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CERTIFIED TO BE A TRUE COPY

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LOUIS F. LOCASCIO, J.S.C.

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Monmouth Executive Center
100 Willowbrook Road, Building 1
Freehold, NJ 07728
(732) 462-7170
Attorneys for Plaintiff
ON REFERRAL FROM MIDDLESEX COUNTY LEGAL SERVICES

EDGAR A. IRIZARRY

Plaintiff,

vs.

SARA IRIZARRY

Defendant.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - FAMILY PART
MONMOUTH COUNTY
DOCKET NO.:FM-13-1633-98A

Civil Action

QUALIFIED DOMESTIC RELATIONS ORDER

This matter having been heard on the 20th day of May, 1999 by the Honorable Norman J. Peer, J.S.C., Cori L. Socher, Esquire, appearing for the plaintiff, Edgar A. Irizarry, and Jules S. Littman, Esquire, appearing for the defendant, Sara Irizarry, and the court having granted a Judgment of Divorce dissolving the marriage between the plaintiff and the defendant which Judgment incorporated a Property Settlement and Support Agreement which provided for the entry of a Qualified Domestic Relations Order dividing the plaintiff's right to a pension from Bell Atlantic through the Bell Atlantic Pension Plan and the intent of this order is to create and recognize the existence of the alternate payee's right to receive a portion of the participant's benefit under the Bell Atlantic Pension Plan and is entered pursuant to the authority granted under the applicable law of the State of New Jersey specifically N.J.S. 2A:34-23 which permits the court to enter an order to divide the marital property rights of the plaintiff and defendant herein, and for good cause shown;

IT IS ON this 18 day of June, 1999,

ORDERED:

A. **Plan Name:**

The name of the Plan is the Bell Atlantic Pension Plan.

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B. **Participant Name:**

1. Edgar A. Irizarry
2. DOB: [redacted]
3. Social Security Number: [redacted]
4. Mailing Address: [redacted]

07728.

C. **Alternate Payee:**

1. Sara Irizarry
2. DOB: [redacted]
3. Social Security Number: [redacted]
4. Mailing Address: [redacted] State of New Jersey 08861.

The above referenced alternate payee has an interest in the Participant's accrued benefit from the Pension Plan and the "Alternate Payee", as defined by Internal Revenue Code Section 414(p)(8), is the former spouse of the Participant.

D. **Division of Benefits:**

1. The interest of the Alternate Payee is determined as follows:

The accrued benefit of the Participant through the benefit commencement date multiplied by a fraction the numerator of which is the number of months of participation in the Plan while married divided by the number of months of participation in the Plan up to the benefit commencement date multiplied by fifty percent (50%).

2. The parties named in this Order were married on February 28, 1980 and divorced on May 20, 1999.

E. **Should the Participant Die Before the Alternate Payee Commences Receiving Benefits Then the Alternate Payee Is Designated as a "Surviving Spouse":**

Should the Participant die before the Alternate Payee commences receiving the benefit described, the Alternate Payee shall receive a percentage of the Qualified Pre-retirement Survivor Annuity Benefit available under the Plan's Qualified Pre-Retirement Survivor Annuity

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provisions. The percentage shall be obtained by a fraction the numerator of which is the number of months participation in the plan while married divided by the number of months participation in the plan up to the date of the Participant's death.

F. **Distributions of the Assigned Benefit and Designation of Post Retirement Surviving Spouse Benefit:**

The Alternate Payee is designated as the sole and exclusive surviving spouse under the Plan's Qualified Joint and Survivor Annuity provisions for the entire benefit available upon the death of the Participant.

G. **Form of Benefit at Commencement:**

The Alternate Payee's assigned benefit is to be paid over the life of the Alternate Payee; the benefit will be distributed in the form of an actuarially equivalent annuity paid over the Alternate Payee's own life time. It will be the responsibility of the Alternate Payee to advise Bell Atlantic as to the date on which payment of benefits are to commence.

H. **Commencement of Benefits:**

1. Since the assigned benefit is to be paid over the life of the Alternate Payee, subject to the provisions of Part I, the Alternate Payee may elect commencement of her assigned benefit at the earliest date in which the Participant may commence benefits, but no later than when the Participant commences receipt of benefits.

2. It is the responsibility of the Alternate Payee to contact the Bell Atlantic Benefit Office at least sixty (60) days in advance of the date when she wishes to elect to commence receipt of her assigned benefit.

3. The benefit cannot be distributed until the sixty (60) day waiting period has expired or until receipt of a properly completed and notarized Waiver of Appeal Form.

I. **Understandings and Conditions:**

1. Actuarial Adjustment: The Alternate Payee's benefit will be actuarially adjusted using the Plan factors in effect at the time benefits commence and an interest rate factor based on the date of the Order so that the present value of the benefit payable to the Alternate Payee will be equal to the present value of such benefit if it were payable to the Participant.

2. Ad hoc Increases: Both the Participant and the Alternate Payee's benefit shall be proportionately adjusted to reflect ad hoc increases.

3. Applicable Plans: This Order shall apply to the Plan designated in the Order and to any successor employer plan or any other plan to which liability for payment of the benefit may be transferred.

4. Change in Plan Sponsor: Changes in Plan Sponsor, Plan Administrator or Plan Name shall not affect this Order.

5. Death of the Alternate Payee: Upon the death of the Alternate Payee prior to commencement of benefits to that Alternate Payee, the Alternate Payee's assigned benefit will be paid to such beneficiary as she may have designated.

6. Early Retirement: If the Alternate Payee elects to commence benefits at an early retirement date which is prior to the Participant's commencement of benefits, payments will be reduced to reflect early retirement discounting, if any, based on the Participant's age and years of credited service when the Alternate Payee's benefit starts.

7. Multiple Benefit: Any Order seeking to require that an Alternate Payee receive both an actuarially equivalent life annuity paid over the Alternate Payee's life and also simultaneously to receive a survivor annuity under any Plan's Qualified Joint and Survivor Annuity or Qualified Pre-Retirement Survivor annuity provisions will be considered to provide an otherwise unavailable form of benefit, and such an Order will not be considered qualified.

8. Name and Address: The Participant and the Alternate Payee must advise the Plan Administrator of any changes in the mailing address(es) or legal name(s) set for in Part B and Part C respectively.

9. Notice of Prior Order: By the submission of this Domestic Relations Order, the interested parties in this Order certify that they are not aware of any prior Orders which purport to dispose of the benefits described herein (except other proceedings in the same matter with respect to the same parties and of which the Plan Sponsor is already aware). Should a prior Order exist, it is the responsibility of the interested parties to advise the Plan Administrator prior to the Plan Administrator's determination of the "qualified status" of this Order.

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10. Qualified Domestic Relations Order: This Order is intended to fulfill the requirements of a Qualified Domestic Relations Order pursuant to Section 414(p) of the Internal Revenue Code, and as such this Order is not intended to require the Bell Atlantic defined benefit plan to provide any increased payments over those due the Participant under the Plan.

11. Remarriage: The subsequent remarriage of either party shall not affect the division of pension benefits as described in this Order.

12. Terms: The terms used in this Order shall have the same meaning as in the Bell Atlantic Plan to which it applies; and it is further

ORDERED, that this court shall retain jurisdiction over this matter and may modify this order in accordance with requirements of the Plan Administrator so that it will qualify as a Domestic Relations Order.

/s/ Louis F. Locascio
HONORABLE ~~NORMAN J. PEER~~
LOUIS F. LOCASCIO, J.S.C.

We hereby consent to the form and entry of the within Order.

CORI I. SOCHER, ESQUIRE
Attorney for the Plaintiff

JULES S. LITTMAN, ESQUIRE
Attorney for the Defendant

SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION FAMILY PART CAPE MAY COUNTY

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Bell Atlantic

January 25, 2000

Private and Confidential

Mr. Edgar Irizarry
311 Freehold-Englishtown Road
Freehold, NJ 07728

Dear Mr. Irizarry:

Subject: Qualified Domestic Relations Order in the Case of
Edgar Irizarry and Sara Irizarry

On December 17, 1999, the Qualified Order Team received the enclosed certified domestic relations order. This order has been determined to be a Qualified Domestic Relations Order (QDRO) as defined in Section 414(p) of the Internal Revenue Code of 1986, as amended.

Please note that the QDRO provisions will become final upon the earlier of the expiration of the 60-day appeal period or notice from both parties that the appeal period has been waived. If you should elect to waive the 60-day appeal period, please sign the enclosed waiver in the presence of a notary and submit the original form back to the Bell Atlantic Qualified Order Team at the address in this letter.

According to the terms of the QDRO, Sara Irizarry is awarded a portion of your benefits. The following information, taken from the order, outlines the administration of the benefits.

When application is made for payment of the pension benefit, the provisions of the order will be followed. Both the participant and the alternate payee should call the Bell Atlantic InTouch Center at (877) 235-5482 at least 90 days prior to when you wish to begin receiving payments from the Plan.

Plan Name
Bell Atlantic Pension Plan

Benefit Assignment
50 percent of a marital fraction as of the benefit commencement date

Form of Payment
In any form of payment under a plan adjusted over the lifetime of the alternate payee

Timing of Commencement
Under the terms of the order, the alternate payee is eligible to commence her assigned benefit upon the participant's attainment of earliest retirement age as defined under the plan.

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Other

In accordance with the terms of the Plan, please be advised that should the alternate payee elect to commence her benefit prior to the participant's actual retirement date, she will not be eligible to share in any early retirement subsidy. As such, her benefit would be substantially reduced.

According to the terms of the order, the alternate payee has been designated as a surviving spouse for purposes of a Preretirement Survivor Annuity. Therefore, in the event the participant predeceases the alternate payee before the alternate payee receives her first payment under the order, she will instead receive a fractional share of this death benefit based on the terms of the order.

According the terms of the order, the alternate payee has been designated as the surviving spouse for purposes of a Qualified Joint & Survivor Annuity. Therefore, in the event the participant predeceases the alternate payee after his retirement, she would be entitled to receive the full benefit of the amount, based on the terms of the order, the participant was receiving from the Plan. Additionally, the participant will be required to elect a Qualified Joint and Survivor Annuity upon his retirement.

The marital fraction used in the order requires the participant's total period of service in the plan to calculate the assigned benefit amount. Because the participant is still in service, the total service cannot be determined at this time. Therefore, the alternate payee's portion of the benefit will be determined upon the participant's retirement or at the time of alternate payee's commencement of benefit payments, as ordered in the QDRO.

Benefit amounts and eligibility dates will be addressed in a separate letter to Sara Irizarry upon request and upon completion of the appropriate calculations based on the participant's eligibility for payment.

We are notifying all interested parties in this case by providing them a copy of this letter and its enclosures.

If you have any questions about the terms of the QDRO, the Qualified Order Team may be reached at the following address:

Bell Atlantic Qualified Order Team
Post Office Box 785011
Orlando, FL 32878-5011

You may also contact the Qualified Order Team at (800) 569-6963. Representatives available at this number to answer your questions Monday through Friday from 8 a.m. to 5 p.m. Eastern time.

Sincerely,

Qualified Order Team

Kimberly Gunderman

Kimberly Gunderman

KG:mo
Enclosures
cc: Ms. Sara Irizarry (w/enc.)
Jules S. Littman, Esq. (w/enc.)

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Pension Plan
Pension Election Authorization Form

Statement Date 12-22-2010

000000
EDGAR A. IRIZARRY
13 Schaeffer Ln
Freehold NJ 07728

Please read the following information carefully, and then, if you agree with the information, sign and date the form below to certify your elections. **You must sign, date, and return all pages of this form to begin your pension benefit.** Written changes to this authorization form will not be valid and your elections as printed below will take effect. If this form (signed and dated) is not received by the Verizon Benefits Center by **March 22, 2011** (within 90 days after the statement date on the Starting Your Pension Benefit form you received in your retirement kit), you must start the pension commencement process over in most cases with a new, future pension commencement date and different benefit amounts.

My signature below:

- Certifies that I have not received a previous distribution from any pension plan of Verizon or its affiliates or any of their predecessors. If I have received a previous distribution, I understand that such distribution may not have been included in my current benefit calculation and, thus, could result in my current benefit being overstated. If I receive an overstated benefit, I understand that I am required to repay any amounts over and above what I am entitled to under the Plan.
- Certifies that my date of birth is [redacted]961.
- Certifies that I am not married or that I am legally separated.
- Certifies that I received a Notice of Rights, the Special Tax Notice Regarding Plan Payments, the Relative Values Notice, and a description of my pension options and amounts payable.
- Certifies that I have been advised that I should consult with a qualified estate planner or financial advisor.
- Certifies that I understand the risk of loss associated with a lump sum distribution as well as the investment opportunities and that if I receive a lump sum distribution I will not be entitled to any further pension benefits.

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- Cancels any prior elections. I understand that my elections can be revoked before the later of my Pension Payment Commencement Date or the close of the 7-day period that begins the day after the statement date on the Starting Your Pension Benefit form in my retirement kit, but cannot be revoked thereafter.

- Certifies that if I choose to exclude my banked and/or accrued vacation days for benefits purposes, I understand that by doing so I am:
  - Waiving banked and/or accrued vacation days for pensionable service.
  - Waiving coverage under the active medical, dental, and life insurance plans for myself and my dependents, during the banked and/or accrued vacation period.
  - Waiving any other benefits held by active employees, during the banked and/or accrued vacation days which were paid in a lump sum.

- Certifies that I have elected the Lump Sum option from the Verizon Management Pension Plan to commence on **January 1, 2011** (my Pension Commencement Date). This payment option pays **$556,643.29**. This amount may change based on final data or final calculations that apply either plan terms or Internal Revenue Code required limitations.

- Certifies that a portion of my benefit has not been assigned to or is not pending assignment to an alternate payee due to a Qualified Domestic Relations Order (QDRO). If a portion of my benefit has been or is pending assignment to an alternate payee, I understand that such assignment has not been included in my current benefit calculation and could result in my current benefit being overstated. If I receive an overstated benefit, I understand that I am required to repay any amounts over and above what I am entitled to under the Plan.

- Certifies that I waive the 30-day notification period, which allows Verizon to make payments at the earliest date possible.

