the directories business of NYNEX at the time of her retirement in April 1995. *Id.* ¶ 8; *see also* Verizon Brief at 18. After her retirement, she also received a service pension. Second Amended Complaint ¶ 8. At the time of the spinoff, Noe was a "participant," for ERISA purposes, of the Verizon Pension Plan for New York and New England Associates. *Id.* ¶ 9. Subsequent to the spinoff, she became a participant of the SuperMedia Pension Plan for Collectively Bargained Employees. *Id.*

The plaintiff Claire M. Palmer ("Palmer") is a third individual affected by the transfer. Palmer was an employee in the NYNEX directories business at the time of her retirement in April 1995. *Id.* ¶ 10; *see also* Verizon Brief at 18. At the time of the spinoff, Palmer was a "participant," for ERISA purposes, of the Verizon Management Pension Plan. Second Amended Complaint ¶ 11. Subsequent to the spinoff, she became a participant of the SuperMedia Pension Plan for Management. Employees. *Id.*

In addition to the transfer of liabilities accomplished in the EMA, and in accordance with 29 U.S.C. § 1054(g) ("Section 204(g)") and 29 U.S.C. § 1058

("Section 208") and their implementing regulations,[2] Verizon transferred, at the time of the spinoff, assets valued at approximately $765 million from its pension plans to "mirror" pension plans administered by Idearc. *See* Verizon Brief at 12 n.5. The value of these assets was calculated in a manner intended to conform to the complex Treasury regulations implementing Section 208. *Id.* at 12. These regulations work to ensure that transferees like Idearc will be able to satisfy any pension obligations or liabilities they assume. *Id.* at 4-7. The plaintiffs do not contend that their pension plan benefits have been diminished or interrupted since their transfer to Idearc's plans. Nor do the plaintiffs dispute that the amount of the assets Verizon transferred was sufficient to conform

---

[2] These sections fall under ERISA's regulatory provisions governing participation and vesting. Section 204(g) mandates that any plan amendment not decrease a participant's accrued benefits. 29 U.S.C. § 1054(g). Section 208 governs mergers, consolidations, and transfers of plan assets. 29 U.S.C. § 1058. It requires that, if such transactions are undertaken, a participant must "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)." *Id.* In the brief supporting their motion for summary judgment, the Verizon defendants helpfully outline the mechanics of the complex regulations implementing Section 208. *See* Verizon Brief at 2-8. They also review the manner in which Verizon structured the spinoff of the pension plans to comply with this section. *Id.* at 11-18. Because the plaintiffs never dispute that Verizon complied with these provisions of ERISA, the court sees no need to engage in a tedious retelling of the mechanics of the pension plan spinoff.

to ERISA Sections 204(g) and 208. *See generally* Second Amended Complaint; *see also generally* Plaintiffs' Memorandum Brief in Support of Motion for Partial Summary judgment ("Plaintiffs' Brief") (docket entry 83). Finally, the plaintiffs do not dispute that the master trust that holds their pension assets is a separate entity from Idearc and SuperMedia and was not a part of Idearc's Chapter 11 reorganization. *See* SuperMedia Brief at 5 and Defendant SuperMedia Employee Benefits Committee's Appendix in Support of its Motion for Summary Judgment ("SuperMedia Appendix") at App 3, App 338 (docket entry 84).

The EMA also contained a provision that required Idearc to establish "mirror" welfare benefits plans for its employees and retirees. *See* Verizon Brief at 15. The provision specifically required the plans to provide "health, dental, and life insurance" benefits that were "substantially the same as the benefits provided for such employees under the corresponding Verizon Welfare Plan[s]." *Id.* The plaintiffs do not dispute that the Idearc plans to which they were transferred provided the same health and welfare benefits as the Verizon plans. Nor do they dispute that, in the years following the spinoff, they received substantially the same health and welfare benefits they would have received had they been participants in Verizon's plans. *See generally* Second Amended Complaint and Plaintiffs' Brief.

On December 22, 2006, soon after completing the transactions consummating the spinoff, Verizon enacted amendments to its pension and welfare benefits plans, which it intended to apply retroactively. Second Amended Complaint ¶¶ 71-72; Verizon Brief at 16-17. Among the amendments were certain provisions that clarified Verizon's asserted right to terminate the participation of those retirees who had been covered under Verizon-administered plans, but whose liabilities had been transferred to Idearc-administered plans. *Id.* at 16-17.

On January 25, 2007, Verizon notified certain management retirees, including the plaintiff Palmer, of the changes resulting from the spinoff. Second Amended Complaint ¶ 73. The letter clarified that these individuals were now participants in Idearc's pension plans; that the plans were "mirror plans" that provided the same benefits the individuals had been receiving prior to the changes; that, for the time being, Verizon would continue to administer certain aspects of the plans; and that Idearc was in the process of setting up its own administrative processes. *See* SuperMedia Appendix at App 77-78. On February 15, 2007, substantially the same letter was sent to a group of non-management retirees that included the plaintiffs Murphy and Noe. Second Amended Complaint ¶ 75; SuperMedia Appendix at App 79-80.

On March 19, 2007, Idearc sent to individuals affected by the transfer a letter informing them that it would be furnishing them with new "summary plan descriptions" ("SPDs") in the near future and that, until these new SPDs were prepared, Verizon's SPDs, summaries of material modifications ("SMMs"), and the March 19 letter would serve as the participants'

SPDs. SuperMedia Appendix at App 81-84. Idearc apparently considered this appropriate, since there were no substantive changes to the affected participants' pension or welfare benefits plans as a result of the transfers of liabilities and participants. *See* SuperMedia Brief at 9-10.

In light of Idearc's deteriorating financial condition, on February 4, 2009 the plaintiffs submitted to both Verizon's and Idearc's employee benefits committees ("EBCs") a letter purporting to make "classwide administrative claims" for benefits allegedly due under the Verizon plans and an ERISA request for plan documents. Second Amended Complaint ¶ 82; Verizon Brief at 19; Appendix in Support of Verizon Defendants' Motion for Summary Judgment ("Verizon Appendix") at 462-70. That letter demanded that the EBCs furnish certain documents containing information about the state of the plaintiffs' pension plans. Verizon Appendix at 462-64, 469-70. It also requested that the EBCs rescind the involuntary transfer of the plaintiffs from Verizon's to Idearc's plans and that the plaintiffs be reinstated in Verizon's plans. *Id.* at 469-70.

On March 3, 2009, Idearc, through its counsel, responded by letter to the February 4, 2009 requests. *See* SuperMedia Appendix at App 350-54; *see also* SuperMedia Brief at 4-5. It provided certain documents that had been requested, indicated that certain other documents were not within its possession and could not be provided by Idearc, and noted that it did not believe the furnishing of the remaining documents was required by ERISA. SuperMedia Appendix at App 350-54. Finally, it noted that further clarification was required regarding the "benefits claim" aspect of the plaintiffs' letter, because it was Idearc's understanding that the plaintiffs were receiving their monthly pension distributions. *Id.* at App 354.

Verizon's Assistant General Counsel Marc Schoenecker ("Schoenecker"), who also served as counsel to VEBC, sent Verizon's initial response letter to the retirees' counsel on February 6, 2009. Second Amended Complaint ¶ 85. In that letter, Schoenecker pointed out that the Verizon plan administrator's position was that it did not "recognize class-wide ERISA administrative claims." *Id.* On April 21, 2009, Schoenecker indicated that the plan administrators had reversed course, determining to recognize the letter "as a claim for non-disability pension benefits on behalf of each of the clamants." *Id.* ¶ 88. In accord with certain ERISA implementing regulations, the letter stated that the administrators were extending the initial 90-day determination period by an additional 90 days. *Id.*

On July 31, 2009, the Verizon Claims Review Unit ("VCRU") issued a letter which denied in full the plaintiffs' individual and proposed class-wide administrative claims. Verizon Appendix at 471-83. On September 15, 2009, the plaintiffs submitted by letter to the Verizon Claims Review Committee ("VCRC") an appeal of the VCRU's initial claim determination. *Id.* at 484-95. On November 13, 2009, the VCRC sent to the plaintiffs' counsel a letter indicating that it needed additional time to decide the appeal and that VCRC members would meet in December 2009 for that purpose. Second Amended Complaint ¶ 99. Following that meeting, the VCRC sent a letter to the plaintiffs' counsel, dated January 12, 2010, indicating that the committee had determined at the December meeting to deny the appeal. Verizon Appendix at 498-504.