- Certifies, under penalties of perjury, that I am entitled to the number of withholding allowances claimed, to elect no withholding, or to claim exempt status if I have elected a non-rollover-eligible payment.

Please return all pages of this Pension Election Authorization form. You will need to resend any missing pages, which may cause a delay in your pension payment.

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Also, if I am retiring or terminating in the ordinary course (that is, other than as part of a voluntary or involuntary separation package), I understand that from time to time in the future the company may decide to offer a voluntary separation package or an enhanced involuntary separation package. Such offers could involve pension and/or separation incentives and they can be made at any time — this year or in a later year, and the offers could be in my work group, department or business unit. Business and budget conditions can change quickly, and the company has to be able to respond quickly, which may include separation incentive offers. Therefore, no one may legitimately tell me that there will not be a separation incentive program, either later this year or in a future year. If anyone tells me or guarantees that there will not be such a program in the future, I understand that I should not rely on any such statement. (Despite the foregoing disclaimers, I understand that there is no guarantee that there will be any such separation incentive offers either).

If I am retiring or terminating under a separation incentive program, I understand that the Company may decide to offer a more generous program at some point in the future, subject to all the same comments as above.

I understand that this form does not create any legal rights and does not constitute a guarantee of any particular benefit amount. If there is a difference between the amount of my benefit determined under the official plan document and the amount described in this form, the plan will pay the amount determined under the plan document, even if that is less. In addition, I understand that the plan administrator reserves the right to take steps to correct or recover any erroneous payments.

Return this fully signed Pension Election Authorization form in the enclosed envelope to:

Verizon Benefits Center
100 Half Day Road
P.O. Box 1457
Lincolnshire, IL 60069-1457

Signature

12/23/2010
Date

Please return all pages of this Pension Election Authorization form. You will need to resend any missing pages, which may cause a delay in your pension payment.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VERIZON EMPLOYEE BENEFITS COMMITTEE, Plaintiff, v. EDGAR A. IRIZARRY, SARA IRIZARRY, and MORGAN STANLEY & CO. LLC, Defendants.	)	Civil Action No. 23-1708

COMPLAINT

Now comes Plaintiff the Verizon Employee Benefits Committee, by and through its undersigned counsel, and asserts the following as its Complaint against Defendants:

Introduction

1. This is an action for injunctive, declaratory and other appropriate equitable relief brought to recover amounts which, based on a false and erroneous misrepresentation by Edgar A. Irizarry, were mistakenly paid from a pension plan to an Individual Retirement Account established by Edgar A. Irizarry, and for a declaratory judgment and determination with respect to the rights of respective defendants to pension benefits from the Verizon Management Pension Plan (the "Pension Plan" or the "Plan").

2. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1001 et seq.

Parties

3. Plaintiff the Verizon Employee Benefits Committee (the "VEBC" or "Plaintiff") is a fiduciary of the Pension Plan as that term is defined in ERISA. The VEBC has delegated the responsibility for the Pension Plan's day-to-day administration to the pension administration department within the human resources department of Verizon Communications Inc. ("Verizon"), which is a Delaware corporation. Verizon, the VEBC members and the Verizon pension administration department all have a principal office located in Basking Ridge, New Jersey.

4. Defendant Edgar A. Irizarry is an individual who, on information and belief, resides at [redacted]

5. Defendant Sara Irizarry is an individual who, on information and belief, resides at [redacted] Sara Irizarry was formerly married to Edgar Irizarry.

6. Defendant Morgan Stanley & Co. LLC (previously known as "Morgan Stanley Smith Barney LLC" and hereinafter referred to as "Morgan Stanley") is an investment banking services company which maintains its headquarters and principal offices located at 1585 Broadway Ave., New York, New York 10036. Morgan Stanley transacts business internationally and throughout the United States, including New Jersey, and maintains various offices throughout the United States.

Jurisdiction and Venue

7. Jurisdiction in this action is conferred upon this Court by 28 U.S.C. §1331 and 29 U.S.C. §1132 inasmuch as this action asserts claims under ERISA, and these claims arise under the laws of the United States of America. This Court also has jurisdiction over the claim asserted

in Count II for declaratory relief pursuant to 28 U.S.C. §2201, and under 28 U.S.C. §1367 inasmuch as these claims are inextricably related to the ERISA claims and therefore form part of the same case or controversy under Article II of the United States Constitution.

Factual Allegations

8. Edgar Irizarry was an employee of Verizon and/or its affiliates and predecessors. By virtue of his employment with Verizon, Edgar Irizarry was a participant in the Bell Atlantic Pension Plan, which was one of the predecessor plans of the Verizon Management Pension Plan.

9. The Pension Plan is covered by and subject to ERISA.

10. Attached hereto as Exhibit A is a copy of the Pension Plan (excluding charts, schedules and appendices but including amendments).

11. On or about November 18, 1999, in a divorce proceeding pending between Edgar Irizarry and Sara Irizarry, the New Jersey Monmouth County Superior Court issued a domestic relations order, a copy of which is attached hereto as Exhibit B.

12. Section 7.2 of the Pension Plan provides, in pertinent part, as follows:

> The benefits under the Plan may not be anticipated, assigned (either at law or in equity), alienated, or subjected to attachment, garnishment, levy, execution, or other legal or equitable process, provided that:
>
> * * *
>
> (c) payments made in accordance with a Qualified Domestic Relations Order are not prohibited.

13. For purposes of the Pension Plan, a "Qualified Domestic Relations Order" is defined in Article II to mean a "qualified domestic relations order" within the meaning of section 206(d) of ERISA.

14. Pursuant to Section 7.2 of the Pension Plan, the Plan's prohibition against alienation of benefits does not apply to payments made in accordance with a Qualified Domestic Relations Order ("QDRO").

15. By letter dated January 25, 2000, a copy of which is attached hereto as Exhibit C, the Plan issued a determination that the New Jersey Monmouth County Superior Court's November 18, 1999 order was a QDRO in accordance with Plan procedures. The January 25, 2000 determination further stated that "[a]ccording to the terms of the QDRO, Sara Irizarry is awarded a portion of [Edgar Irizarry's] benefits," and that "[w]hen application is made for payment of the pension benefit, the provisions of the order will be followed."

16. The QDRO issued by the New Jersey Monmouth County Superior Court provides that Sara Irizarry, as Alternate Payee, was entitled to an awarded benefit of Fifty Percent (50%) of a fraction of Edgar Irizarry's retirement benefit, with the numerator of such fraction being the number of months of credited service during the marriage, and the denominator of such fraction being the total months of service credited to Edgar Irizarry under the Pension Plan at the time of his retirement.

17. The QDRO further states that Sara Irizarry was designated as Edgar Irizarry's surviving spouse for purposes of a Qualified Joint and Survivor Annuity. Accordingly, under the terms of the QDRO, Edgar Irizarry was required to elect a Qualified Joint and Survivor Annuity upon his retirement, with Sara Irizarry designated as the surviving spouse.

18. Edgar Irizarry terminated his employment with Verizon on October 15, 2010 and elected to commence his pension under the Plan beginning on January 1, 2011. Attached hereto as Exhibit D is a copy of the Pension Election Authorization Form completed by him and submitted to the Plan on or about December 23, 2010.

19. In the Pension Election Authorization Form completed and signed by Edgar Irizarry on December 23, 2010, Mr. Irizarry misrepresented and falsely certified that no portion of his benefit under the Pension Plan had been assigned to an alternate payee due to a QDRO. The Pension Election Authorization Form signed by Mr. Irizarry contains the following specific certification:

> My signature below:
>
> * * *
>
> Certifies that a portion of my benefit has not been assigned to or is not pending assignment to an alternate payee due to a Qualified Domestic Relations Order (QDRO). If a portion of my benefit has been or is pending assignment to an alternate payee, I understand that such assignment has not included in my current benefit calculation and could result in my current benefit being overstated. If I receive an overstated benefit, I understand that I am required to repay any amounts over and above what I am entitled to under the Plan.

20. Despite the provisions of the QDRO cited and quoted in paragraphs 16-17 herein, Mr. Irizarry elected to receive his pension in the form of a single lump sum distribution in the amount of $556,643.29.

21. As a result of the culpable and improper conduct of Mr. Irizarry in applying for a lump sum distribution and falsely certifying that he had not assigned any portion of his pension benefit to an alternate payee due to a QDRO, the Plan (a) paid Mr. Irizarry's pension benefit in accordance with his lump sum election rather than restricting his payment option to a Qualified Joint and Survivor Annuity as required by the terms of the QDRO; and (b) paid Mr. Irizarry in accordance with his lump sum distribution election without taking into account his prior assignment of a portion of his pension benefit to Sara Irizarry as an alternate payee under the terms of the QDRO which had been entered by the New Jersey Monmouth County Superior Court.

22. The payments by the Plan resulting from the culpable and improper conduct of Mr. Irizarry as described in paragraph 21 herein resulted in an overpayment of benefits to Mr. Irizarry by the Plan.

23. On February 1, 2011, following receipt of the Pension Election Authorization Form described in paragraphs 18 and 19 and attached hereto as Exhibit D, the Pension Plan made a lump sum distribution to Mr. Irizarry in the amount of $556,643.29. This lump sum distribution was paid by the Plan by rollover check written to Morgan Stanley for deposit into Mr. Irizarry's traditional individual retirement account ("IRA") with Morgan Stanley, Account No. [redacted]. On information and belief, Plaintiff alleges that all or a substantial portion of these funds remain on deposit in this IRA account at Morgan Stanley.

24. Because the QDRO required that Mr. Irizarry receive his pension benefit under the Plan in the form of a Qualified Joint and Survivor Annuity which named Sara Irizarry as his surviving spouse and took into account the assignment of a portion of the amount assigned to Sara Irizarry under the QDRO, Mr. Irizarry was not permitted to receive his pension benefit in the form of a single lump sum payment.

25. As a result of his culpable and improper conduct described herein in paragraph 21, Mr. Irizarry was overpaid by the Pension Plan when he received a lump sum distribution contrary to the terms of the Plan and the QDRO. Instead of electing and receiving a lump sum distribution, pursuant to the terms of the QDRO, Mr. Irizarry was only eligible to elect payment in the form of a Qualified Joint and Survivor Annuity and should have received only the portion of those annuity payments payable under that option, after reduction by the portion payable to Alternate Payee Sara Irizarry.

26. In August, 2022, Sara Irizarry contacted the Verizon Benefits Center and inquired as to the status of her interest in the pension benefit of Edgar Irizarry which had been assigned to her as set forth in the QDRO entered by the New Jersey Monmouth County Superior Court. The inquiry of Sara Irizarry led to the discovery by the Verizon Benefits Center and Verizon of the overpayment of pension benefits which had been made by the Plan to Edgar Irizarry, and of the culpable and improper conduct of Edgar Irizarry as described in paragraph 21 herein.

COUNT I

Against Morgan Stanley and Edgar A. Irizarry for Recovery of Erroneous Payment, Constructive Trust and Injunctive Relief

27. Plaintiff incorporates by reference paragraphs 1 through 26 above as though fully set forth herein.

28. Based on the circumstances and events described herein, Edgar Irizarry was paid $556,643.29 from the Pension Plan to which he was not entitled.

29. This action seeks to recover specifically identifiable funds which were erroneously paid by the Pension Plan to the Edgar Irizarry IRA which belong in good conscience to the Pension Plan.

30. Pursuant to 29 U.S.C. §1132(a)(3), Plaintiff is entitled to appropriate equitable relief to enforce the Pension Plan's terms, and to enforce the requirements of 29 U.S.C. §1104. Plaintiff is entitled to impose a constructive trust on the $556,643.29 (as that amount has or will change based on interest, earnings or losses since February, 2011) (hereinafter the "Disputed Pension Payment") which was paid to the Edgar Irizarry IRA Acct. No. [redacted] at Morgan Stanley, and to receive equitable restitution in the same amount to recoup the assets that belong in good conscience to the Pension Plan.

31. Plaintiff has no adequate remedy at law.

32. In the absence of injunctive relief, Plaintiff may be irreparably harmed if, during the pendency of this action, money currently in the possession of the Edgar Irizarry IRA is withdrawn, spent or otherwise dissipated.

33. Defendant Sara Irizarry is named as a defendant to this action as an interested party, inasmuch as her interests may be adversely affected if the relief requested by Plaintiff is not granted.

34. By naming Morgan Stanley as a defendant in this action, Plaintiff is not asserting any adverse claims against Morgan Stanley. Defendant Morgan Stanley is named as defendant solely because it is the entity in which, on information and belief, the Edgar Irizarry IRA is held; is the entity in which the Disputed Pension Payment was deposited; and, on information and belief, is the entity where all or a portion of the Disputed Pension Payment remains on deposit.

Prayer for Relief

Based on the foregoing, Plaintiff prays for the following relief in Count I:

(a) That the Court issue a temporary restraining order and a preliminary injunction prohibiting Morgan Stanley, Edgar Irizarry, or any other beneficiary of the Edgar Irizarry IRA from dissipating, transferring, pledging, spending, disposing of, or encumbering the Disputed Pension Payment which may have been mistakenly paid to the IRA Acct. No. [redacted] and ordering Morgan Stanley and/or Edgar Irizarry to transfer the Disputed Pension Payment back to the Pension Plan or its agent, until this case can be resolved on the merits. Without such relief, Plaintiff will suffer irreparable harm if Morgan Stanley, Edgar Irizarry, or any other beneficiary of the Edgar Irizarry IRA dissipates, transfers, pledges, spends, disposes of, or encumbers the Disputed Pension Payment which may have been mistakenly paid to the Edgar Irizarry IRA;

(b) That the Court enter judgment in favor of Plaintiff: (i) imposing a constructive trust in the amount of the Disputed Pension Payment on the specifically identifiable funds in the custody and control of the Edgar Irizarry IRA or any of the beneficiaries of that IRA; (ii) granting Plaintiff the remedy of equitable restitution of the specifically identifiable funds in the amount of the Disputed Pension Payment or, if the funds have been transferred, imposing a constructive trust and/or equitable lien on the specifically identifiable funds, accounts, or property where those funds may be traced; and (iii) ordering Morgan Stanley and/or Edgar Irizarry to transfer the Disputed Pension Payment back to the Pension Plan or its agent;

(c) That the Court award pre-and post-judgment interest;

(d) That the Court award Plaintiff costs and attorney fees pursuant to 29 U.S.C. §1132(g); and

(e) That the Court award such other relief as it deems just and proper.

COUNT II

For Declaratory Relief Against Edgar Irizarry and Sara Irizarry

35. Plaintiff incorporates by reference paragraphs 1 through 34 above as though fully set forth herein.

36. This is a claim brought by Plaintiff pursuant to Section 502(a)(3) of ERISA seeking declaratory relief concerning the interpretation of the QDRO issued by the New Jersey Monmouth County Superior Court, as described more fully below. This claim is also brought pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §2201 seeking a declaratory judgment concerning certain interests of Edgar Irizarry and Sara Irizarry under the terms of the QDRO.

37. 29 U.S.C. §1132 (a)(3)(B)(ii) provides that a civil action may be brought "by a participant, beneficiary, or fiduciary . . . to obtain other appropriate equitable relief . . . to enforce any provisions of this title or the terms of the Plan."

38. Plaintiff is a fiduciary as defined by ERISA and exercises discretionary authority and/or control with respect to the management and administration of the Pension Plan and the disposition of the Pension Plan's assets.

39. As stated herein in paragraphs 16-17, pursuant to the QDRO entered by the New Jersey Monmouth County Superior Court, Sara Irizarry was assigned a portion of Edgar Irizarry's pension benefit under the Pension Plan. Specifically, the QDRO states that Sara Irizarry is entitled to the following: "The accrued benefit of the Participant through the benefit commencement date multiplied by a fraction the numerator of which is the number of months of participation in the Plan while married divided by the number of months of participation in the Plan up to the benefit commencement date multiplied by fifty percent (50%)."

40. The QDRO entered by the New Jersey Monmouth County Superior Court further ordered that Edgar Irizarry elect to receive his pension benefit in the form of a Qualified Joint and Survivor Annuity. As to this requirement, the QDRO states: "The Alternate Payee is designated as the sole and exclusive surviving spouse under the Plan's Qualified Joint and Survivor Annuity provisions for the entire benefit available upon the death of the Participant."

41. As alleged herein in Count I, the lump sum distribution erroneously paid to Edgar Irizarry in on February 1, 2011 was $556,643.29. However, under the QDRO, Edgar Irizarry was not entitled to a lump sum distribution. The QDRO mandated that Edgar Irizarry elect a Qualified Joint and Survivor Annuity at the time he commenced receipt of his retained pension under the Plan, with Sara Irizarry named as the surviving annuitant. The normal form of

Qualified Joint and Survivor Annuity under the Plan for an annuity commencement date of January 1, 2011 was an actuarially equivalent joint and survivor annuity under which a 50-percent survivor annuity was payable ("50% QJSA").

42. The amount of the monthly benefits to which Sara Irizarry and Edgar Irizarry are entitled under the terms of the QDRO is unclear because of a lack of clarity in the QDRO as to whether Sara Irizarry is entitled to receive a portion of an early retirement subsidy under the Plan. Specifically, when he commenced receipt of his pension benefit in February 2011 based on a January 1, 2011 benefit commencement date, Edgar Irizarry was entitled to a subsidized early retirement benefit under the Pension Plan. The QDRO does not clearly address whether Sara Irizarry, as alternate payee, is entitled to share in Edgar Irizarry's early retirement subsidy, or whether, in the alternative, Sara Irizarry's monthly annuity benefit is to be subjected to early retirement discounting.

43. As a result of the QDRO's lack of clarity with respect to the early retirement subsidy issue, there are two potential interpretations of the QDRO:

- Interpretation No. 1: Sara Irizarry is entitled to share in Edgar Irizarry's early retirement subsidy. Under this interpretation of the QDRO, Edgar Irizarry's retained pension in the 50% QJSA would equal a monthly annuity benefit of $1,456.62 (with Sara Irizarry as his surviving beneficiary being entitled to a monthly annuity benefit of $728.31 following Mr. Irizarry's death) and Sara Irizarry's monthly annuity benefit would be $696.81.
- Interpretation No. 2: Sara Irizarry is not entitled to share in the early retirement subsidy and her benefit is to be subjected to early retirement discounting upon Edgar Irizarry's commencement of benefits. Under this interpretation of the QDRO, Edgar Irizarry's retained pension in the 50% QJSA would equal a monthly annuity benefit of $1,914.90 (with Sara Irizarry as his surviving beneficiary being entitled to a monthly annuity benefit of $957.45 following Mr. Irizarry's death) and Sara Irizarry's monthly annuity benefit would be $208.05.

44. Because of a lack of clarity in the QDRO as described in paragraphs 42 and 43 herein, the Plan Administrator cannot definitively determine whether Interpretation No. 1 or

Interpretation No. 2 is correct.

Based on the foregoing, Plaintiff prays for the following relief as to Count II:

(a) That the Court make a determination resolving the QDRO's lack of clarity and ambiguity as to the issue of the early retirement subsidy, including a determination as to whether Interpretation No. 1 or Interpretation No. 2 is correct;

(b) That the Court, based on its determination under subparagraph (a) above, enter a declaratory judgment pursuant to ERISA Section 502(a)(3) and/or under 28 U.S.C. §2201; and

(c) That the Court award such other relief as it deems just and proper.

Dated: March 27, 2023

Respectfully submitted,

/s/ *Sarah Fehm Stewart*

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March 28, 2023

Sara Irizarry
275 Friendship Road
Cranbury, NJ 08512

Dear Sara Irizarry:

This letter relates to your pension benefit under the Verizon Management Pension Plan (the successor plan to the Bell Atlantic Pension Plan) (the "Plan"). As set forth below, you are rightfully entitled to a benefit under the Plan and a serious problem arose when your ex-spouse, Edgar Irizarry, because of his culpability, received an overstated pension benefit in the form of a lump sum distribution in February 2011, based on a January 1, 2011 benefit commencement date. The facts surrounding Edgar's improper lump sum distribution involve complicated legal and actuarial issues. The Plan administrator and it's ERISA legal counsel have reviewed this matter carefully, and a lawsuit has been filed against Edgar. Unfortunately, because of uncertainty with the order of the divorce court that dissolved your marriage with Edgar, you will be affected by this lawsuit as well. The Plan administrator is hopeful the lawsuit will be resolved and settled between Edgar, you and the Plan. Edgar has been copied on this letter.

Pursuant to the enclosed qualified domestic relations order ("QDRO") regarding the dissolution of your marriage, the court assigned a portion of Edgar's pension benefit under the Plan to you. Specifically, the court stated that you were entitled to the following: "The accrued benefit of the Participant through the benefit commencement date multiplied by a fraction the numerator of which is the number of months of participation in the Plan while married divided by the number of months of participation in the Plan up to the benefit commencement date multiplied by fifty percent (50%)."

The court also ordered that Edgar elect to receive his pension benefit in the form of a Qualified Joint and Survivor Annuity. The court stated: "The Alternate Payee is designated as the sole and exclusive surviving spouse under the Plan's Qualified Joint and Survivor Annuity provisions for the entire benefit available upon the death of the Participant."

Based on the foregoing, a portion of Edgar's pension was assigned to you and Edgar had to elect a joint and survivor annuity distribution of his retained pension benefits. Therefore, it was inappropriate for Edgar to have elected to receive the entire pension benefit in the form of a lump sum distribution. As dictated by the terms of the QDRO, a portion of the pension benefit rightfully belonged to you and Edgar was not eligible for a lump sum distribution. For reasons that are set forth in the lawsuit against Edgar, Edgar was culpable because he lied on the pension election form, indicating to the Plan administrator that he was not subject to a QDRO with respect to his pension under the Plan.

The lump sum distribution erroneously paid to Edgar in February 2011 was $556,643.29, based on a January 1, 2011 benefit commencement date. He was not entitled to a lump sum distribution. As noted above, *the* QDRO mandated that Edgar elect a Qualified Joint and Survivor Annuity at the time he commenced receipt of his retained pension under the Plan, with you named as the surviving annuitant. The normal form of Qualified Joint and Survivor Annuity under the Plan for a benefit commencement date of January 1, 2011 was an actuarially equivalent joint and survivor annuity under which a 50-percent survivor annuity was payable ("50% QJSA").

Sara Irizarry
ID:[0583]

However, the issue of the amount of monthly benefits that you and Edgar are entitled to under the QDRO is complicated by the fact that Edgar was entitled to a subsidized early retirement benefit when he commenced receipt of his benefit in February 2011, based on a January 1, 2011 benefit commencement date. Whether you, as the alternate payee, are entitled to share in Edgar's early retirement subsidy – or whether your monthly annuity benefit is to be subjected to early retirement discounting – is not clearly addressed in the QDRO. As a result, there are two possible outcomes:

- Outcome 1: You are entitled to share in Edgar's early retirement subsidy. In this outcome, Edgar's retained pension in the 50% QJSA would equal a monthly annuity benefit of $1,456.62 (with his surviving beneficiary (i.e., you) being potentially entitled to a monthly annuity benefit of $728.31 following his death) and your monthly annuity benefit would be $696.81.

- Outcome 2: You are not entitled to share in the early retirement subsidy and your benefit is to be subjected to early retirement discounting upon Edgar's commencement of benefits. In this outcome, Edgar's retained pension in the 50% QJSA would equal a monthly annuity benefit of $1,914.90 (with his surviving beneficiary (i.e., you) being potentially entitled to a monthly annuity benefit of $957.45 following his death) and your monthly annuity benefit would be $208.05.

As you can see, the differences between Outcome 1 and Outcome 2 are significant. Unfortunately, because of lack of clarity in the divorce court's order (namely the QDRO), the Plan administrator cannot confidently determine whether Outcome 1 or Outcome 2 is correct. Thus, the Plan administrator is asking the court in the lawsuit noted above to declare whether Outcome 1 or Outcome 2 is proper.

However, at a minimum, the Plan administrator acknowledges that you are entitled to a monthly annuity benefit of $208.05. Although you only fairly recently contacted the Plan administrator about your assigned pension in August of 2022, the Plan administrator will treat your assigned pension as commencing in January 2011, which is when Edgar commenced his pension (albeit an improper amount and form of payment). Between then and the end of March of this year, 147 months have passed (January 2011 through and including March 2023). The lump sum value of those interim payments equals $30,583.35. The Plan is ready to make the back benefit payment to you as soon as possible, after you make two decisions. First, please decide whether you want checks mailed to your home address or if you prefer direct deposit. We have enclosed a form for your election. Second, we have enclosed the tax withholding form. Please complete both forms and return them to the Benefits Center at the address listed above. Thereafter, your back benefit payment will be promptly sent to you, and your prospective payments will be made on a monthly basis thereafter.

Please note that your monthly annuity benefit, as well as the corresponding lump sum payment for the noted back payments from 2011 to 2023, remain subject to potential increase if the court makes a determination that you are entitled to all or some portion of Edgar's early retirement subsidy. Similarly, your assigned pension under the Plan will increase if there is a settlement of the lawsuit with terms that award you an additional amount.

Verizon strongly encourages you to engage legal counsel to represent you in this important matter. The same recommendation is being made to Edgar. Your legal counsel may contact Verizon's outside litigation counsel, Jim Hollihan, at 412-497-1040 or JPHollihan@duanemorris.com.

Sincerely,

Verizon Benefits Center

cc: Marc Schoenecker, Esq.
Edgar Irizarry

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VERIZON EMPLOYEE BENEFITS COMMITTEE Plaintiff, v. EDGAR A. IRIZARRY and SARA IRIZARRY, Defendants,	Civil Action No.: 3:23-CV-1708-MAS DEA

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

On the Brief:

Janie Byalik, Esq.

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Defendant Edgar Irizzary respectfully moves to dismiss the Complaint filed by Plaintiff, the Verizon Employee Benefits Committee (Verizon) (ECF No. 1) and the crossclaim filed by Defendant Sara Irizzary (ECF No. 26).

PRELIMINARY STATEMENT

This is a case of a colossal administrative error (if not breach of fiduciary duty) on the part of Verizon that led to what Verizon alleges is an overpayment of pension benefits to Defendant Edgar Irizzary more than twelve years ago. Now, twelve years after it paid Mr. Irizzary a lump sum pension amount (which Verizon cannot show still exists), Verizon seeks to undo its mistake. Verizon only learned of the error through Defendant's ex-wife, Sarah Irizzary, who called to inquire about the status of her benefits, which were payable to her upon Edgar's retirement under the terms of a Qualified Domestic Relations Order (QDRO) entered by a New Jersey family court. Verizon received a copy of the QDRO in 1999 and advised both Edgar and Sarah Irizzary that when application for benefits are made upon retirement, it would follow the terms of the Order, including dividing payments between the formerly married couple. Verizon failed to do so, and when Mr. Irizzary made his benefits election upon retirement in 2011, Verizon approved a lump sum payment distribution to Mr. Irizzary that contravened the terms of the QDRO.

From 2011 until now Mr. Irizzary has lived his life in full reliance on the money rightfully belonging to him. It would defy all bounds of fairness and reasonableness to now permit Verizon to take back whatever is left of that money (which Verizon cannot plead even exists) due to its own failure to properly maintain records. The statute of limitations on Verizon's claims has long expired and it cannot now invoke the discovery rule given its unequivocal knowledge – as far back as 1999 – that Mr. Irizzary was not entitled to receive a lump sum distribution. Verizon's failure to flag Mr. Irizzary's account and properly account for payments to an alternate beneficiary is the result of administrative failures, not lack of knowledge sufficient to invoke the discovery rule to resurrect decade-plus old claims. The Complaint against Edgar Irizzary should be dismissed.

Nor does Sara Irizzary have a claim against her ex-husband. Ms. Irizzary's claims properly belong against Verizon for failing to adhere to the QDRO and pay her the rightfully owed benefits. There is no legal theory (and she pleads none) under which Edgar Irizzary would be personally responsible for making payments. Sara Irizzary's crossclaim against Edgar Irizzary should also be dismissed.