C. Procedural History

The plaintiffs Murphy, Noe, and Palmer, individually and on behalf of all retirees involuntarily transferred from Verizon's to Idearc's pension plans (collectively, the "plaintiffs"), filed this suit on November 25, 2009 against Verizon Communications, Inc. ("VCI"), Verizon Employee Benefits Committee ("VEBC"), Verizon Pension Plan for New York and New England Associates ("VPPNY"), Verizon Management Pension Plan ("VMPP"), Idearc Employee Benefits Committee, Idearc Pension Plan for Management Employees, and Idearc Pension Plan for Collectively Bargained Employees. *See generally* Complaint.

The plaintiffs amended their complaint on January 6, 2010, adding as a defendant SuperMedia, Inc. f/k/a Idearc, Inc. *See generally* Amended Complaint for Proposed Class Action Relief Under ERISA ("First Amended Complaint") (docket entry 6). SuperMedia, Inc. was dismissed without prejudice on February 9, 2010. *See* Order of February 9, 2010 (docket entry 17).

On March 10, 2010, Idearc Employee Benefits Committee, Idearc Pension Plan for Management Employees, and Idearc Pension Plan for Collectively Bargained Employees moved to dismiss the claims against them. *See* Defendants SuperMedia Employee Benefits Committee, SuperMedia Pension Plan for Management Employees, and SuperMedia Pension Plan for Collectively Bargained Employees' Motion to Dismiss for Plaintiffs' Failure to State a Claim (docket entry 22). The court's Memorandum Opinion and Order of October 18, 2010, which granted this motion in part and denied it in part, dismissed the claims against Idearc Pension Plan for Management Employees and Idearc Pension Plan for Collectively Bargained Employees. *See* Memorandum Opinion and Order of October 18, 2010 at 1 n.1, 10, 27-28 (docket entry 33).

On December 2, 2010, the plaintiffs filed a motion for class certification, *see* Plaintiffs' Motion for Class Certification (docket entry 42), which the court granted by its order of March 3, 2011. *See* Order for Class Certification (docket entry 55). This order certified a class under FED. R. CIV. P. 23(b)(2), defined as "All former participants in Verizon's pension plans who were transferred into Idearc's pension plans in connection with a spin-off transaction occurring in November 2006 and who were retired or terminated from Verizon at the time of the spin-off, as well as any beneficiaries of such participants." *Id.* at 1.

The plaintiffs filed a second amended complaint on June 21, 2011, adding as defendants Verizon

Corporate Services Group Inc. ("VCSG"), Verizon Enterprises Management Pension Plan ("VEMPP"), and Verizon Pension Plan for Mid-Atlantic Associates ("VPPMA") (collectively, including the four above-referenced Verizon entities, "Verizon," or the "Verizon defendants"). *See generally* Second Amended Complaint. By this time, Idearc Employee Benefits Committee had become known as SuperMedia Employee Benefits Committee.

On August 26, 2011, the Verizon defendants and SEBC filed separate motions for summary judgment. On the same date, the plaintiffs filed a partial motion for summary judgment. These are the instant motions.

II. ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper when the pleadings, depositions, admissions, disclosure materials on file, and affidavits, if any, "show[ ] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a), (c)(1).[3] A fact is material if the

[3] Disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Company,* 780 F.2d 1190, 1197 (5th Cir. 1986).

governing substantive law identifies it as having the potential to affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). An issue as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*; see also *Bazan ex rel. Bazan v. Hidalgo County,* 246 F.3d 481, 489 (5th Cir. 2001) ("An issue is 'genuine' if it is real and substantial, as opposed to merely formal, pretended, or a sham.").

The moving party need not actively negate the opponent's claim. *Celotex Corporation v. Catrett,* 477 U.S. 317, 323 (1986). The moving party simply must point out an absence of evidence to support the nonmoving party's claim. *Id.* at 325.

At this stage, the court does not weigh the evidence or make credibility determinations; rather, the court merely determines if there is a genuine issue for trial. *Anderson,* 477 U.S. at 249, 255. However, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Company v. Zenith Radio Corporation,* 475 U.S. 574, 586 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient." *Anderson,* 477 U.S. at 252. "'[E]ven in cases where elusive concepts such as motive or intent are at issue,'" summary judgment may be appropriate "'if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.'" *Forsyth v. Barr,* 19 F.3d 1527, 1533 (5th

Cir.) (quoting *Krim v. BancTexas Group, Inc.,* 989 F.2d 1435, 1449 (5th Cir. 1993)), *cert. denied,* 513 U.S. 871 (1994).

When evaluating a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving party and "all justifiable inferences are to be drawn in his favor." *Anderson,* 477 U.S. at 255 (citing *Adickes v. S.H. Kress & Company,* 398 U.S. 144, 158-59 (1970)). However, the court will only resolve factual controversies in favor of the nonmoving party "when an actual controversy exists, that is, when both parties have submitted evidence of contradictory facts." *Olabisiomotosho v. City of Houston,* 185 F.3d 521, 525 (5th Cir. 1999).

Moreover, it is not incumbent upon the court to comb the record in search of evidence that creates a genuine issue as to a material fact. See *Malacara v. Garber,* 353 F.3d 393, 405 (5th Cir. 2003). The nonmoving party has a duty to designate the evidence in the record that establishes the existence of genuine issues as to the material facts and "articulate the 'precise manner' in which that evidence support[s] [his] claim." *Celotex,* 477 U.S. at 324; *Forsyth,* 19 F.3d at 1537 (citing *Topalian v. Ehrman,* 954 F.2d 1125, 1131 (5th Cir.), *cert. denied,* 506 U.S. 825 (1992)). "When evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court." *Malacara,* 353 F.3d at 405.

B. Verizon Defendants' Motion for Summary Judgment

The Verizon defendants have moved for summary judgment on all the claims against them in the plaintiffs' second amended complaint, including (1) the plaintiffs' first claim for relief for failure to provide a full and fair review of a denied claim for benefits, (2) the plaintiffs' second claim for relief for failure to disclose summary plan descriptions, (3) the plaintiffs' third claim for relief for engaging in a prohibited transaction, (4) the plaintiffs' fourth claim for relief for breach of fiduciary duty, (5) the plaintiffs' sixth claim for relief for appropriate equitable relief, and (6) the plaintiffs' seventh claim for relief for failure to pay benefits due under the Verizon pension plans. *See* Verizon Defendants' Motion for Summary Judgment ("Verizon Motion") at 1 (docket entry 77); *see also* Second Amended Complaint ¶ 2.

1. *Plaintiffs' Fourth Claim for Relief: Section 404(a)(1) Breach of Fiduciary Duty*

a. Legal Standard

29 U.S.C. § 1104 ("Section 404") is ERISA's fiduciary duty provision. Section 404(a)(1) sets forth the standards in accord with which "a fiduciary shall discharge his duties with respect to a plan." "[T]he threshold question" in ERISA breach of fiduciary duty cases "is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, but whether that

person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich,* 530 U.S. 211, 226 (2000). The typical fiduciary functions, as the Court noted in *Pegram,* involve "decisions about managing assets and distributing property to beneficiaries." *Pegram,* 530 U.S. at 231.

Thus, the Supreme Court has held that when employers act to amend or terminate a benefits plan, they do not perform a "fiduciary function" that triggers fiduciary duties under ERISA. See *Curtiss-Wright Corporation v. Schoonejongen,* 514 U.S. 73, 78 (1995) (citing *Adams v. Avondale Industries, Inc.,* 905 F.2d 943, 947 (6th Cir.), *cert. denied,* 498 U.S. 984 (1990), for the proposition that decisions to terminate or amend benefits plans are not taken in a fiduciary capacity); *Hughes Aircraft Company v. Jacobson,* 525 U.S. 432, 444 (1999) ("In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets.").