STATEMENT OF FACTS

Defendant Edgar Irizzary is a former employee of Verizon's predecessor, Bell Atlantic. *See* Compl., ¶ 8. During his employment, Mr. Irizarry was a participant in the Bell Atlantic Pension Plan, one of the predecessor plans of the

Verizon Management Pension Plan (Pension Plan). *Id.*; Ex. A to Compl. While he was still employed at Verizon, Mr. Irrizary and his then-wife, Defendant Sara Irizzary, were in the midst of a divorce proceeding. As part of a judgment dissolving the marriage of Edgar and Sara Irizzary, on November 18, 1999, the New Jersey Monmouth County Superior Court entered a qualified domestic relations order (QDRO) recognizing the right of Sara Irizzary to share in Edgar Irizary's Pension Plan as an alternate payee. Compl., ¶ 11; Ex. B to Compl.

The QDRO set forth the terms of Sara Irizzary's participation in Edgar's Pension Plan. Among other things, the order provided:

> **G. Form of Benefit at Commencement:**
> The Alternate Payee's [Sara Irizzary's] assigned benefit is to be paid over the life of the Alternate Payee; the benefit will be distributed in the form of an actuarially equivalent annuity paid over the Alternate Payee's own life time, It will be the responsibility of the Alternate Payee to advise Bell Atlantic as to the date on which payment of benefits are to commence."

Ex. B, at p. 5. The QDRO further provided

> **H. Commencement of Benefits:**
> 1. Since the assigned benefit is to be paid over the life of the Alternate Payee, subject to the provisions of Part I, the Alternate Payee may elect commencement of her assigned benefit at the earliest date in which the Participant may commence benefits, but no later than when the Participant commences receipt of benefits.

Id. The QDRO, thus, made clear that the benefits paid out of the Pension plan to Sara Irizzary must be paid over the course of her life in annuity payments.

Shortly after the QDRO was entered, on January 25, 2000, a letter was sent to Mr. Irizzary by the Bell Atlantic Qualified Order Team. *See* Compl. Ex. B. The letter advised that the Bell Atlantic Qualified Order Team had received a copy of the QDRO on December 17, 1999; that the Order was, indeed, determined to be a QDRO as defined by Section 414(p) of the Internal Revenue Code of 1986; that under the terms of the QDRO, Sara Irizzary is awarded a portion of the benefits under the Pension Plan, and that "when an application is made for payment of the pension benefit, the provisions of the order will be followed." Ex. B, p. 2. The remainder of the letter reiterated the terms of the QDRO concerning form, timing, commencement of benefits, and other related issues. Thus, as of December 17, 1999 when it received a copy of the QDRO, Plaintiff and/or its predecessor was on notice that Mr. Irizzary's Pension Plan was subject to partial distribution to an alternate payee and that the payment option to Mr. Irizzary must be restricted to a Qualified Joint and Survivor Annuity as required by the terms of the QDRO.

Edgar Irizarry terminated his employment with Verizon on October 15, 2010 and elected to commence his pension under the Plan beginning on January 1, 2011. Mr. Irizarry elected to receive his pension in the form of a single lump sum distribution in the amount of $556,643.29. *See* Ex. D. Mr. Irizzary signed Verizon's Pension Plan election authorization form, which contained a number of small print bullet-point provisions that Mr. Irizzary was said to be certifying to by placing his

signature at the bottom of the last page. One of those provisions, buried in the middle of the second page, stated that by signing the document Mr. Irizzary was certifying that a portion of his benefit has not been assigned to an alternate payee due to a QDRO. Ex. D, at p. 2. Overlooking the fine print in what evidently appeared as a boiler-plate document, Mr. Irizzary signed the authorization form.

As far as Mr. Irizzary was concerned, Verizon was in possession of the QDRO and had been for over a decade at the time he elected to receive his pension and, according to the January 25, 2000 letter sent to him, was to take steps to follow the QDRO procedures once an application was made for the commencement of benefits. At no point in time did Verizon decline Mr. Irizzary's request for a lump sum payment or put him on notice that his payment option must be restricted to a Qualified Joint and Survivor Annuity pursuant to the terms of the QDRO. According to the terms of the Pension Plan, and in accordance with federal law, "[a] delegate of the Committee within the Verizon Human Resources Department shall establish written procedures to determine the qualified status of domestic relations orders and to administer distributions under Qualified Domestic Relations Orders." Ex. A, § 9.14. It is unclear what, if any procedures, were in place at the time the QDRO was entered or at the time Mr. Irizzary elected to commence his benefits. What is clear, however, is that despite its undeniable knowledge of the QDRO and professed obligation to follow the terms of the

QDRO, Verizon did nothing to account for the fact that an alternate payee had a claim to a portion of Mr. Irizzary's benefits and took no action in preventing Mr. Irizzary from electing to receive a lump sum payment.

On February 1, 2011, the Pension Plan made a lump sum distribution to Mr. Irizarry in the amount of $556,643.29 by rollover check written to Morgan Stanley for deposit into Mr. Irizarry's traditional individual retirement account ("IRA") with Morgan Stanley, Account No. 178564564. Compl., ¶ 23. Although Plaintiff has alleged in its complaint that "all or a substantial portion of these funds remain on deposit in this IRA account at Morgan Stanley," *id*., that is, in fact, not the case, as Plaintiff subsequently voluntarily dismissed Morgan Stanley as a defendant from the case (ECF No. 17) after obtaining documents pursuant to a subpoena which showed that the funds are no longer in that account. Plaintiff otherwise does not allege that any portion of the $556,643.29 that was paid to Mr. Irizzary more than 12 years ago still remains in his possession.

More than a decade after its erroneous lump sum payment to Mr. Irizzary, Verizon realized that it failed to account for Sara Irizzary's portion of the benefits set forth in the QDRO – an error that was discovered only after Sara Irizzary inquired into the status of her payments in August 2022. *See* Compl., ¶ 26. By way of this action, Verizon now seeks to claw back the payments it made to Edgar Irizzary more than twelve years ago – moneys Verizon has not and cannot allege

are still in existence. In response to Verizon bringing this action, Defendant Sara Irizzary filed a counterclaim against Verizon and crossclaim against Edgar Irizzary seeking a declaration that she is entitled to monthly benefits pursuant to the QDRO, including a *pro rata* share of Mr. Irizzary's early retirement subsidy. (ECF No. 26, at pp. 7-8)

LEGAL ARGUMENT

I. Verizon's Complaint Must be Dismissed in its Entirety Because it is Barred by the Statute of Limitations

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint is not sufficient unless it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

On a Rule 12(b)(6) motion, a complaint may be dismissed on statute of limitations grounds, "when the statute of limitations defense is apparent on the face of the complaint." *Wisniewski v. Fisher,* 857 F.3d 152, 157 (3d Cir. 2017) (citing *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014)). Although on a motion to

dismiss, the Court does not consider matters outside the pleadings, it may, however, consider documents that are "integral to or explicitly relied upon in the complaint" or any "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document[.]" *In re Rockefeller Ctr. Props., Inc. Sec. Litig.,* 184 F.3d 280, 287 (3d Cir. 1999) (emphasis and citations omitted); s*ee In re Asbestos Prods. Liab. Litig. (No. VI)*, 822 F.3d 125, 133 n.7 (3d Cir. 2016); *Schmidt*, 770 F.3d at 249.

There is no express statute of limitations for a claim seeking equitable, non-fiduciary relief under ERISA, and as such, courts borrow the limitations period of the state-law cause of action to which the ERISA claim is most analogous. *See Miller v. Fortis Benefits Ins. Co.,* 475 F.3d 516, 520 (3d Cir. 2007); *Raymond v. Barry Callebaut, U.S.A., LLC*, 510 F. App'x 97, 99 (3d Cir. 2013). The question for the Court is, thus, which limitations period to apply to Verizon's overpayment claim. In this instance, however, regardless of which New Jersey equivalent cause of action is deemed to be most analogous to an ERISA overpayment claim, the end result is the same – Verizon's twelve-year-old claims are time-barred.

Although Verizon's claims potentially, on their face, can be characterized as claims for breach of contract,[1] Verizon makes no attempt to argue that Mr. Irizzary

[1] The terms of Mr. Irizzary's pension benefits were covered by contract – the Pension Plan – which detailed at length the protocols, procedures, and obligations of the parties concerning the pension plan. Moreover, the Pension Plan expressly

has breached any provision of the Pension Plan. Instead, Verizon seeks recovery for an "Erroneous Payment, Constructive Trust and Injunctive Relief." Compl., Count I. That claim can properly be characterized a quasi-contract claim, such as unjust enrichment or money had and received, the essence of which is that Verizon mistakenly conferred a benefit upon Mr. Irizzary that he should return.

The federal courts have generally described ERISA overpayment claims to be claims for unjust enrichment. *See Luby v. Teamsters Health, Welfare, & Pension Tr. Funds,* 944 F.2d 1176, 1186 (3d Cir. 1991) ("Although ERISA itself does not explicitly provide a statutory right of restitution, it is clear that Congress intended federal courts to fashion a federal common-law under ERISA, and this permits application of a federal common-law doctrine of unjust enrichment if restitution would not override a contractual provision of an ERISA plan"); *Provident Life & Ace. Ins. Co. v. Waller*, 906 F.2d 985, 990 (4th Cir.) (describing a suit to recover overpayment as "the archetypal unjust enrichment scenario"); *Jamail, Inc. v. The Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 954 F.2d 299, 305-06 (5th Cir. 1992) (approving the Fourth Circuit's *Provident Life* case in creating common law restitution claim to recover overpayments); *Heller v. Fortis Benefits Ins. Co.,* 142 F.3d 487, 495 (D.C. Cir. 1998) ("restitution is an appropriate remedy

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contemplates the pension administrator's ability to recover overpaid sums. *See* Ex. A to Compl., at ¶ 7.12.

where there is unjust enrichment"); *UNUM Life Ins. Co. v. Lynch*, 2006 WL 266562 (S.D.N.Y. 2006) (finding unjust enrichment theory available under ERISA); *Metro. Life Ins. Co. v. Solomon*, 996 F.Supp. 1473, 1477 (M.D. Fla. 1998) ("For Plaintiff to have a remedy against Defendant, it must be for restitution under a theory of unjust enrichment."); *Celi v. Trustees of Pipefitters Local 537 Pension Plan*, 975 F.Supp. 23, 28 (D. Mass. 1997) (finding it "irrelevant whether the reason for the unjust enrichment is an innocent mistake or a material misrepresentation."); *Floor Covering Union and Indus. Welfare Trust v. Tompkins*, 761 F.Supp. 101, 103-04 (D. Or. 1991) (describing the claim as restitution, applicable in any situation in which one person is accountable to another on the ground that otherwise one would unjustly benefit or the other would unjustly suffer loss).

Under New Jersey law, the statute of limitations for an unjust enrichment claim is six years. *See Iwanowa v. Ford Motor Co.,* 67 F. Supp. 2d 424, 473 (D.N.J. 1999) ("The statute of limitations in New Jersey for claims sounding in restitution/unjust enrichment or quantum meruit is six years."); *Talon Indus., LLC v. Rolled Metal Prod., Inc.,* No. CV 15-4103 (CCC), 2022 WL 3754800, at *7 (D.N.J. Aug. 30, 2022) (discussing New Jersey's six-year statute of limitations period applicable to unjust enrichment and other quantum meruit claims) (citing *Kopin v. Orange Prods., Inc.* 688 A.2d 130, 140–41 (N.J. Super. Ct. App. Div. 1997); N.J.S.A. § 2A:14-1)). Any other claim that might otherwise be remotely

analogous to the claims brought by Verizon - i.e., breach of contract or fraud, has the same maximum limitations period of six years. *See, e.g., Cont'l Cas. Co. v. J.M. Huber Corp.,* No. V134298KMJBC, 2022 WL 17340680, at *8 (D.N.J. Nov. 30, 2022) (noting that the statute of limitations for a "contractual claim or liability" under New Jersey law is six years) (citing N.J.S.A. § 2A:14-1(a)); *Arch Specialty Ins. Co. v. CJS Plumbing, Inc.*, No. 2:20-CV-16382 (WJM), 2021 WL 2352412, at *2 (D.N.J. June 9, 2021) (stating that New Jersey law provides a six-year statute of limitations for contract claims and quasi-contract claims) (citing *Penn Nat'l Ins. Co. v. N. River Ins. Co.,* 783 F. App'x 195, 200 (3d Cir. 2019); *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.,* 181 F.3d 410, 425 (3d Cir. 1999) ("Under New Jersey law, the statute of limitations for fraud is six years, see N.J. Stat. Ann. § 2A:14–1").

Although state law furnishes the statute of limitations, the date of accrual of the ERISA non-fiduciary duty claims is determined as a matter of federal common law. *Romero v. Allstate Corp.,* 404 F.3d 212, 221 (3d Cir. 2005); *see also Union Pacific R.R. Co. v. Beckham,* 138 F.3d 325, 330 (8th Cir.) (stating in ERISA action, "despite determining the limitations period by analyzing state law, this Court looks to federal common law to determine the time at which a plaintiff's federal claim accrues"), *cert. denied,* 525 U.S. 817 (1998).

Under federal law, the statute of limitations begins to run when the plaintiff "knew or has reason to know of the injury upon which its action is based." *See Kach v. Hose*, 589 F.3d 626, 634 (3d Cir. 2009); *Northern California Retail Clerks Unions and Food Employers Joint Pension Trust Fund v. Jumbo Markets, Inc.,* 906 F.2d 1371, 1372 (9th Cir. 1990); *Michigan United Food and Commercial Workers Unions and Drug and Mercantile Employees Joint Health and Welfare Fund v. Muir Co.,* 992 F.2d 594, 597–98 (6th Cir. 1993); *Cullen v. Margiotta,* 811 F.2d 698, 725 (2d Cir. 1987). Regardless of how Verizon's claims are characterized – whether under the theory of unjust enrichment or another New Jersey law claim, those claims would have accrued far too long ago for Verizon to bring this action.

This case is more than just one of constructive knowledge or what Verizon should have known. Verizon had *actual knowledge* long before it issued any payment to Mr. Irizzary as to the type of distribution he was entitled. By its own concession, Verizon was aware of and retained a copy of the QDRO since December 1999 when it issued a letter to both Edgar and Sara Irizzary notifying them of same and stating, "when application is made for payment of pension benefit, the provisions of the [QDRO] will be followed." *See* Ex. C to Compl. The letter further noted that "the participant will be required to elect a Qualified Joint Survivor Annuity Option upon his retirement." *Id.* at p. 2. As an administrator of the Pension Plan, it was incumbent upon Verizon to know and keep track of its

accounts, to document the QDRO, to place some sort of flag on Mr. Irizzary's account, and to follow the QDRO procedures upon application for payment.

Indeed, the QDRO structure was passed by Congress when it amended ERISA with the Retirement Equity Act ("REA") of 1984 to protect divorced spouses' interest in retirement funds earned during marriage, *Boggs v. Boggs*, 520 U.S. 833, 848, 854 (1997). The REA amendments require each pension plan to provide for "the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order," 29 U.S.C. § 1056(d)(3)(A), and furthermore require "[e]ach plan [to] establish reasonable procedures to determine the qualified status of domestic relations orders ***and to administer distributions under such qualified orders***." 29 U.S.C. § 1056(d)(3)(G)(ii) (emphasis added). Verizon confirmed in its letter sent to the parties in early 2000 that it would follow the QDRO procedures. Ex. C to Compl. It is, therefore, unreasonable for Verizon to plead ignorance when it had an affirmative obligation to follow the terms of the QDRO.

In an effort to trigger the discovery rule to salvage its decade-plus year-old claims, Verizon purports to characterize its action as one sounding fraud by accusing Mr. Irizzary of falsely misrepresenting in the benefit election form that his pension is not subject to a QDRO. Putting aside the moment the lack of any evidence that Mr. Irizzary's signature on Verizon's authorization form containing

the QDRO language was the product of intentional fraud as opposed to simple mistake in him overlooking fine print on a boiler-plate looking document, even if this were a fraud action, the discovery rule could not resurrect Verizon's stale claim.

Irrespective of any alleged misrepresentation by Mr. Irizzary (which was as likely to have been unintentional as it was purposeful, as Verizon claims), it was Verizon's responsibility to know that the account was subject to a QDRO and that lifetime annuity payments were due to an alternate payee (Sara Irizzary); its reliance on an employee's authorization form in distributing pension funds is unreasonable. In examining the history and principles underlying the discovery rule, the New Jersey Supreme Court explained,

> the doctrine "postpon[es] the accrual of a cause of action" so long as a party ***reasonably is unaware*** either that he [or she] has been injured, or that the injury is due to the fault or neglect of an identifiable individual or entity…Once a person ***knows or has reason to know of this information,*** his or her claim has accrued since, at that point, he or she is actually or constructively aware "of that state of facts which may equate in law with a cause of action."

Mancuso v. Neckles ex rel. Neckles, 163 N.J. 26, 29 (2000)(internal citations and quotes omitted)(emphasis added); *see also Cty of Morris v. Fauver*, 707 A.2d 958, 972 (N.J. 1998) ("the discovery rule imposes on plaintiffs an affirmative duty to use reasonable diligence to investigate a potential cause of action, and thus *bars from recovery plaintiffs who had "reason to know" of their injuries."* The central

premise underlying the application of the discovery rule focuses on reasonableness and imposes an affirmative obligation upon a plaintiff to do basic reasonable diligence. Verizon has failed to adhere to that basic premise and thus, should be prohibited from relying on the discovery rule.

That was the conclusion reached by a Northern District of Texas court, later affirmed by the Fifth Circuit, involving overpayments by Verizon. *See Verizon Emp. Benefits Comm. v. Frawley*, No. CIV.A. 305CV2105-P, 2007 WL 2051113, at *1 (N.D. Tex. July 12, 2007). In that case, Defendant, who retired from Verizon, received a lump sum payment of $563,982.19 from the Verizon's Pension plan, which was calculated based on thirty-four years of continuous service. *Id.* at *1. Verizon subsequently advised Defendant that the plan administrators erred in calculating his retirement package by crediting 15 years of service with a company that was not a member of the plan and sought the return of $239,872.10 that it paid Defendant due to an "administrative error." *Id.* Like here, Verizon sought relief under § 502(a)(3) of the ERISA seeking to impose a constructive trust on the alleged overpayment and to receive restitution of the money. *Id.* Defendant moved for a judgment on pleadings under Fed. R. Civ. P. 12(c). *Id.*

Recognizing that ERISA does not provide a statute of limitations for claims under § 502(a)(3), the issue before the court was which was the most analogous claim under forum state law. After analogizing the ERISA § 502(a)(3) claim for

recovery of money Verizon claims was overpaid to Defendant to various Texas state law claims (including breach of contract and unjust enrichment), the Northern District of Texas ultimately concluded that the claim was one of "money had and received," a claim in which a contract has been overpaid but, unlike unjust enrichment, is not based on wrongdoing; it is an action "for money obtained lawfully but… retained wrongfully." *Id.* at *2.

Although at that time, the court held that that the applicability of the discovery rule was factually driven, the court later held in subsequent summary judgment proceedings that Verizon could not benefit from the discovery rule. *Verizon Emp. Benefits Comm. v. Frawley*, 655 F. Supp. 2d 644 (N.D. Tex. 2008), aff'd, 326 F. App'x 858 (5th Cir. 2009). Noting that under § 1132, the statute of limitations "does not begin to run until the party bringing suit knows, or has *reason to know,* of the injury," the court held that Verizon was aware of potential overpayments well before the expiration of the limitations period. *Id.* at 649 (emphasis in original). There was evidence produced in discovery that Verizon's employees knew that Defendant may not be eligible for pension accrual from his prior employer and a "flag" was added to his account but payments were miscalculated anyway.

Notably, the court stated, "the Committee persistently points the finger at [Defendant] for accepting and electing to receive the lump sum on this

miscalculation even though he had been informed by Chase that his RH Donnelley service was not to be included," but found that "this is not relevant… to the issue of the Committee's knowledge of the error." *Id.* at 650. The court concluded that certain employees were aware of the issue – knowledge that is imputed to Verizon by virtue of their agency – which renders Verizon in possession of information from which it could have and should have known about its mistaken calculation. As such, Verizon could not be shielded by the discovery rule. *Id.* That decision was affirmed by the Fifth Circuit. *Verizon Emp. Benefits Comm. v. Frawley*, 326 F. App'x 858, 859 (5th Cir. 2009).

The *Frawley* case is on all fours with this one, and with no Third Circuit precedent directly on point that Defendant could find, the *Frawley* case provides useful guidance. Here, however, unlike in *Frawley,* no discovery is needed to demonstrate that Verizon and/or its predecessor knew that Mr. Irizzary was not eligible for a lump sum payment; that evidence is clearly set forth in the documents attached to the complaint. The attempt by Verizon to blame Mr. Irizzary for the misinformation on the authorization form – whether the product of intentional misrepresentation or an innocent mistake – is unavailing. It is not relevant to the issue of Verizon's knowledge as to what benefit election Mr. Irizzary was entitled. Verizon knew upon receipt of the QDRO that Mr. Irizzary was ineligible to receive a lump sum payment and that it needed to set aside a portion of his pension to an

alternate payee. It failed to do so. It cannot now cloak its administrative error under the discovery rule and its claims have long expired.

The Third Circuit's application of the discovery rule in the ERISA context concerning a denial of benefits further supports Defendant's position. The discovery rule in the ERISA context has developed into the "clear repudiation" rule whereby a non-fiduciary cause of action accrues at the time a claim for benefits has been denied. *Miller v. Fortis Benefits Ins. Co.,* 475 F.3d 516, 520–21 (3d Cir. 2007). Significantly, there need not be a *formal* denial so long it was *clear* and made known to the beneficiary that there had been a repudiation of benefits. *Id.; Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan,* 201 F.3d 44, 48 (2d Cir.1999) ("We ... follow the Seventh, Eighth, and Ninth Circuits in holding that an ERISA claim accrues upon a clear repudiation by the plan that is known, or should be known, to the plaintiff—regardless of whether the plaintiff has filed a formal application for benefits."). In other words, some "event other than a denial of a claim" may trigger the statute of limitations *by clearly alerting the plaintiff* that his entitlement to benefits has been repudiated. *Id.* (citations omitted) emphasis added).

That logic is similarly applicable here. Verizon need not have been formally advised that it overpaid a claim, like when Sara Irizzary called to inquire about the status of her benefits. Nor should it have relied on the authorization form submitted

by Edgar Irizzary, as errors in application forms are not uncommon. The event that triggered Verizon's knowledge concerning the type of benefits to which Mr. Irizzary was entitled and imposed an affirmative obligation to ensure compliance was its receipt of the QDRO.

As the Third Circuit noted,

> statutes of limitations are intended to encourage rapid resolution of disputes, repose for defendants, and avoidance of litigation involving lost or distorted evidence. These aims are served when the accrual date anchors the limitations period to a plaintiff's reasonable discovery of actionable harm. This ensures that evidence is preserved and claims are efficiently adjudicated." In contrast, a statute of limitations not based on reasonable discovery is effectively no limitation at all.

Id. (quoting *Romero v. Allstate Corp.,* 404 F.3d 212, 223 (3d Cir.2005)). If the Court were to accept Verizon's position – that its cause of action accrued only upon learning of the error from Sara Irizzary, then the statute of limitations would essentially become indefinite, as Ms. Irizzary could have inquired about her claim five, ten, or twenty years later, decades after Verizon paid the pension to Edgar Irizzary. The Court should decline to invite such a result. Mr. Irizzary received his pension payment more than a decade ago and has lived his life under the impression that the entire sum of money rightfully belonged to him. It would defy all bounds of fairness and equity to permit Verizon to recoup that money at this late stage when the overpayment was issued due to Verizon's failure to properly maintain records. *See Phillips v. Mar. Ass'n-I.L.A. Loc. Pension Plan,* 194 F. Supp.

2d 549, 558 (E.D. Tex. 2001) (holding that pension plan could not avail itself of restitution for overpayments made to four divorced women who received overpayments of distributions under their QDROs, noting "[t]hese older women depended on the dollar …[and] actually distributed to them for years, when planning the rest of their lives" and "[t]he overpayments were the result of more than just a mistake, they were the result of [the Pension plan's] breach of fiduciary duty"; "he court does not believe it would be equitable for the Plaintiffs to bear the weight of an error that Hunt could have prevented by upholding her duty as plan administrator and allowing an actuary to check the QDROs."). *Phillips v. Mar. Ass'n-I.L.A. Loc. Pension Plan*, 194 F. Supp. 2d 549, 556-57 (E.D. Tex. 2001).

II. The Crossclaim by Sara Irizzary against Edgar Irizzary Should be Dismissed

Sara Irizzary's counterclaim against Verizon and Crossclaim against Edgar Irizzary consists of a single allegation: "Defendant is entitled to monthly benefits pursuant to the QDRO that include a pro rata share of the early retirement subsidy." *See* Answer, ECF No. 26, at ¶ 46. The relief sought by Ms. Irizzary stems from a lack of clarity in the QDRO. As explained in Verizon's complaint, when he commenced receipt of his pension benefit in February 2011 based on a January 1, 2011 benefit commencement date, Edgar Irizarry was entitled to a subsidized early retirement benefit under the Pension Plan. The QDRO does not clearly address whether Sara Irizarry, as alternate payee, is entitled to share in Edgar Irizarry's

early retirement subsidy, or whether, in the alternative, Sara Irizarry's monthly annuity benefit is to be subjected to early retirement discounting. Compl., ¶ 42. If Ms. Irizzay is entitled to share in Mr. Irizzary's early retirement subsidy, her monthly annuity benefit would be $696.81 as opposed to $208.05 if she does not. *Id.* at ¶ 43.

Although Sara Irizzary seeks to clarify the confines of the QDRO and the amounts to which she is entitled, her crossclaim fails to set forth any basis for asserting relief against Edgar Irizzary. The QDRO entitled Sara Irizzary to a "right to a pension *from Bell Atlantic through the Bell Atlantic [now Verizon] Pension Plan*" and the intent of the QDRO was "to create and recognize the existence of the alternate payee's right to receive a portion of the participant's benefit under the Bell Atlantic Pension Plan." Ex. B to Compl., at 1. Ms. Irizzary has failed to plead any facts that entitle her to enforce the QDRO against Mr. Irizzary personally, rather than a claim against Verizon for failing to follow the terms of the QDRO. The claim against Mr. Irizzary should be dismissed.

CONCLUSION

For the foregoing reasons, all claims against Edgar Irizzary should be dismissed.

PASMAN STEIN WALDER HAYDEN
A Professional Corporation
Attorneys for Edgar A. Irizzary

Date: July 31, 2023

By: s/*Janie Byalik*
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Re: Verizon Employee Benefits Committee v. Irizarry, et al.

Dear Sarah, James, and Janie,

I hope this finds you all well. It was a pleasure meeting you last month. While we consider our response to Mr. Irizarry's motion to dismiss, I would like to summarize Ms. Irizarry's position in the hope that we might be able to resolve some of the outstanding issues.

Ms. Irizarry's primary interest in the case is whether she is entitled to a *pro rata* share of the early retirement subsidy. Verizon describes the QDRO as being ambiguous on this point. (Complaint, ¶ 42; Letter dated March 28, 2023, at 2, attached as "Exhibit A" to Plaintiff's Response to Request by Defendant Sara Irizarry for Extension to File Responsive Pleading.) The QDRO assigns Ms. Irizarry a separate interest in the Plan's benefits, and, in relevant part, provides that:

- Ms. Irizarry "may elect commencement of her assigned benefit at the earliest date in which [Mr. Irizarry] may commence benefits, but no later than when [he] commences receipt of benefits." (QDRO, ¶ H.1.)

- If Ms. Irizarry "elects to commence benefits at an early retirement date which is prior to [Mr. Irizarry's] commencement of benefits, payments will be reduced to reflect early retirement discounting, if any, based on [Mr. Irizarry's] age and years of credited service when [her] benefit starts." (QDRO, ¶ I.6.)