Other courts have extended this principle to the actions of merging or consolidating pension plans, or transferring plan assets in a spinoff transaction. See, *e.g., Paulsen v. CNF Inc.,* 559 F.3d 1061, 1076 (9th Cir. 2009) ("a decision to spin a plan off . . . is not a fiduciary act"), *cert. denied,* 558 U.S. 1111 (2010); *Systems Council EM-3 v. AT&T Corporation,* 159 F.3d 1376, 1379 (D.C. Cir. 1998) ("there has been no showing that AT&T acted in a fiduciary capacity" when it took actions including "amend[ing] its pension and welfare plans and allocat[ing] the assets and liabilities of those plans between AT&T and Lucent"); *Hunter v. Caliber System, Inc.,* 220 F.3d 702, 719 (6th Cir. 2000) ("an employer's decision to transfer plan assets" when spinning off a subsidiary "is not a fiduciary decision"); *Blaw Knox Retirement Income Plan v. White Consolidated Industries, Inc.,* 998 F.2d 1185, 1189 (3d Cir. 1993) (the "decision to sell [corporate divisions] and to transfer . . . pension plans was a business decision not subject to ERISA's fiduciary provisions"), *cert. denied,* 510 U.S. 1042 (1994).

b. Application

The Verizon defendants argue that the transfers associated with the Idearc pension plan spinoff fully complied with ERISA's provisions governing transfers of assets, and nothing more was therefore required of them.[4] *See* Verizon Brief at 22. They also assert that "Verizon's decision to transfer the benefit obligations for current and former VIS employees to Idearc as part of the spinoff transaction was not made in a fiduciary capacity," and that such a decision therefore

[4] This argument is intriguing, and the Verizon defendants cite a number of persuasive decisions that appear to support it. *See* Verizon Brief at 23-26. Ultimately, however, the court is hesitant to rely on a rule that suggests there is no possibility a plan administrator who fully complied with Section 208 in transferring plan assets could breach fiduciary duties connected with that transfer.

cannot support a claim for breach of fiduciary duty. *Id.* at 28. Finally, the Verizon defendants note that the spinoff was entirely consistent with the terms of the relevant pre-spinoff Verizon pension plans and that the retroactive December 22, 2006 amendments were permissible under ERISA. *Id.* at 22.

The plaintiffs respond that they do not challenge Verizon's bare decision to transfer the retirees' pension obligations, a decision which the plaintiffs agree is not one made in a fiduciary capacity. *See* Plaintiffs' Brief in Support of Plaintiffs' Opposition to Verizon Defendants' Motion for Summary Judgment ("Plaintiffs' Verizon Response") at 6 (docket entry 87). Rather, they argue, their challenge is to the manner in which the Verizon defendants accomplished that transfer. Plaintiffs' Verizon Response at 5, 7, 22-23. Their argument is threefold: first, that the transfer of retirees violated the pension plans' terms and therefore violated the "plan documents rule," *id.* at 7-8; *see also* 29 U.S.C. § 1104(a)(I)(D) ("a fiduciary shall discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan"), and *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan,* 555 U.S. 285, 300 (2009) (noting that "ERISA provides no exemption from" the duty to act in accordance with plan documents "when it comes time to pay benefits"); second, that the December 22, 2006 amendments to Verizon's plans could not be applied retroactively and so cannot defeat the principle that Verizon violated the plan documents rule in accomplishing the spinoff, *id.* at 13; and third, that the involuntary transfer of retirees was not in the retirees' best interests and thus constituted a breach of the Verizon defendants' fiduciary duty of loyalty, *id.* at 19.

The core assertion of the plaintiffs' argument that Verizon violated the plan documents rule is that, while Verizon's pension plans permitted transfers of *assets and liabilities,* nothing in the plans permitted the transfer of individual *persons,* like the retirees, from coverage under one plan to coverage under another. *Id.* at 8. As shown below, this argument leads to absurd results. The court thus concludes, as a matter of law, that the pre-November 2006 Verizon pension plans implicitly granted Verizon the authority to transfer participants in its plans to a different plan created as a result of a transfer of assets or liabilities.[5] The Verizon defendants therefore did not breach fiduciary duties in connection with the pension plan spinoff by violating the plan documents rule.

The language of the relevant pension plans clearly permitted transfers of assets and liabilities, so long as these were transferred in compliance with ERISA Section 208 and its implementing regulations. Section 11.3 of the VMPP and the VEMPP stated that portions of the plans' "assets or liabilities may be transferred to another plan" and that "no benefit

---

[5] This conclusion obviates the need to consider whether the December 22, 2006 amendments could be validly applied, retroactive to November 17, 2006.

previously payable under the Plan on account of such liability shall be payable under the Plan following such transfer." Verizon Appendix at 399-400, 407-08. Section 20.6 of the VPPNY and the VPPMA also provided that the "assets or liabilities" of the plans may be "transferred to[ ] any other plan," so long as the transfer complied with Section 208 and the implementing regulations. *Id.* at 367, 385.

The plaintiffs' assertions (1) that the retirees are "persons" and not "assets" or "liabilities," *see* Plaintiffs' Verizon Response at 8-9, and (2) that no single asset in a defined benefit plan is traced to, or belongs to, a single individual, *id.* at 10, cannot overcome the plain import of these provisions: that the plans implicitly authorize the transfer of persons from one plan to another.

The "liabilities" the Verizon plans' provisions permitted to be transferred were not free-floating abstractions. They included, quite plainly, liabilities to pay benefits to individuals. *See* Verizon Appendix at 400 ("[N]o benefit previously payable under the Plan on account of such liability shall be payable under the Plan following such transfer."); *see also, e.g.,* 26 C.F.R. § 1.414(1)-1(o) ("[I]f in accordance with the transfer of one or more employees, a block of assets and liabilities are transferred from Plan A to Plan B, each of which is a defined benefit plan, the transaction will be considered as a spinoff from Plan A and a merger of one of the spinoff plans with Plan B."); 26 C.F.R. § 1.401-2(b)(2) ("The term 'liabilities' as used in section 401(a)(2) includes both fixed and contingent obligations to employees."); 29 U.S.C. § 1002(25) ("The term 'vested liabilities' means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable."), (29) ("The term 'accrued liability' means the excess of the present value, as of a particular valuation date of a pension plan, of the projected future benefit costs and administrative expenses for all plan participants and beneficiaries over the present value of future contributions for the normal cost of all applicable plan participants and beneficiaries.").

Any transfer of liabilities from one plan to another, which both ERISA and the Verizon plans clearly permit, makes it necessary for a plan administrator to identify and track which individuals, going forward, the transferor plan will remain liable to and which individuals the transferee plan will become liable to. Section 208's implementing regulations envision, in both the merger and spinoff contexts, just such a process of identification and tracking of individuals with assets and liabilities. *See* 26 C.F.R. § 1.414(1)-1(n) ("In the case of a spinoff of a defined benefit plan, the requirements of section 414(1) will be satisfied if – (i) All of *the accrued benefits of each participant* are allocated to only one of the spun off plans.") (emphasis added), § 1.414(1)-1(e) ("Merger of defined benefit plans . . . If the sum of the assets of all plans is not less than the sum of the present values of the accrued benefit (whether or not vested) of all plans, the requirements of section 414(1) will be satisfied merely by combining the assets and *preserving each participant's accrued benefits*.") (emphasis added). The fact that the Verizon plans did not explicitly mention this tracking is of no moment.

Furthermore, it is absurd to imagine that the Verizon pension plans provided a mechanism for the splitting of one plan into two via a spinoff transaction that transferred assets and liabilities, without permitting the plan administrator to transfer individuals from participation in the first plan to participation in the second. Indeed, reading the plans this way would render the transfer provisions a nullity. Federal common law rules of contract interpretation, applicable to ERISA plans, dictate avoiding such a reading. See *Wegner v. Standard Insurance Company,* 129 F.3d 814, 818 (5th Cir. 1997) (applying federal common law to interpretation of ERISA plan); *Harris v. The Epoch Group, L.C.*, 357 F.3d 822, 825 (8th Cir. 2004) ("[U]nder federal common law 'a contract should be interpreted as to give meaning to all of its terms – presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous.'") (quoting *Transitional Learning Community at Galveston, Inc. v. United States Office of Personnel Management,* 220 F.3d 427, 431 (5th Cir. 2000)). The court thus concludes that the relevant Verizon pension plans implicitly authorized any transfer of individuals from Verizon plans to spunoff plans that was accomplished in accord with Section 208's provisions and implementing regulations. Since the transfer of retirees was not a violation of plan provisions, the plaintiffs' theory that Verizon violated the plan documents rule cannot support its breach of fiduciary duty claim.

The plaintiffs also propose in passing that the Verizon defendants violated plan provisions, because those provisions allegedly required the unanimous consent of individuals to be transferred in connection with a pension plan spinoff. *See* Plaintiffs' Memorandum Brief in Support of Motion for Partial Summary Judgment ("Plaintiffs' Brief") at 15-16 (docket entry 83). For this argument, the plaintiffs point to Section 15.1(b) of both the VPPNY and VPPMA, which stated, "A change or termination shall not 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." *Id.*; Verizon Appendix at 365, 383.

First, by its terms, Section 15.1(b) applies only to employees, not retirees. Second, the plaintiffs do not – indeed, cannot – dispute, given that Idearc instituted mirror plans, that the spinoff transfer changed nothing regarding either the pension or welfare benefits to which they were entitled. Since their substantive benefits did not change, the plaintiffs' argument boils down to an assertion that one of the "benefits" to which they had become entitled under the plans, at the time of the spinoff, was the right to have a particular corporate entity sponsoring and administering their plans. This is incorrect. The plaintiffs have pointed to nothing in the plans' provisions for transfers of assets or liabilities that creates such a benefit.

Nor do they point to any other provision of the plans that creates this benefit.

Moreover, as the Verizon defendants note, the reading of Section 15.1(b) the plaintiffs advocate would effectively render the provision in Section 20.6 of the VPPNY and VPPMA a nullity. *See* Brief in Opposition to Plaintiffs' Motion for Summary Judgment ("Verizon Defendants' Response") at 19-20 (docket entry 93). This is because in a pension plan with as many participants as Verizon's, it would be nearly impossible to obtain unanimous consent to any proposed transfer of assets. Compare, *e.g., Chastain v. AT&T,* 2007 WL 3357516, at *9 (W.D. Okla. November 8, 2007) ("[A]s a practical matter, plaintiffs' theory suggests that liability for welfare benefit plans could never, or almost never, be completely transferable to another plan or entity, because all participants might not consent to a complete transfer of plan liability."), *aff'd on other grounds,* 558 F.3d 1177 (10th Cir. 2009). At the very least, a settlor looking forward could never be certain unanimous consent would be forthcoming. Hence, the settlor would be highly unlikely to include such a provision (in the absence of a mandate from ER1SA, to which the plaintiffs have not pointed). *See* Verizon Defendants' Response at 20. The court thus concludes that Verizon's pension plans do not require the unanimous consent of affected participants prior to a transfer of assets or liabilities. This theory, therefore, cannot support the plaintiffs' claim for breach of fiduciary duty.

Aside from the notion that the Verizon defendants breached fiduciary duties by deviating from the pension plans' provisions in transferring retirees, the plaintiffs also apparently argue that an "involuntary" or "surreptitious" transfer of retirees in the context of a pension plan spinoff, *i.e.,* one that takes place in the absence of their consent, is a *per se* breach of the fiduciary duty of loyalty. *See* Plaintiffs' Brief at 2027; Plaintiffs' Verizon Response at 19-26. The plaintiffs cite only one case that comes close to supporting such a theory, *Howe v. Varity Corporation,* 36 F.3d 746 (8th Cir. 1994), *aff'd on other grounds,* 516 U.S. 489 (1996).

The *Howe* panel found a breach of fiduciary duty in an involuntary transfer of retirees from participation in a benefits plan administered by the retirees' former employer to participation in a benefits plan administered by a corporate entity created by the employer to ease its own financial strain. See *Howe,* 36 F.3d at 756. There was overwhelming evidence in the case, however, that the newly created entity was financially doomed from the moment of its creation. *Id.* at 749-50. Moreover, there was significant evidence that the defendants had affirmatively misled current employees to induce them to voluntarily transfer to coverage under the new entity's pension plans. *Id.* Those facts led the court to find breaches of fiduciary duty both with respect to certain employees and also with respect to the involuntarily transferred retirees. *Id.* at 756.

The plaintiffs' reliance on *Howe* is misplaced for at least two reasons. First, the egregious facts of that case led the panel to a finding that the defendants had performed certain acts that could be characterized as "fiduciary functions" in the context of the transfers at issue. *Id.* at 753 ("Plaintiffs' proof here, however, goes beyond mere business decisions on the part of defendants. Misleading communications to plan participants regarding plan administration . . . will support a claim for breach of fiduciary duty.") (internal citations and quotations omitted); see also, *e.g., James v. Pirelli Armstrong Tire Corporation,* 305 F.3d 439, 449 (6th Cir. 2002) ("A fiduciary breaches his duty by providing plan participants with materially misleading information."), *cert. denied,* 538 U.S. 1033 (2003). Thus, the *Howe* panel was able to distinguish between (1) a business decision to transfer plan assets, which is not a fiduciary function, and (2) affirmative actions the defendants took to induce employees into volunteering for the transfer by misleading them about the new corporation's financial health. *Howe,* 36 F.3d at 753.

Underlying *Howe*'s holding with respect to the retirees, then, was the notion that the act of withholding from the retirees information about the new corporation before involuntarily transferring the retirees was an act that could be construed in the same way – *i.e.,* as an attempt to induce the retirees' acceptance of the transfer by misleading them. The *Howe* panel could therefore construe this "complete disregard of the rights and interests of beneficiaries" as a fiduciary function. *Id.* at 756.

Here, the plaintiffs have identified no specific act the Verizon defendants performed, from which a reasonable factfinder could conclude that the Verizon defendants fraudulently induced or otherwise materially misled the retirees into accepting a pension plan transfer for which they did not volunteer. *See generally* Second Amended Complaint. Nor have the plaintiffs identified any other similar acts of misconduct that would support a conclusion that the Verizon defendants performed "fiduciary functions" in connection with the spinoff. *Id.*

Unlike in *Howe,* the plaintiffs here have not pointed to evidence from which a reasonable factfinder could conclude that Idearc was an entity doomed, and known by Verizon to be doomed, from the beginning of its existence. The mere fact that an entity undergoes a Chapter 11 restructuring two and a half years after it begins its corporate life is not enough to conclude that the entity was fatally flawed, and known to be so, from the beginning of that life. *Contra* Plaintiffs' Brief at 24. And while the plaintiffs also point to observations made by Idearc's future leaders about Idearc's relative financial strength during the planning phase of the spinoff, *see* Plaintiffs' Brief at 25, these observations alone are also wholly insufficient for a reasonable factfinder to conclude Idearc was an entity doomed to fail.

Moreover, since the court has already concluded that the Verizon defendants had the authority under the terms of the pension plans to perform the transfers at issue here, there was no act the Verizon defendants undertook, or even needed to undertake, to induce anyone to consent to a transfer.[6] Compare, *e,g., Howe* 36 F.3d at 749-50. That the plan provisions required any transfer of assets or liabilities to comply with ERISA Section 208 was sufficient protection to an affected employee or retiree. *See* Verizon Appendix at 367, 385, 399-400, 407-08.

And finally, there are facts in the summary judgment record here which were not present in the *Howe* case, namely that (1) in the EMA, Verizon required Idearc to maintain the same level of health and welfare benefits Verizon provided, *see* Verizon Appendix at 276, and (2) Verizon had an agreement with Idearc under which Verizon was required to, and in fact did, assist Idearc for almost a year in administering and maintaining those benefits. *Id.* at 236, 275, 314-15, 330.

---

[6] Indeed, the plaintiffs have not identified any communications to the retirees either pre- or post-spinoff that can be construed as misleading. The plaintiffs do refer to a decision of Verizon to postpone notification to the retirees until after the spinoff, *see* Second Amended Complaint ¶¶ 157-58, but, in the context of the facts of this case, that decision cannot reasonably be construed as a materially misleading omission. It was a decision well within the sound business judgment of the plan administrators.

As a final aside, it is also not clear that the *Howe* panel was correct in its holding that a materially misleading statement regarding plan administration, on its own, is a "fiduciary function" supporting a claim for breach of fiduciary duty under ERISA. Other courts have held that when an administrator makes materially misleading communications about a fund's financial status (especially in SEC filings), it is not performing a fiduciary function. See, *e.g., Fisher v. JP Morgan Chase & Company,* 703 F.Supp.2d 374, 388 (S.D. N.Y. 2010) ("ERISA's duty to speak truthfully applies only to those who are, in fact, ERISA fiduciaries.") (citing cases), *aff'd,* 469 Fed. Appx. 57 (2d Cir.), *cert. denied*, ___ U.S. ___, 133 S. Ct. 617 (2012). Even if the plaintiffs had pointed to evidence indicating an issue of fact that Verizon made materially misleading communications to the retirees (and this court thinks they have not), those communications would fall closer to the *Fisher* holding than the *Howe* holding, because they are more like the generic statements about the prospects of an entity made in *Fisher* than the statements in *Howe,* which were made specifically for the purpose of deceiving employees. *See* Second Amended Complaint ¶ 196.