We agree that Ms. Irizarry would not have been eligible for the early retirement subsidy had she commenced her benefits before Mr. Irizarry's actual retirement date. (Letter dated Jan. 25, 2000, at 2.) This restriction is required by Section 206(d)(3)(E) of ERISA, which provides that under a separate interest QDRO, an alternate payee may commence benefits before the participant has separated from service once the participant attains the earliest retirement age; when such an election is made, the alternate payee's benefit is determined as if the participant had retired on the alternate payee's benefit commencement date, "(but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement)." 29 U.S.C. § 1056(d)(3)(E)(i) (I) & (II).

However, Ms. Irizarry's benefits did *not* begin prior to Mr. Irizarry's actual retirement date of January 1, 2011: The Plan administrator deems Ms. Irizarry's benefit commencement date to be coincident with Mr. Irizarry's benefit commencement date. (Letter dated March 28, 2023.) This is consistent with the QDRO, which provides that although Ms. Irizarry "may elect commencement of her assigned benefit at the earliest date in which [Mr. Irizarry] may commence benefits," her benefits shall commence "no later than when [Mr. Irizarry] commences receipt of benefits." (QDRO, ¶ H.1.) The constraint against paying Ms. Irizarry a share of the early retirement subsidy in the event her benefits had commenced prior to Mr. Irizarry's is thus inapplicable.

The question remains whether Ms. Irizarry is positively entitled to a *pro rata* share of the early retirement subsidy. Early retirement subsidies attributable to employment during marriage are considered marital property subject to equitable distribution. *See, e.g., Reinbold v. Reinbold*, 710 A.2d 556, 563, 311 N.J. Super. 460, 472 (N.J. Super. Ct. App. Div. 1998) ("Where early retirement incentives or other pension enhancers are earned in whole or in part during the marriage, they are includable in the pot for equitable distribution absent a bargain to the contrary."). *See also Barr v. Barr*, 11 A.3d 875, 886-887, 889-90, 418 N.J. Super. 18, 39-41, 44 (N.J. Super. Ct. App. Div. 2011); *Eisenhardt v. Eisenhardt*, 740 A.2d 164, 325 N.J. Super. 576 (N.J. Super. Ct. App. Div. 1999).

Under the Plan's "Rule of 75," (Verizon Management Pension Plan, Restated Jan. 1, 2014, § 5.3, at 63-64), Mr. Irizarry qualified for a subsidized early retirement when he terminated employment in 2010 at age 49 with 31 years of service. Ms. Irizarry is entitled to the early retirement subsidy, therefore, payable to her to the extent that Mr. Irizarry's 31 years of employment coincide with the parties' fourteen-year marriage (from February 1980, to February 1994).

Significantly, the parties themselves recognized that the early retirement subsidy is subject to equitable distribution. Section 12 of the May 20, 1999, Property Settlement Agreement, incorporated into the Dual Judgment for Divorce, provides:

> **12. HUSBAND'S PENSION** – The husband has certain qualified retirement benefits through his employment with Bell Atlantic. The wife shall be entitled to fifty percent (50%) of the those [sic] benefits incurred from the date of the marriage, February 29, 1980 until the date of the separation February 28, 1994. The balance of the retirement benefits shall be paid to the husband. The parties acknowledge that the wife's attorney will prepare the Qualified Domestic Relations Order so that the wife may receive equitable distribution of this asset.
>
> The QDRO shall be based on the Marx formula & shall provide to the wife a QPRA & a Q post Retire annuity & provide for the wife's benefit any disability payment, COLA adjustments & enhanced benefits offered for early retirement or otherwise. Wife is also entitle[d] to a cash buyout of her share if offered by the plan.[1]

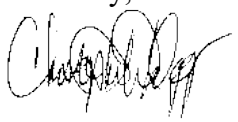
PSA Section 12, at 11. (Emphasis added.) The Settlement Agreement thus explicitly assigns Ms. Irizarry a *pro rata* share of the early retirement subsidy ("enhancements" in New Jersey parlance). *See, e.g., Reinbold, supra, passim*.

Magistrate Judge Arpert expressed his preference to remand the question of Ms. Irizarry's entitlement to the subsidy to state court, rather than decide a matter of New Jersey domestic relations law. Ms. Irizarry's options in New Jersey Superior Court include moving for a declaratory judgment as to her right to share in the subsidy under the QDRO in its current form, or moving to amend the QDRO to explicitly award her a share of the benefit enhancement, and thereby resolve the ambiguity by harmonizing the QDRO with the parties' Settlement Agreement. Either approach would inevitably involve a considerable amount of time and expense that I believe we'd all like to avoid.

Please let me know if my hope that we can resolve this without further litigation is well placed. I look forward to discussing this further with you.

Thank you.

Cordially,



Christopher Wm. Dagg

Encls.

[1] The second paragraph represents my attempt at transcribing the handwritten additions to the Agreement.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VERIZON EMPLOYEE BENEFITS COMMITTEE, Plaintiff, v. EDGAR A. IRIZARRY and SARA IRIZARRY, Defendants.	)	Civil Action No. 3:23-1708-MAS-DEA

FIRST AMENDED COMPLAINT

Now comes Plaintiff the Verizon Employee Benefits Committee, by and through its undersigned counsel, and pursuant to Rule 15(a)(1)(B) of the Federal Rules of Civil Procedure, files the following First Amended Complaint against Defendants:

Introduction

1. This is an action for injunctive, declaratory and other appropriate equitable relief brought to recover amounts which, based on a false and erroneous misrepresentation by Edgar A. Irizarry, were mistakenly paid from a pension plan to an Individual Retirement Account established by Edgar A. Irizarry, and for a declaratory judgment and determination with respect to the rights of respective defendants to pension benefits from the Verizon Management Pension Plan (the "Pension Plan" or the "Plan").

2. This action arises under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §1001 et seq.

Parties

3. Plaintiff the Verizon Employee Benefits Committee (the "VEBC" or "Plaintiff") is a fiduciary of the Pension Plan as that term is defined in ERISA. The VEBC has delegated the responsibility for the Pension Plan's day-to-day administration to the pension administration department within the human resources department of Verizon Communications Inc. ("Verizon"), which is a Delaware corporation. Verizon, the VEBC members and the Verizon pension administration department all have a principal office located in Basking Ridge, New Jersey.

4. Defendant Edgar A. Irizarry is an individual who, on information and belief, resides at 13 Schaeffer Lane, Freehold, New Jersey 07728**.**

5. Defendant Sara Irizarry is an individual who, on information and belief, resides at 275 Friendship Road, Cranbury, New Jersey 08512. Sara Irizarry was formerly married to Edgar Irizarry.

Jurisdiction and Venue

6. Jurisdiction in this action is conferred upon this Court by 28 U.S.C. §1331 and 29 U.S.C. §1132 inasmuch as this action asserts claims under ERISA, and these claims arise under the laws of the United States of America. This Court also has jurisdiction over the claim asserted in Count II for declaratory relief pursuant to 28 U.S.C. §2201, and under 28 U.S.C. §1367 inasmuch as these claims are inextricably related to the ERISA claims and therefore form part of the same case or controversy under Article II of the United States Constitution.

Factual Allegations

7. Edgar Irizarry was an employee of Verizon and/or its affiliates and predecessors. By virtue of his employment with Verizon, Edgar Irizarry was a participant in the Bell Atlantic Pension Plan, which was one of the predecessor plans of the Verizon Management Pension Plan.

8. The Pension Plan is covered by and subject to ERISA.

9. Attached hereto as Exhibit A is a copy of the Pension Plan (excluding charts, schedules and appendices but including amendments).

10. On or about November 18, 1999, in a divorce proceeding pending between Edgar Irizarry and Sara Irizarry, the New Jersey Monmouth County Superior Court issued a domestic relations order, a copy of which is attached hereto as Exhibit B.

11. Section 7.2 of the Pension Plan provides, in pertinent part, as follows:

> The benefits under the Plan may not be anticipated, assigned (either at law or in equity), alienated, or subjected to attachment, garnishment, levy, execution, or other legal or equitable process, provided that:
>
> * * *
>
> (c) payments made in accordance with a Qualified Domestic Relations Order are not prohibited.

12. For purposes of the Pension Plan, a "Qualified Domestic Relations Order" is defined in Article II to mean a "qualified domestic relations order" within the meaning of section 206(d) of ERISA.

13. Pursuant to Section 7.2 of the Pension Plan, the Plan's prohibition against alienation of benefits does not apply to payments made in accordance with a Qualified Domestic Relations Order ("QDRO").

14. By letter dated January 25, 2000, a copy of which is attached hereto as Exhibit C, the Plan issued a determination that the New Jersey Monmouth County Superior Court's

November 18, 1999 order was a QDRO in accordance with Plan procedures. The January 25, 2000 determination further stated that "[a]ccording to the terms of the QDRO, Sara Irizarry is awarded a portion of [Edgar Irizarry's] benefits," and that "[w]hen application is made for payment of the pension benefit, the provisions of the order will be followed."

15. The QDRO issued by the New Jersey Monmouth County Superior Court provides that Sara Irizarry, as Alternate Payee, was entitled to an awarded benefit of Fifty Percent (50%) of a fraction of Edgar Irizarry's retirement benefit, with the numerator of such fraction being the number of months of credited service during the marriage, and the denominator of such fraction being the total months of service credited to Edgar Irizarry under the Pension Plan at the time of his retirement.

16. The QDRO further states that Sara Irizarry was designated as Edgar Irizarry's surviving spouse for purposes of a Qualified Joint and Survivor Annuity. Accordingly, under the terms of the QDRO, Edgar Irizarry was required to elect a Qualified Joint and Survivor Annuity upon his retirement, with Sara Irizarry designated as the surviving spouse.

17. Edgar Irizarry terminated his employment with Verizon on October 15, 2010 and elected to commence his pension under the Plan beginning on January 1, 2011. Attached hereto as Exhibit D is a copy of the Pension Election Authorization Form completed by him and submitted to the Plan on or about December 23, 2010.

18. In the Pension Election Authorization Form completed and signed by Edgar Irizarry on December 23, 2010, Mr. Irizarry misrepresented and falsely certified that no portion of his benefit under the Pension Plan had been assigned to an alternate payee due to a QDRO. The Pension Election Authorization Form signed by Mr. Irizarry contains the following specific certification:

My signature below:

* * *

> Certifies that a portion of my benefit has not been assigned to or is not pending assignment to an alternate payee due to a Qualified Domestic Relations Order (QDRO). If a portion of my benefit has been or is pending assignment to an alternate payee, I understand that such assignment has not included in my current benefit calculation and could result in my current benefit being overstated. If I receive an overstated benefit, I understand that I am required to repay any amounts over and above what I am entitled to under the Plan.

19. Despite the provisions of the QDRO cited and quoted in paragraphs 15-16 herein, Mr. Irizarry elected to receive his pension in the form of a single lump sum distribution in the amount of $556,643.29.

20. As a result of the culpable and improper conduct of Mr. Irizarry in applying for a lump sum distribution and falsely certifying that he had not assigned any portion of his pension benefit to an alternate payee due to a QDRO, the Plan (a) paid Mr. Irizarry's pension benefit in accordance with his lump sum election rather than restricting his payment option to a Qualified Joint and Survivor Annuity as required by the terms of the QDRO; and (b) paid Mr. Irizarry in accordance with his lump sum distribution election without taking into account his prior assignment of a portion of his pension benefit to Sara Irizarry as an alternate payee under the terms of the QDRO which had been entered by the New Jersey Monmouth County Superior Court.

21. The payments by the Plan resulting from the culpable and improper conduct of Mr. Irizarry as described in paragraphs 18 and 20 herein resulted in an overpayment of benefits to Mr. Irizarry by the Plan.

22. On February 1, 2011, following receipt of the Pension Election Authorization Form described in paragraphs 17 and 18 and attached hereto as Exhibit D, the Pension Plan made a lump sum distribution to Mr. Irizarry in the amount of $556,643.29. This lump sum

distribution was paid by the Plan by rollover check written to Morgan Stanley & Co. LLC (previously known as "Morgan Stanley Smith Barney LLC" and hereinafter referred to as "Morgan Stanley") for deposit into Mr. Irizarry's traditional individual retirement account ("IRA") with Morgan Stanley, Account No. 178564564.

23. In Plaintiff's Initial Complaint, Morgan Stanley was named as a defendant in this action. Subsequent to service of Plaintiff's Complaint, in-house counsel for Morgan Stanley informed counsel for Plaintiff that Edgar Irizarry's IRA Account previously held by him with Morgan Stanley was closed in 2014. After receipt of that information, Plaintiff voluntarily dismissed Morgan Stanley as a defendant in this action.

24. Subsequent to its dismissal as a defendant, and in response to a subpoena *duces tecum*, Morgan Stanley provided counsel for Plaintiff with copies of monthly statements of Edgar Irizarry's IRA Account previously held by him with Morgan Stanley. The monthly statements provided by Morgan Stanley show that prior to the closure of his IRA account with Morgan Stanley, Mr. Irizarry withdrew almost all of the funds in the account in the form of distributions. Based on these records, Plaintiff alleges, on information and belief, that all or a substantial amount of the funds which were initially deposited into the Morgan Stanley account remain in Mr. Irizarry's custody or control.

25. Because the QDRO required that Mr. Irizarry receive his pension benefit under the Plan in the form of a Qualified Joint and Survivor Annuity which named Sara Irizarry as his surviving spouse and took into account the assignment of a portion of the amount assigned to Sara Irizarry under the QDRO, Mr. Irizarry was not permitted to receive his pension benefit in the form of a single lump sum payment.

26. As a result of his culpable and improper conduct described herein in paragraphs 18-20, Mr. Irizarry was overpaid by the Pension Plan when he received a lump sum distribution contrary to the terms of the Plan and the QDRO. Instead of electing and receiving a lump sum distribution, pursuant to the terms of the QDRO, Mr. Irizarry was only eligible to elect payment in the form of a Qualified Joint and Survivor Annuity and should have received only the portion of those annuity payments payable under that option, after reduction by the portion payable to Alternate Payee Sara Irizarry. Likewise, the amount of benefits payable to Mr. Irizarry were subject to reduction based on the partial assignment of benefits to his ex-spouse pursuant to the QDRO.