Given all of this, a reasonable factfinder could not conclude, on the basis of the summary judgment record, that the Verizon defendants performed any act in the context of the pension plan spinoff that constitutes a fiduciary function. The court declines the plaintiffs' invitation to fashion a broader rule holding that "whenever a corporate employer negotiates and carries out either the sale or spinoff of a division or business segment which will include retirees having vested rights to future benefits, the corporate employer's actions . . . implicate fiduciary duties." *See* Plaintiff's Brief at 27.

The dominant rule in the case law therefore governs here: Verizon's implementation of the spinoff of its pension plans and its transfer of certain retirees to the spun-off plans were not fiduciary functions. The Verizon defendants' motion for summary judgment on the plaintiffs' claim for breach of fiduciary duty in violation of ERISA Section 404(a)(1) is therefore granted.

2. *Plaintiffs' Third Claim for Relief: Section 406(b) Prohibited Transaction*

a. Legal Standard

29 U.S.C. § 1106 ("Section 406") prohibits a fiduciary from engaging in certain transactions between the plan and either a party in interest or a fiduciary. The provisions aim to prevent fiduciaries from either self-dealing or from engaging in transactions that would benefit other parties at the expense of a plan's beneficiaries or participants. *Reich v. Compton,* 57 F.3d 270, 275 (3d Cir. 1995) ("Congress adopted section 406(a) of ERISA to prevent plans from engaging in certain types of transactions that had been used in the past to benefit other parties at the expense of the plans' participants and beneficiaries."); *Lowen v. Tower Asset Management, Inc.,* 829 F.2d 1209, 1213

(2d Cir. 1987) ("[Section 406(b)] protects beneficiaries by prohibiting transactions tainted by a conflict of interest and thus highly susceptible to self-dealing.").

As an initial matter, it is clear that these provisions apply only to acts performed in a fiduciary capacity. This is because, on their face, the provisions plainly apply only to fiduciaries. 29 U.S.C. § 1106. And the question who is a fiduciary is, as noted above, a question not of identity but of functions being performed. *See* 29 U.S.C. § 1002(21); see also *Hunter,* 220 F.3d at 724 ("[B]y its own terms, § 1106 applies only to those who act in a fiduciary capacity."). Additionally, the circuit courts have widely held that, in the context of a pension plan spinoff, the prohibited transaction provisions are inapplicable, because the plan administrator acting to spin off a plan is not acting in a fiduciary, capacity. *Id.*; see also *Flanigan v. General Electric Company,* 242 F.3d 78, 87-88 (2d Cir.), *cert. denied,* 534 U.S. 1065 (2001); *Blaw Knox,* 998 F.2d at 1191. Finally, the Supreme Court has held that an entity "act[s] not as a fiduciary but as a settlor when it amend[s] the terms of [a] Plan." *Lockheed Corporation v. Spink,* 517 U.S. 882, 891 (1996).

b. Application

The Verizon defendants argue that the plaintiffs' Section 406 claim fails automatically, because the weight of authority is so strong that (1) Section 406 only applies to acts performed in a fiduciary capacity, and (2) the decision to spin off an ERISA plan is not an act performed in a fiduciary capacity. *See* Verizon Defendants' Brief at 36-37. The plaintiffs argue that the rule in (1) on which the Verizon defendants rely is narrower than the defendants assert. Plaintiffs' Verizon Response at 27-29. The plaintiffs admit that it is true that Section 406(a) only applies to acts performed in a fiduciary capacity. *Id.* at 27. But, they assert, Section 406(b) applies whether or not the act in question was one undertaken in a fiduciary capacity. *Id.* at 28, 30.

As an initial matter, the plaintiffs' strained argument is foreclosed by the plain language of the statute. Section 406(b) applies only to a "fiduciary." 29 U.S.C. § 1106(b). An entity or person is a "fiduciary," under ERISA's definition, only "to the extent" that certain fiduciary functions are performed. 29 U.S.C. § 1002(21). If the entity or person in question is not performing fiduciary functions in connection with a particular transaction, then the entity is not a fiduciary to whom Section 406(b)'s prohibition applies.[7] See also *Hunter,* 220 F.3d at 724.

The case law makes abundantly clear, as the plaintiffs admit, that Section 406(a) only applies to acts taken in a fiduciary capacity. *Id.*; *Flanigan,* 242 F.3d at 87; *Blaw Knox,* 998 F.2d at 1191. Not only so,

---

[7] This is precisely the line of interpretation the Supreme Court followed in reaching its conclusion in *Lockheed* that Lockheed was not acting in a fiduciary capacity with respect to a transaction challenged under Section 406(a). See *Lockheed,* 517 U.S. at 891.

but the language of the cases examining Section 406(a) is often broad enough to encompass Section 406(b) as well. See, *e.g., Hunter,* 220 F.3d at 724 (noting that Section 406 generally "applies only to those who act in a fiduciary capacity" without distinguishing between Section 406(a) and 406(b)). Thus, there is a wealth of dicta indicating that the rule the Supreme Court articulated in *Lockheed,* 517 U.S. at 891, applies to Section 406(b). Moreover, there are a number of cases which directly hold that Section 406(b) only applies to those performing fiduciary functions. See *Systems Council EM-3, International Brotherhood of Electrical Workers, AFL-CIO v. AT&T Corporation,* 972 F.Supp. 21, 29 (D.D.C. 1997) ("For liability to attach, Defendants must have acted in a fiduciary capacity as to each count which charges a violation of § 404 or § 406(a) or (b)."), *aff'd,* 159 F.3d 1376 (D.C. Cir. 1998); *Flanigan,* 242 F.3d at 87 (holding that "[f]iduciary duty and prohibited transaction rules apply only to decisions by an employer acting in its fiduciary capacity" and citing 29 U.S.C. § 1106(b)); *DeLuca v. Blue Cross Blue Shield of Michigan,* 628 F.3d 743, 748 (6th Cir. 2010) ("Because [defendant] was not acting in a fiduciary capacity when it negotiated the rate changes at issue in this case, [defendant] did not violate § 1106(b)(2)."); *Chicago District Council of Carpenters Welfare Fund v. Caremark, Inc.,* 474 F.3d 463, 472 n.4 (7th Cir. 2007) ("Carpenters alleged that Caremark violated section 1106(b) when it engaged in certain transactions . . . Because we find that Caremark was not a fiduciary when it engaged in any of the relevant transactions, we need not address this section further."). The plaintiffs have pointed the court to no case directly holding the contrary.

The Verizon defendants' conduct falls comfortably within the ambit of the cases cited above, because the actions of which the plaintiffs complain in connection with their Section 406(b) claim are all actions that were taken in pursuit of amending Verizon's plans to accomplish the spinoff. *See* Second Amended Complaint ¶¶ 153-63, 166-67, 169-72. As with the plaintiffs' Section 404 claim (perhaps even more so here), the plaintiffs point the court to no actions of Verizon analogous to the material misrepresentations in *Howe.* See *Howe,* 36 F.3d at 750; *see also* Second Amended. Complaint ¶¶ 153-72. There is thus nothing before the court to indicate that, in the context of the spinoff, the Verizon defendants performed actions extraneous to the typical settlor functions of amending the plans that would support a holding that they performed some fiduciary function to activate Section 406(b)'s prohibitions.

Because the actions to which the plaintiffs point in connection with the Section 406 claim are all actions taken in pursuit of amending the plans to accomplish the spinoff, there is not evidence before the court sufficient for a reasonable factfinder to conclude that the Verizon defendants performed fiduciary functions that would trigger Section 406(b)'s prohibitions. The Verizon defendants' motion for summary judgment on the plaintiffs' third claim for relief is granted.

3. *Plaintiffs' Second Claim for Relief: Failure to Make Required Disclosures*

a. Legal Standard

ERISA's reporting and disclosure requirements include a provision, 29 U.S.C. § 1022 ("ERISA Section 102"), which mandates that a summary plan description ("SPD") be furnished to a plan's participants and beneficiaries, containing certain disclosures and information about the plan. Among the disclosures the provision requires an administrator to make via SPD are the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b).

b. Application

Both the plaintiffs and the Verizon defendants rely heavily on plain language readings of the provision at issue, probably due to the fact that there is a relative dearth of case law interpreting it. *See, e.g.,* Plaintiff's Brief at 5-9, and Verizon Defendants' Brief at 39-42. The plaintiffs point to the fact that the relevant SPDs did not contain language indicating that a spinoff resulting in an involuntary transfer from one pension plan to another was a "circumstance[ ] which may result in . . . denial or loss of benefits." *See* Plaintiffs' Brief at 5, Plaintiffs' Verizon Response at 33. The Verizon defendants argue, first, that the transfer was not a circumstance which resulted in denial or loss of benefits, because the benefits the new plans contemplated were equal to the previous benefits the plaintiffs had received. *See* Verizon Defendants' Brief at 39-40. Second, the defendants assert that a plan administrator is not required to foresee and disclose every conceivable eventuality via an SPD. *Id.* at 40. Here, the Verizon defendants argue, it is enough that there was a "reservation of rights" provision in the SPDs, which put participants and beneficiaries on notice that Verizon could amend or terminate the plans at any time. *Id.* Since the spinoff did in fact result in an "amendment" to the existing Verizon plans, that reservation of rights provision contains sufficient disclosure to satisfy Section 102. *Id.* at 40-41.

The court cannot accept the defendants' argument that the transfer of retirees was not a circumstance which "may" result in denial or loss of benefits. Quite evidently, the transfer presented a possible circumstance which could result in a loss of benefits, because SuperMedia had the right to amend its health and welfare benefits plans and cause the retirees to lose benefits they might have retained under the Verizon plans. The defendants try to dodge this plain reading of Section 102's language by arguing for, in effect, a *per se* rule that plan amendments are not, for Section 102 purposes, circumstances which result in denied benefits. *See* Verizon Defendants' Brief at 40. The court is not persuaded by the Verizon defendants' hypertechnical reading.

The court does, however, agree with the defendants that the reservation of rights provision constitutes sufficient notice to the plan's beneficiaries that a situation like a spinoff, which results in an amendment of the plan, could lead to a denial or loss of benefits. *Id.* at 41. There is case law supporting this notion. See, *e.g., Fischer v. Philadelphia Electric Company,* 994 F.2d 130, 135 (3d Cir.) ("An ERISA fiduciary is under no obligation to offer precise predictions about future changes to its plan."), *cert. denied,* 510 U.S. 1020 (1993); *Flanigan,* 242 F.3d at 8485 ("[W]e do not require an ERISA fiduciary to be perfectly prescient as to all future changes in employee benefits.") (internal quotations and citations omitted).

Moreover, while the court recognizes that the standard by which an SPD's language is judged is that of an "average plan participant," *see* 29 U.S.C. § 1022(a) ("The summary plan description . . . shall be written in a manner calculated to be understood by the average plan participant."), it is at least slightly disingenuous for the plaintiffs to assert that a spinoff resulting in a transfer of participation is not a "scenario" that "can be envisioned" in this context. *See* Plaintiffs' Brief at 6. During the course of their own retirement, the named plaintiffs had experienced multiple cosmetic pension plan changes that were the result of the mergers that eventually created Verizon. *See* Verizon Defendants' Brief at 18. And while a merger is a different transaction mechanically than a spinoff, the mere fact that the plaintiffs here were participants in a Fortune 50 pension plan should have been enough to put them on notice that certain corporate transactions might work changes in the administration of their pension plans. The same is true of the "average plan participant" in a plan sponsored by a corporate entity like Verizon.

Because the court concludes that the Verizon pension plans' SPDs contained sufficient disclosure of circumstances that could result in denial or loss of benefits, the Verizon defendants' motion for summary judgment on the claim that they violated Section 102 is granted.

4. *Plaintiffs' First Claim for Relief: Failure to Provide Full and Fair Review*

a. Legal Standard

29 U.S.C. § 1133(2) mandates that an employee benefit plan must "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." While the "full and fair" review provision applies to all denied claims for benefits, it is clear from the face of the statute that, in order to merit full review, the denied claim must indeed have been one "for benefits." Thus, where a participant merely challenges the manner in which benefits have been provided, the full and fair review provision is inapplicable. See *Woolsey v. Marion Laboratories, Inc.,* 934 F.2d 1452, 1457 (10th Cir. 1991) (holding that the mode or manner of payment of benefits is not mandated by ERISA, absent specific plan language providing for it).

b. Application

The plaintiffs' complaint insists that its February 4, 2009 "class-wide administrative claim for benefits" was not a challenge to "the mode or manner in which . . . pension benefits are being paid." Second Amended Complaint ¶ 118. The court disagrees. A challenge to the identity of the payor and administrator of benefits is a challenge to something peripheral to the substantive benefits themselves, akin to a challenge to the mode or manner in which benefits are paid. Nothing in the plaintiffs' first claim for relief suggests that the plaintiffs presented to the relevant Verizon administrator a claim for a "benefit" that had been contractually promised to the plaintiffs while they were participants in either Verizon's or SuperMedia's (or Idearc's) plans. *See generally* Verizon Appendix at 462-70. Indeed, the confusion in the response of Idearc's counsel to the classwide administrative claim betrays the difficulty of conceiving the plaintiffs' February 4 letter as a claim for "benefits." *See* SuperMedia Appendix at App 354.

ERISA nowhere mandates that a particular administrator pay a participant's benefits, whether accrued or not. In addition, as explained above, the notion that the identity of the administrator of the plaintiffs' benefits was itself a "benefit" provided under the Verizon plans is unsupported by any of the plaintiffs' arguments or evidence. *See above* at 24. The plaintiffs have pointed to no provision of the Verizon plans indicating that one of the plans' benefits was a right to a particular administrator or payor.

Thus, despite Verizon's July 31, 2009 "denial" of the plaintiffs' February 4, 2009 classwide administrative claim, it is evident that no claim for a "benefit" was ever denied. In the absence of such a denial, the procedures in Section 503 are simply inapplicable to Verizon's conduct. See *Woolsey,* 934 F.2d at 1457.

The court concludes that the plaintiffs' challenge to the identity of the administrator and payor of their benefits, *see* Second Amended Complaint ¶¶ 117-18, was a challenge to the manner in which benefits were being paid. Given that nothing in ERISA or Verizon's plans mandated a particular payor, ERISA's full and fair review provision, and its implementing regulations, do not apply to the Verizon defendants' review of the plaintiffs' classwide administrative claim. The Verizon defendants' motion for summary judgment on the plaintiffs' first claim for relief is granted.

5. *Plaintiffs' Seventh Claim for Relief: Failure to Provide Benefits Due Under VPP*

a. Legal Standard

29 U.S.C. § 1132 ("Section 502") states in relevant part that "[a] civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

In *CIGNA Corporation v. Amara,* the Supreme Court clarified the type of relief that is available under Section 502(a)(1)(B). See generally *CIGNA Corporation* *v. Amara*, ___ U.S. ___, 131 S. Ct. 1866 (2011). That relief, according to the Court, does not include reformation of the terms of a pension plan. *Id.* at 1876-77. As the Court noted, a plain reading of the section shows that it permits enforcement of pension plan terms as written, but not the additional step of changing those terms under equitable principles. *Id.*

b. Application

The defendants argue that the court cannot grant the remedy of reinstatement in the Verizon plans, which the plaintiffs request in their seventh claim for relief, because Section 502(a)(1)(B) does not authorize the court to reform the Verizon pension plans' terms. *See* Verizon Defendants' Brief at 42. The terms of those plans currently exclude individuals like the plaintiffs from coverage. *Id.* at 42-43. Hence the court would have to strike those terms in order to grant the relief the plaintiffs request. *Id.*

The plaintiffs assert in response that they do not seek a reformation of pension plan terms. *See* Plaintiffs' Verizon Response at 41. Rather, they argue that they seek to enforce the terms of the Verizon plans as they existed prior to the (in the plaintiffs' view invalid) December 22, 2006 amendments to those plans, amendments which finally explicitly authorized the transfer of retirees in conjunction with the spinoff. *Id.*

Before the court wades into the details of the plaintiffs' convoluted argument, *id.* at 41-43, the court notes that it has already held that the Verizon plans (even pre-December 22, 2006) implicitly authorized the transfer of retirees that was accomplished in the spinoff. *See above* at 19-20. Thus, "enforcement" of those pre-December 22, 2006 plans would do nothing to satisfy the plaintiffs' claims here, because at every step the Verizon defendants were entitled to change them in such a way that individuals like the plaintiffs would no longer be entitled to benefits thereunder.