Verizon's Discovery of the Overpayment to Edgar Irizarry

27. In August, 2022, Sara Irizarry contacted the Verizon Benefits Center and inquired as to the status of her interest in the pension benefit of Edgar Irizarry which had been assigned to her as set forth in the QDRO entered by the New Jersey Monmouth County Superior Court. The inquiry of Sara Irizarry led to the discovery by the Verizon Benefits Center and Verizon of the overpayment of pension benefits which had been made by the Plan to Edgar Irizarry, and of the culpable and improper conduct of Edgar Irizarry as described in paragraphs 18-20 herein.

28. The submission of the Monmouth County Domestic Relations Order described in paragraph 10 herein, and the January 25, 2000 approval of that Order as a QDRO as described in paragraph 14 herein, occurred in the midst of a significant reorganization and merger involving Verizon and its predecessors. Specifically, effective June 30, 2000, Bell Atlantic Corporation ("Bell Atlantic") acquired GTE Corporation ("GTE") in a stock transaction valued at $52.8 billion, thereby combining Bell Atlantic's local and wireless phone service with GTE's local, long-distance, wireless and internet businesses. The merger of Bell Atlantic and GTE resulted in the formation of Verizon, which after the merger employed approximately 260,000 employees.

29. As would be expected, the Bell Atlantic/GTE merger and the formation of Verizon had a significant impact on the benefit and pension plans sponsored by GTE and Bell Atlantic, including the administration of such plans. Moreover, this 2000 mega-merger was preceded by another mega-merger in August of 1997 when NYNEX merged with Bell Atlantic. That 1997 merger also had a significant impact on the benefit and pension plans sponsored by the two companies, including the administration of such plans.

30. Immediately prior to the merger, the third party administrator for the Bell Atlantic Pension Plan in which Edgar Irizarry was a participant was Kwasha Lipton, which was purchased by Price Waterhouse Coopers ("PwC") in 1998 and, after being combined with PwC's benefits group, was called Unifi Network ("Unifi"). Unifi was the third party administrator for the Bell Atlantic Pension Plan through the end of 2001, and was responsible for issuing the January 25, 2000 QDRO determination referred to in paragraph 14 herein.

31. Immediately prior to the merger, the third party administrator for GTE's pension plans was Hewitt Associates ("Hewitt"), which was acquired by Aon Corp. in 2010 and at that time changed its name to Aon Hewitt. Effective January 1, 2002, Hewitt became the third party administrator for all of Verizon's pension plans, including the Verizon Management Pension Plan. The Bell Atlantic Pension Plan under which Mr. Irizarry was a participant became part of the Verizon Management Pension Plan in 2001. Hewitt remained the Pension Plan's third party administrator until June, 2015.

32. The transition of administrative responsibilities from Unifi to Hewitt required the transfer from Unifi to Hewitt of a significant amount of data and voluminous files and documents concerning the Pension Plan's participants whose number far exceeds 100,000. To mitigate the risk of gaps in the transfer of information and as a matter of general prudence, the

pension election forms included various participant certifications. See the form signed by Mr. Irizarry on December 23, 2010 (Exhibit D hereto). These certifications were (and still are) designed to mitigate risk by providing a "check and balance" with respect to completeness and accuracy of the information in the possession of the Pension Plan's third party administrator. The use of these certifications also is intended to reduce the risk of mistakes being made in connection with the administration of the Pension Plan. The effectiveness of such a "check and balance" is dependent on accurate and honest responses to the certifications from the Plan participants.

33. As described more fully in paragraph 18 herein, at the time he applied for a lump sum pension distribution from the Pension Plan, Mr. Irizarry falsely certified that no portion of his pension benefits had been assigned to an alternate payee pursuant to a QDRO. Had Mr. Irizarry accurately responded to this certification - - either by not signing the election form which included the certification or by disclosing the prior QDRO which had been entered by the Monmouth County Court in his divorce proceeding, it would have led to a materially different result, namely that Hewitt would not have processed the lump sum distribution, because it would have researched its records to find the prior QDRO which contained distribution restrictions and even more fundamentally because the QDRO assigned a portion of Mr. Irizarry's pension to his ex-spouse Sara Irizarry.

COUNT I

Against Edgar A. Irizarry for Recovery of Erroneous Payment, Constructive Trust and Injunctive Relief

34. Plaintiff incorporates by reference paragraphs 1 through 33 above as though fully set forth herein.

35. Based on the circumstances and events described herein, Edgar Irizarry was paid $556,643.29 from the Pension Plan to which he was not entitled.

36. This action seeks to recover specifically identifiable funds which were erroneously paid by the Pension Plan which belong in good conscience to the Pension Plan.

37. Pursuant to 29 U.S.C. §1132(a)(3), Plaintiff is entitled to appropriate equitable relief to enforce the Pension Plan's terms, and to enforce the requirements of 29 U.S.C. §1104. Plaintiff is entitled to impose a constructive trust on the $556,643.29 (as that amount has or will change based on interest, earnings or losses since February, 2011) (hereinafter the "Disputed Pension Payment") which was paid to the Edgar Irizarry IRA Acct. No. 178564564 at Morgan Stanley, and to receive equitable restitution in the same amount to recoup the assets that belong in good conscience to the Pension Plan.

38. Plaintiff has no adequate remedy at law.

39. In the absence of injunctive relief, Plaintiff may be irreparably harmed if, during the pendency of this action, money currently in the possession, custody or control of Edgar Irizarry is withdrawn, spent or otherwise dissipated.

40. Defendant Sara Irizarry is named as a defendant to this action as an interested party, inasmuch as her interests may be adversely affected if the relief requested by Plaintiff is not granted.

Prayer for Relief

Based on the foregoing, Plaintiff prays for the following relief in Count I:

(a) That the Court issue a temporary restraining order and a preliminary injunction prohibiting Edgar Irizarry from dissipating, transferring, pledging, spending, disposing of, or encumbering the Disputed Pension Payment which was mistakenly paid to Edgar Irizarry, and ordering Edgar Irizarry to transfer the Disputed Pension Payment back to the

Pension Plan or its agent, until this case can be resolved on the merits. Without such relief, Plaintiff will suffer irreparable harm if Edgar Irizarry dissipates, transfers, pledges, spends, disposes of, or encumbers the Disputed Pension Payment;

(b) That the Court enter judgment in favor of Plaintiff: (i) imposing a constructive trust in the amount of the Disputed Pension Payment on the specifically identifiable funds in the custody and control of the Edgar Irizarry; (ii) granting Plaintiff the remedy of equitable restitution of the specifically identifiable funds in the amount of the Disputed Pension Payment or, if the funds have been transferred, imposing a constructive trust and/or equitable lien on the specifically identifiable funds, accounts, or property where those funds may be traced; and (iii) ordering Edgar Irizarry to transfer the Disputed Pension Payment back to the Pension Plan or its agent;

(c) That the Court award pre-and post-judgment interest;

(d) That the Court award Plaintiff costs and attorney fees pursuant to 29 U.S.C. §1132(g); and

(e) That the Court award such other relief as it deems just and proper.

COUNT II

For Declaratory Relief Against Edgar Irizarry and Sara Irizarry

41. Plaintiff incorporates by reference paragraphs 1 through 40 above as though fully set forth herein.

42. This is a claim brought by Plaintiff pursuant to Section 502(a)(3) of ERISA seeking declaratory relief concerning the interpretation of the QDRO issued by the New Jersey Monmouth County Superior Court, as described more fully below. This claim is also brought pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §2201 seeking a

declaratory judgment concerning certain interests of Edgar Irizarry and Sara Irizarry under the terms of the QDRO.

43. 29 U.S.C. §1132 (a)(3)(B)(ii) provides that a civil action may be brought "by a participant, beneficiary, or fiduciary . . . to obtain other appropriate equitable relief . . . to enforce any provisions of this title or the terms of the Plan."

44. Plaintiff is a fiduciary as defined by ERISA and exercises discretionary authority and/or control with respect to the management and administration of the Pension Plan and the disposition of the Pension Plan's assets.

45. As stated herein in paragraphs 15-16, pursuant to the QDRO entered by the New Jersey Monmouth County Superior Court, Sara Irizarry was assigned a portion of Edgar Irizarry's pension benefit under the Pension Plan. Specifically, the QDRO states that Sara Irizarry is entitled to the following: "The accrued benefit of the Participant through the benefit commencement date multiplied by a fraction the numerator of which is the number of months of participation in the Plan while married divided by the number of months of participation in the Plan up to the benefit commencement date multiplied by fifty percent (50%)."

46. The QDRO entered by the New Jersey Monmouth County Superior Court further ordered that Edgar Irizarry elect to receive his pension benefit in the form of a Qualified Joint and Survivor Annuity. As to this requirement, the QDRO states: "The Alternate Payee is designated as the sole and exclusive surviving spouse under the Plan's Qualified Joint and Survivor Annuity provisions for the entire benefit available upon the death of the Participant."

47. As alleged herein in Count I, the lump sum distribution erroneously paid to Edgar Irizarry in on February 1, 2011 was $556,643.29. However, under the QDRO, Edgar Irizarry was not entitled to a lump sum distribution. The QDRO mandated that Edgar Irizarry elect a

Qualified Joint and Survivor Annuity at the time he commenced receipt of his retained pension under the Plan, with Sara Irizarry named as the surviving annuitant. The normal form of Qualified Joint and Survivor Annuity under the Plan for an annuity commencement date of January 1, 2011 was an actuarially equivalent joint and survivor annuity under which a 50-percent survivor annuity was payable ("50% QJSA").

48. The amount of the monthly benefits to which Sara Irizarry and Edgar Irizarry are entitled under the terms of the QDRO is unclear because of a lack of clarity in the QDRO as to whether Sara Irizarry is entitled to receive a portion of an early retirement subsidy under the Plan. Specifically, when he commenced receipt of his pension benefit in February 2011 based on a January 1, 2011 benefit commencement date, Edgar Irizarry was entitled to a subsidized early retirement benefit under the Pension Plan. The QDRO does not clearly address whether Sara Irizarry, as alternate payee, is entitled to share in Edgar Irizarry's early retirement subsidy, or whether, in the alternative, Sara Irizarry's monthly annuity benefit is to be subjected to early retirement discounting.

49. As a result of the QDRO's lack of clarity with respect to the early retirement subsidy issue, there are two potential interpretations of the QDRO:

- Interpretation No. 1: Sara Irizarry is entitled to share in Edgar Irizarry's early retirement subsidy. Under this interpretation of the QDRO, Edgar Irizarry's retained pension in the 50% QJSA would equal a monthly annuity benefit of $1,456.62 (with Sara Irizarry as his surviving beneficiary being entitled to a monthly annuity benefit of $728.31 following Mr. Irizarry's death) and Sara Irizarry's monthly annuity benefit would be $696.81.
- Interpretation No. 2: Sara Irizarry is not entitled to share in the early retirement subsidy and her benefit is to be subjected to early retirement discounting upon Edgar Irizarry's commencement of benefits. Under this interpretation of the QDRO, Edgar Irizarry's retained pension in the 50% QJSA would equal a monthly annuity benefit of $1,914.90 (with Sara Irizarry as his surviving beneficiary being entitled to a monthly annuity benefit of $957.45 following Mr. Irizarry's death) and Sara Irizarry's monthly annuity benefit would be $208.05.

50. Because of a lack of clarity in the QDRO as described in paragraphs 48-49 herein, the Plan Administrator cannot definitively determine whether Interpretation No. 1 or Interpretation No. 2 is correct.

Based on the foregoing, Plaintiff prays for the following relief as to Count II:

(a) That the Court make a determination resolving the QDRO's lack of clarity and ambiguity as to the issue of the early retirement subsidy, including a determination as to whether Interpretation No. 1 or Interpretation No. 2 is correct;

(b) That the Court, based on its determination under subparagraph (a) above, enter a declaratory judgment pursuant to ERISA Section 502(a)(3) and/or under 28 U.S.C. §2201; and

(c) That the Court award such other relief as it deems just and proper.

Dated: August 18, 2023

Respectfully submitted,

/s/ *Sarah Fehm Stewart*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VERIZON EMPLOYEE BENEFITS COMMITTEE Plaintiff, v. EDGAR A. IRIZARRY and SARA IRIZARRY, Defendants,	Civil Action No.: 3:23-CV-1708-MAS DEA

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

On the Brief:

Janie Byalik, Esq.

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Defendant Edgar Irizzary respectfully moves to dismiss the Amended Complaint filed by Plaintiff, the Verizon Employee Benefits Committee (Verizon) (ECF No. 42) and the crossclaim filed by Defendant Sara Irizzary (ECF No. 26).

PRELIMINARY STATEMENT

This is a case of a colossal administrative error (if not breach of fiduciary duty) on the part of Verizon that led to what Verizon alleges is an overpayment of pension benefits to Defendant Edgar Irizzary more than twelve years ago. Now, twelve years after it paid Mr. Irizzary a lump sum pension amount, Verizon seeks to undo its mistake. Verizon only learned of the error through Defendant's ex-wife, Sarah Irizzary, who called to inquire about the status of her benefits, which were payable to her upon Edgar's retirement under the terms of a Qualified Domestic Relations Order (QDRO) entered by a New Jersey family court. Verizon received a copy of the QDRO in 1999 and advised both Edgar and Sarah Irizzary that when application for benefits are made upon retirement, it would follow the terms of the Order, including dividing payments between the formerly married couple. Verizon failed to do so, and when Mr. Irizzary made his benefits election upon retirement in 2011, Verizon approved a lump sum payment distribution to Mr. Irizzary that contravened the terms of the QDRO.

From 2011 until now Mr. Irizzary has lived his life in full reliance on the money rightfully belonging to him. It would defy all bounds of fairness and

reasonableness to now permit Verizon to take back what is left of that money due to its own failure to properly maintain records. In response to Mr. Irizzary's motion to dismiss its original complaint, Verizon filed an Amended Complaint wherein it purported to explain the mishap that occurred with Mr. Irizzary's retirement account. At bottom, Verizon blames a reorganization and merger and a resulting transition of administrative responsibilities for the "significant impact on the benefit and pension plans sponsored."