Even if this were not the case, though, the plaintiffs' argument would fail. Since the plaintiffs' argument is extremely difficult to understand, the court will attempt to view it stated several different ways. First, if the plaintiffs' argument is that they are entitled to benefits under the current Verizon plans, then it fails. The argument, stated this way, is defeated by the plain language of Section 502(a)(1)(B), as construed in *Amara*. The language of Section 502(a) permits a participant to bring an action to recover benefits "under the terms of *his* plan." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). The plaintiffs' plans are currently SuperMedia plans, not Verizon plans. In order to render an individual plaintiff here a participant in a Verizon plan, such that the Verizon plan would become "*his* plan," the court would have to amend the currently operative Verizon plans. *Amara* does not permit this, at least not under Section 502(a)(1)(B). *Amara,* 131 S. Ct. at 1877.

If, on the other hand, the plaintiffs' argument is that Verizon failed to pay benefits due prior to December 22, 2006, this court can find no allegation supporting that argument. What amount is due? How did the plaintiffs earn a right to that amount?

If, from yet another perspective, the argument is that the plaintiffs had a vested right to remain participants in Verizon pension plans (and thus a vested right to ongoing benefits under those plans), that argument fails, for reasons stated above. *See above* at 19-20. The pre-December 22, 2006 Verizon plans permitted the transfers under consideration here (of assets, liabilities, *and* participants), thus the plaintiffs could not have had a vested right to remain participants in them permanently. In the court's opinion, this exhausts the sensible readings of the plaintiffs' seventh claim for relief, none of which raise a genuine issue of material fact.

The Verizon defendants' motion for summary judgment on the plaintiffs' seventh claim for relief is therefore granted.

6. *Plaintiffs' Sixth Claim for Relief: Appropriate Equitable Relief*

The plaintiffs' sixth "claim" for relief is a free-floating claim for appropriate equitable relief under ERISA Sections 502(a)(2) and (a)(3).

29 U.S.C. § 1132(a)(2) permits a participant to bring an action for "appropriate relief under section 1109 of this title." 29 U.S.C. § 1109 contains one of ERISA's breach of fiduciary duty provisions (the other being in 29 U.S.C. § 1104). Because the court has

determined that the plaintiffs have not shown a genuine dispute of material fact that the Verizon defendants breached fiduciary duties in connection with the pension plan spinoff, the plaintiffs' sixth claim under Section 502(a)(2) fails as a matter of law.

29 U.S.C. § 1132(a)(3) permits a participant to bring an action to redress violations of the provisions of ERISA or of a plan, or to enforce the provisions of ERISA or a plan. Because the court has determined that the plaintiffs have not shown a genuine dispute of material fact that Verizon violated any provisions of ERISA or its plans in connection with the spinoff, Section 502(a)(3) does not provide any ground for the court to award the plaintiffs equitable relief in connection with their claims.

Since there is no ground for awarding the plaintiffs appropriate equitable relief under Sections 502(a)(2) or (a)(3), the Verizon defendants' motion for summary judgment on the plaintiffs' sixth claim for relief is granted.

C. SEBC's Motion for Summary Judgment

The defendant SEBC has moved for summary judgment on all the claims against it in the plaintiffs' second amended complaint. *See* SuperMedia Brief at 1-2. These include claims of failure to provide the plaintiffs with a full and fair review of a claim for benefits, failure to disclose summary plan descriptions, and equitable relief. Second Amended Complaint ¶ 2.

1. *Plaintiffs' First Claim for Relief: Failure to Provide Full and Fair Review*

The court has already set forth the relevant legal standards governing this claim in connection with its discussion of the Verizon defendants' motion for summary judgment. *See above* at 38-39. The court will thus proceed to its consideration of the parties' arguments.

The plaintiffs allege in their complaint that SEBC failed to provide a full and fair review of their "classwide administrative claim," which requested that the involuntary transfer be undone and that they be reinstated in Verizon's pension plans. Specifically, they allege (1) that SEBC "completely refused to make a determination on Plaintiffs' internal administrative claim," Second Amended Complaint ¶ 105, (2) that "Plaintiffs' attempted . . . claim should have been treated by SuperMedia EBC as one arising under ERISA Section 502(a)(1)(B)," *id.* ¶ 117, and (3) that SEBC should have rendered "a determination or clarification of their 'rights to future benefits under the terms of the plan[s].'" *Id.*

SEBC's argument is simple. It asserts that, since the plaintiffs were not denied any benefits under SuperMedia's plans, the ERISA full and fair review provision in 29 U.S.C. § 1133(2) was never triggered. *See* SuperMedia Brief at 1, 7-8. It also implicitly argues that the plaintiffs' "administrative claim" is not the kind of "claim for benefits" that triggers the two-step process of response and review required by § 1133. *Id.* at 8-9.

The plaintiffs respond, confusingly, that ERISA Section 502(a) required SuperMedia to render a decision clarifying their rights to future benefits. *See* Plaintiffs' Brief in Support of Plaintiffs' Opposition to SuperMedia EBC's Motion for Summary Judgment ("Plaintiffs' SuperMedia Response") at 7-8 (docket entry 89). This argument is bizarre and incorrect. Section 502 sets forth the types of *civil actions* participants and others are entitled to bring under ERISA. *See* 29 U.S.C. § 1132(a). That section has nothing to do with administrative review under 29 U.S.C. § 1133, and it certainly does not require a plan administrator to render the kind of declaratory judgment a federal court may render in connection with a civil suit under Section 502.

The court agrees with SEBC's argument. In order to "grant" the plaintiffs' classwide administrative claim, the only action SEBC could have taken would have been to terminate the plaintiffs' participation in the SuperMedia (at the time, Idearc) plans. *See* Second Amended Complaint ¶ 117-48, 122. It is highly unlikely that the Idearc plan administrators had any authority to unilaterally reinstate the plaintiffs in Verizon's pension plans. Certainly the plaintiffs have pointed to no plan provisions granting Idearc's administrators such authority. The decision to reinstate the plaintiffs in Verizon's plans was a decision Verizon's administrators would have had to make. Thus, the only "claim" before SEBC in the plaintiffs' February

4, 2009 letter was a claim for termination of the plaintiffs' participation in SuperMedia's plans. The court concludes, for the following reasons, that such a claim is not a "claim for benefits under the plan" that triggers § 1133's two-step response and review procedure. *See* 29 U.S.C. § 1133(1).

The question is the meaning of the phrase "benefits under the plan" in § 1133(1).[8] *See id.* The terms "benefit" and "benefits" are not statutorily defined. *See generally* 29 U.S.C. § 1002. It is, of course, true that the term "benefit," when understood as a "legal benefit," is quite broad and encompasses a variety of types of "profit" or "gain." *See* Black's Law Dictionary 178 (9th ed. 2009). Nevertheless, scouring ERISA's other defined terms for references to "benefit" or "benefits" convinces the court that the terms have a narrower meaning in both ERISA's statutory scheme considered as a whole and in the provisions at issue in § 1133.

That narrower meaning emerges in the first two definitions in § 1002, the definitions of an "employee welfare benefit plan" and an "employee pension benefit plan." 29 U.S.C. § 1002(1)-(2). A "welfare benefit plan" is a "plan, fund, or program . . . maintained for the purpose of providing," among other things

[8] The plaintiffs' claim focuses on the full and fair review provision in § 1133(2), but an administrator's duty to comply with that provision is not triggered until a claim for benefits has been denied under § 1133(1). *See* 29 U.S.C. § 1133.

"medical, surgical, or hospital care or *benefits,* or *benefits* in the event of sickness, accident, disability, death or unemployment, or vacation *benefits*." 29 U.S.C. § 1002(1) (emphasis added). An "employee pension benefit plan" is one that either "provides retirement income" or "results in a deferral of income." 29 U.S.C. § 1002(2). In the latter case, the definition clarifies that it is a pension plan "regardless of the method of calculating the contributions made to the plan, the method of calculating the *benefits* under the plan or the method of distributing *benefits* from the plan." *Id.* (emphasis added).

In each instance in the definitions section and elsewhere in the statutory scheme considered broadly, references to "benefits" are intimately connected to the notion of either specific payments or rights to payment that arise out of participation in a plan. *See, e.g.,* 29 U.S.C. § 1002(22)-(23), (25), (28)-(29), (31), (34)-(36). This notion is not broad enough to encompass the plaintiffs' suggestion-by-implication here – that their February 4, 2009 administrative claim for termination from participation in Idearc's plans was a claim for "benefits under the plan."

Because the plaintiffs have not shown a genuine dispute of material fact that they made a claim for "benefits under the plan" that triggered SEBC's duty under § 1133 to respond and review, SEBC's motion for summary judgment on the plaintiffs' first claim for relief against it is granted.

2. *Plaintiffs' Fifth Claim for Relief: Failure to Timely Provide SPDs*

a. Legal Standard

29 U.S.C. § 1024(b)(1)(A) requires plan administrators to "furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary plan description, and all modifications and changes referred to in § 1022(a)(1) . . . within 90 days after he becomes a participant." The implementing regulation also requires the SPD to be provided "on or before the later of . . . [t]he date which is 90 days after the employee becomes a participant." 29 C.F.R. § 2520.104b-2(a)(1).

It is a generally held principle that, to justify relief, technical violations of ERISA's reporting provisions must be accompanied by a showing of active concealment or detrimental reliance. See *Williams v. Plumbers & Steamfitters Local 60 Pension Plan,* 48 F.3d 923, 926 (5th Cir. 1995) (citing *Godwin v. Sun Life Assurance Company,* 980 F.2d 323, 328 (5th Cir. 1992) ("There is no requirement that the Plan prove actual notice of an amendment absent a showing of active concealment or some significant reliance upon, or prejudice resulting from the lack of notice.")).

b. Application

SEBC argues that the undisputed facts show no active concealment, as (1) Verizon disclosed the existence of the transfers to the retirees within the reporting period by its letters dated January 25 and

February 15, 2007, and (2) SuperMedia disclosed to the retirees the pertinent details of the new SPD's within a short time after the notice period contemplated by § 1024(b)(1)(A) expired (calculated from the date of the spinoff). *See* SuperMedia Brief at 9-10, 12. It also argues that the plaintiffs did not make in their complaint any allegations of detrimental reliance. *Id.* at 10-12. Finally, SEBC argues that the mandated notice period that ought to apply in a spinoff context is the 210-day period set forth in § 1024(b)(1)(B). *Id.* at 10.

The plaintiffs respond that detrimental reliance can be found in the fact that SEBC's failure to comply with the 90-day deadline slowed their ability to formulate a strategy (particularly a litigation strategy) in response to the pension plan transfer. *See* Plaintiffs' SuperMedia Response at 15-16. They also assert that, because they only request declaratory relief in their complaint, the cases SEBC cites for the general principle that a showing of active concealment or detrimental reliance is necessary to justify relief are inapplicable. *Id.* at 16-18.

In reply, SEBC asserts that the harm the plaintiffs have identified (delay in their ability to formulate an appropriate litigation strategy) is too generic to support an award of relief. *See* Defendant Super-Media Employee Benefits Committee's Reply Brief in Support of its Motion for Summary Judgment ("SuperMedia Reply") at 4 (docket entry 97).

Without deciding whether a 90-day period or 210-day period applies to a plan administrator's requirement to furnish an SPD in the context of a pension plan spinoff, the court agrees with SEBC that the plaintiffs (1) are required to show active concealment or detrimental reliance, and (2) that the plaintiffs have not made a sufficient showing of either of these such as to justify an award of relief here.

First, in spite of the plaintiffs' strident insistence that the requirement to show detrimental reliance should not be imposed on them because they seek only "equitable relief," *see* Plaintiffs' SuperMedia Response at 16-18, the court is not convinced. Not only have the plaintiffs cited no case supporting this assertion, *id.,* they have presented no argument to demonstrate that their request for declaratory judgment should be considered "equitable" in this context. See *Gulf Life Insurance Company v. Arnold,* 809 F.2d 1520, 1523 (11th Cir. 1987) (noting that the determination whether a particular declaratory judgment claim is equitable or legal hinges on examining "the basic nature of the issues involved to determine how they would have arisen had Congress not enacted the Declaratory Judgment Act.") (citations and quotations omitted).

Moving to the question whether the plaintiffs have made a sufficient showing of detrimental reliance, the court agrees with SEBC that the plaintiffs' vague assertions of harm (which appear for the first time in their response to the motion for summary judgment, *see generally* Second Amended Complaint

¶¶ 209-221) are both unpersuasive and insufficient. At the earliest, SuperMedia would have been required by § 1024 to furnish new SPDs to the plaintiffs on February 15, 2007, which was 90 days from the spinoff date of November 17, 2006. The plaintiffs received notice of what the contents of their new SPDs would be on March 19, 2007, barely a month later. *See* SuperMedia Appendix at App 3, 81-332. Certainly this delay had no impact on the statute of limitations, and the defendants here have raised no such defense. The plaintiffs do point to the affidavits of the named plaintiffs asserting that, if they had been provided SPDs within the required period, they "would have sooner taken a different course of legal action against the defendants." *See* Plaintiffs' SuperMedia Response at 16. These affidavits are self-serving and unconvincing, however, given that the plaintiffs already had notice from Verizon, via the January 25, 2007 and February 15, 2007 letters, of the transfers. This "scintilla" of evidence is not enough to withstand a motion for summary judgment. See *Anderson,* 477 U.S. at 252.

Because the plaintiffs have not shown any genuine dispute of material fact that there was active concealment or detrimental reliance connected with SEBC's failure to timely provide SPDs to them after the spinoff, SEBC's motion for summary judgment on the plaintiffs' fifth claim for relief is granted.

3. *Plaintiffs' Sixth Claim for Relief: Other Appropriate Equitable Relief*

For substantially the same reasons set forth in Section II.B.6 above, SEBC's motion for summary judgment on the plaintiffs' sixth claim for relief is granted.

D. Plaintiffs' Motion for Partial Summary Judgment

The plaintiffs have moved for partial summary judgment on some of the claims in their second amended complaint, including (1) the plaintiffs' second claim for relief for VEBC's failure to provide required disclosures in SPDs, (2) the plaintiffs' third claim for relief for VEBC's participation in a transaction adverse to the plaintiffs' interests, (3) the plaintiffs' fourth claim for relief for VEBC's breach of ERISA fiduciary duties, and (4) the plaintiffs' sixth claim for appropriate equitable relief against VEBC and SEBC. Plaintiffs' Brief at 3. For the reasons stated above, the court has determined to grant the Verizon defendants' and SEBC's motions for summary judgment on these claims. The plaintiffs' motion for partial summary judgment is therefore denied.

III. CONCLUSION

For the reasons stated above, the Verizon defendants' and SEBC's motions for summary judgment are **GRANTED**. The plaintiffs' motion for partial summary judgment is **DENIED**.

Judgment will be entered for the defendants.

SO ORDERED.

September 16, 2013.

/s/ A. Joe Fish
A. JOE FISH
Senior United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-11117

PHILIP A. MURPHY, JR.; SANDRA R. NOE; CLAIRE M. PALMER, Individually and as Representative of plan participants and plan beneficiaries of Verizon's Pension Plans involuntarily re-classified and treated as transferred into IDEARC's Pension Plans,

Plaintiffs-Appellants

v.

VERIZON COMMUNICATIONS, INCORPORATED; VERIZON EMPLOYEE BENEFITS COMMITTEE; VERIZON PENSION PLAN FOR NEW YORK AND NEW ENGLAND ASSOCIATES; VERIZON MANAGEMENT PENSION PLAN; SUPERMEDIA EMPLOYEE BENEFITS COMMITTEE, formerly known as Idearc Employee Benefits Committee; VERIZON CORPORATE SERVICES GROUP, INCORPORATED; VERIZON ENTERPRISES MANAGEMENT PENSION PLAN; VERIZON PENSION PLAN FOR MID-ATLANTIC ASSOCIATES,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Filed Nov. 19, 2014)

(Opinion: October 14, 2014, 5 Cir., ___, F.3d ___)

Before KING, GRAVES, and HIGGINSON, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in

---

* Chief Judge Stewart, and Judges Higginbotham, Jones, and DeMoss did not participate in the consideration of the rehearing en banc.

active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn Dineen King
UNITED STATES
CIRCUIT JUDGE