Verizon's newly pled facts do not change the law nor the resulting outcome. The statute of limitations on Verizon's claims has long expired and it cannot now invoke the discovery rule. Verizon knew of the QDRO and the way in which Mr. Irizzary's account should have been administered in 2000. At all times since 2000 Verizon has been in possession of the relevant information, it simply failed to competently transition its data from one administrator to another. Upon being alerted to a possible error in the distribution of Mr. Irizzary's pension by his ex-wife, Verizon searched its system and was able to find documentation to confirm its error. Those facts amplify Verizon's failures; they are not a reason to justify forgiving them.

The standard under the law is not necessarily what Verizon actually knew (as it now purports to plead ignorance in light of its administrative turnover), but what Verizon *should have* known or *had reason to know*. Neither a merger nor

change in administrators remove responsibility of the pension plan administrator to accurately maintain records of a pension plan holder's account and it is unreasonable to solely rely on the beneficiary's self-executing authorization form in furnishing benefit payments. To accept Verizon's argument would be to sanction the mishandling over 100,000 pension plan accounts that Verizon claims were transferred merely because there was a turn-over in administration, and would allow Verizon to sue participants *decades* after inaccurate payments were made. That would lead to an absurd result. The failure on the part of Verizon and its predecessors and third-party administrators in properly maintaining accounts should not permit Verizon to resurrect decade-plus old claims. It is grossly unfair and inequitable for a pension holder who relied on what he believed to be a properly paid benefit for twelve years in making financial decisions to now be liable for repayment from the little moneys he might have left. The Amended Complaint against Edgar Irizzary should be dismissed.

Nor does Sara Irizzary have a claim against her ex-husband. Ms. Irizzary's claims properly belong against Verizon for failing to adhere to the QDRO and pay her the rightfully owed benefits. There is no legal theory (and she pleads none) under which Edgar Irizzary would be personally responsible for making payments. Sara Irizzary's crossclaim against Edgar Irizzary should also be dismissed.

STATEMENT OF FACTS

Defendant Edgar Irizzary is a former employee of Verizon's predecessor, Bell Atlantic. *See* Compl., ¶ 8. During his employment, Mr. Irizarry was a participant in the Bell Atlantic Pension Plan, one of the predecessor plans of the Verizon Management Pension Plan (Pension Plan). *Id.*; Ex. A to Compl. While he was still employed at Verizon, Mr. Irrizary and his then-wife, Defendant Sara Irizzary, were in the midst of a divorce proceeding. As part of a judgment dissolving the marriage of Edgar and Sara Irizzary, on November 18, 1999, the New Jersey Monmouth County Superior Court entered a qualified domestic relations order (QDRO) recognizing the right of Sara Irizzary to share in Edgar Irizary's Pension Plan as an alternate payee. Compl., ¶ 11; Ex. B to Compl.

The QDRO set forth the terms of Sara Irizzary's participation in Edgar's Pension Plan. Among other things, the order provided:

> **G. Form of Benefit at Commencement:**
> The Alternate Payee's [Sara Irizzary's] assigned benefit is to be paid over the life of the Alternate Payee; the benefit will be distributed in the form of an actuarially equivalent annuity paid over the Alternate Payee's own life time, It will be the responsibility of the Alternate Payee to advise Bell Atlantic as to the date on which payment of benefits are to commence."

Ex. B, at p. 5. The QDRO further provided

> **H. Commencement of Benefits:**
> 1. Since the assigned benefit is to be paid over the life of the Alternate Payee, subject to the provisions of Part I, the Alternate Payee may elect commencement of her assigned benefit at the earliest date in which the

> Participant may commence benefits, but no later than when the Participant commences receipt of benefits.

Id. The QDRO, thus, made clear that the benefits paid out of the Pension plan to Sara Irizzary must be paid over the course of her life in annuity payments.

Shortly after the QDRO was entered, on January 25, 2000, a letter was sent to Mr. Irizzary by the Bell Atlantic Qualified Order Team. *See* Am. Compl., ¶ 14 Ex. C. The letter advised that the Bell Atlantic Qualified Order Team had received a copy of the QDRO on December 17, 1999; that the Order was, indeed, determined to be a QDRO as defined by Section 414(p) of the Internal Revenue Code of 1986; that under the terms of the QDRO, Sara Irizzary is awarded a portion of the benefits under the Pension Plan, and that "when an application is made for payment of the pension benefit, the provisions of the order will be followed." Ex. C, p. 2. The remainder of the letter reiterated the terms of the QDRO concerning form, timing, commencement of benefits, and other related issues. Thus, as of December 17, 1999 when it received a copy of the QDRO, Plaintiff and/or its predecessor was on notice that Mr. Irizzary's Pension Plan was subject to partial distribution to an alternate payee and that the payment option to Mr. Irizzary must be restricted to a Qualified Joint and Survivor Annuity as required by the terms of the QDRO.

Edgar Irizarry terminated his employment with Verizon on October 15, 2010 and elected to commence his pension under the Plan beginning on January 1, 2011. Am Comp., ¶ 17. Mr. Irizarry elected to receive his pension in the form of a single lump sum distribution in the amount of $556,643.29. Ex. D. Mr. Irizzary signed Verizon's Pension Plan election authorization form, which contained a number of small print bullet-point provisions that Mr. Irizzary was said to be certifying to by placing his signature at the bottom of the last page. One of those provisions, buried in the middle of the second page, stated that by signing the document Mr. Irizzary was certifying that a portion of his benefit has not been assigned to an alternate payee due to a QDRO. Ex. D, at p. 2. Overlooking the fine print in what evidently appeared as a boiler-plate document, Mr. Irizzary signed the authorization form.

As far as Mr. Irizzary was concerned, Verizon was in possession of the QDRO and had been for over a decade at the time he elected to receive his pension and, according to the January 25, 2000 letter sent to him, was to take steps to follow the QDRO procedures once an application was made for the commencement of benefits. At no point in time did Verizon decline Mr. Irizzary's request for a lump sum payment or put him on notice that his payment option must be restricted to a Qualified Joint and Survivor Annuity pursuant to the terms of the QDRO. According to the terms of the Pension Plan, and in accordance with federal law, "[a] delegate of the Committee within the Verizon Human Resources

Department shall establish written procedures to determine the qualified status of domestic relations orders and to administer distributions under Qualified Domestic Relations Orders." Ex. A, § 9.14. It is unclear what, if any procedures, were in place at the time the QDRO was entered or at the time Mr. Irizzary elected to commence his benefits. What is clear, however, is that despite its undeniable knowledge of the QDRO and professed obligation to follow the terms of the QDRO, Verizon did nothing to account for the fact that an alternate payee had a claim to a portion of Mr. Irizzary's benefits and took no action in preventing Mr. Irizzary from electing to receive a lump sum payment.

On February 1, 2011, the Pension Plan made a lump sum distribution to Mr. Irizarry in the amount of $556,643.29 by rollover check written to Morgan Stanley for deposit into Mr. Irizarry's traditional individual retirement account ("IRA") with Morgan Stanley, Account No. 178564564. Compl., ¶ 22. Plaintiff had alleged in its original complaint that "all or a substantial portion of these funds remain on deposit in this IRA account at Morgan Stanley," but that is, in fact, not the case, as Plaintiff corrected that statement in its Amended Complaint, recognizing that it voluntarily dismissed Morgan Stanley as a defendant from the case (ECF No. 17) after obtaining documents pursuant to a subpoena which showed that the funds are no longer in that account. Although Plaintiff purports to allege "a substantial amount of the funds" that were paid to Mr. Irizzary are still in his possession,

custody, or control, that allegation is being pled "on information and belief" given the reality that the payment occurred more than 12 years ago.

More than a decade after its erroneous lump sum payment to Mr. Irizzary, Verizon realized that it failed to account for Sara Irizzary's portion of the benefits set forth in the QDRO – an error that was discovered only after Sara Irizzary inquired into the status of her payments in August 2022. *See* Compl., ¶ 27. By way of this action, Verizon now seeks to claw back the payments it made to Edgar Irizzary more than twelve years ago – moneys Verizon cannot credibly allege, other than on information and belief, are still in existence. In response to Verizon bringing this action, Defendant Sara Irizzary filed a counterclaim against Verizon and crossclaim against Edgar Irizzary seeking a declaration that she is entitled to monthly benefits pursuant to the QDRO, including a *pro rata* share of Mr. Irizzary's early retirement subsidy. (ECF No. 26, at pp. 7-8)

LEGAL ARGUMENT

I. Verizon's Complaint Must be Dismissed in its Entirety Because it is Barred by the Statute of Limitations

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint is not sufficient unless it "pleads factual content that allows the court to draw the reasonable inference that

the defendant is liable for the misconduct alleged." *Id.* "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 1950.

On a Rule 12(b)(6) motion, a complaint may be dismissed on statute of limitations grounds, "when the statute of limitations defense is apparent on the face of the complaint." *Wisniewski v. Fisher,* 857 F.3d 152, 157 (3d Cir. 2017) (citing *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014)). Although on a motion to dismiss, the Court does not consider matters outside the pleadings, it may, however, consider documents that are "integral to or explicitly relied upon in the complaint" or any "undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document[.]" *In re Rockefeller Ctr. Props., Inc. Sec. Litig.,* 184 F.3d 280, 287 (3d Cir. 1999) (emphasis and citations omitted); s*ee In re Asbestos Prods. Liab. Litig. (No. VI)*, 822 F.3d 125, 133 n.7 (3d Cir. 2016); *Schmidt*, 770 F.3d at 249.

There is no express statute of limitations for a claim seeking equitable, non-fiduciary relief under ERISA, and as such, courts borrow the limitations period of the state-law cause of action to which the ERISA claim is most analogous. *See Miller v. Fortis Benefits Ins. Co.,* 475 F.3d 516, 520 (3d Cir. 2007); *Raymond v. Barry Callebaut, U.S.A., LLC*, 510 F. App'x 97, 99 (3d Cir. 2013). The question for

the Court is, thus, which limitations period to apply to Verizon's overpayment claim. In this instance, however, regardless of which New Jersey equivalent cause of action is deemed to be most analogous to an ERISA overpayment claim, the end result is the same – Verizon's twelve-year-old claims are time-barred.

Although Verizon's claims potentially, on their face, can be characterized as claims for breach of contract,[1] Verizon makes no attempt to argue that Mr. Irizzary has breached any provision of the Pension Plan. Instead, Verizon seeks recovery for an "Erroneous Payment, Constructive Trust and Injunctive Relief." Compl., Count I. That claim can properly be characterized a quasi-contract claim, such as unjust enrichment or money had and received, the essence of which is that Verizon mistakenly conferred a benefit upon Mr. Irizzary that he should return.

The federal courts have generally described ERISA overpayment claims to be claims for unjust enrichment. *See Luby v. Teamsters Health, Welfare, & Pension Tr. Funds,* 944 F.2d 1176, 1186 (3d Cir. 1991) ("Although ERISA itself does not explicitly provide a statutory right of restitution, it is clear that Congress intended federal courts to fashion a federal common-law under ERISA, and this permits application of a federal common-law doctrine of unjust enrichment if restitution

[1] The terms of Mr. Irizzary's pension benefits were covered by contract – the Pension Plan – which detailed at length the protocols, procedures, and obligations of the parties concerning the pension plan. Moreover, the Pension Plan expressly contemplates the pension administrator's ability to recover overpaid sums. *See* Ex. A to Compl., at ¶ 7.12.

would not override a contractual provision of an ERISA plan"); *Provident Life & Ace. Ins. Co. v. Waller*, 906 F.2d 985, 990 (4th Cir. 1990) (describing a suit to recover overpayment as "the archetypal unjust enrichment scenario"); *Jamail, Inc. v. The Carpenters Dist. Council of Houston Pension & Welfare Trusts*, 954 F.2d 299, 305-06 (5th Cir. 1992) (approving the Fourth Circuit's *Provident Life* case in creating common law restitution claim to recover overpayments); *Heller v. Fortis Benefits Ins. Co.,* 142 F.3d 487, 495 (D.C. Cir. 1998) ("restitution is an appropriate remedy where there is unjust enrichment"); *UNUM Life Ins. Co. v. Lynch*, 2006 WL 266562 (S.D.N.Y. 2006) (finding unjust enrichment theory available under ERISA); *Metro. Life Ins. Co. v. Solomon*, 996 F.Supp. 1473, 1477 (M.D. Fla. 1998) ("For Plaintiff to have a remedy against Defendant, it must be for restitution under a theory of unjust enrichment."); *Celi v. Trustees of Pipefitters Local 537 Pension Plan*, 975 F.Supp. 23, 28 (D. Mass. 1997) (finding it "irrelevant whether the reason for the unjust enrichment is an innocent mistake or a material misrepresentation."); *Floor Covering Union and Indus. Welfare Trust v. Tompkins*, 761 F.Supp. 101, 103-04 (D. Or. 1991) (describing the claim as restitution, applicable in any situation in which one person is accountable to another on the ground that otherwise one would unjustly benefit or the other would unjustly suffer loss).

Under New Jersey law, the statute of limitations for an unjust enrichment claim is six years. *See Iwanowa v. Ford Motor Co.,* 67 F. Supp. 2d 424, 473

(D.N.J. 1999) ("The statute of limitations in New Jersey for claims sounding in restitution/unjust enrichment or quantum meruit is six years."); *Talon Indus., LLC v. Rolled Metal Prod., Inc.,* No. CV 15-4103 (CCC), 2022 WL 3754800, at *7 (D.N.J. Aug. 30, 2022) (discussing New Jersey's six-year statute of limitations period applicable to unjust enrichment and other quantum meruit claims) (citing *Kopin v. Orange Prods., Inc.* 688 A.2d 130, 140–41 (N.J. Super. Ct. App. Div. 1997); N.J.S.A. § 2A:14-1)). Any other claim that might otherwise be remotely analogous to the claims brought by Verizon - i.e., breach of contract or fraud, has the same maximum limitations period of six years. *See, e.g., Cont'l Cas. Co. v. J.M. Huber Corp.,* No. V134298KMJBC, 2022 WL 17340680, at *8 (D.N.J. Nov. 30, 2022) (noting that the statute of limitations for a "contractual claim or liability" under New Jersey law is six years) (citing N.J.S.A. § 2A:14-1(a)); *Arch Specialty Ins. Co. v. CJS Plumbing, Inc.*, No. 2:20-CV-16382 (WJM), 2021 WL 2352412, at *2 (D.N.J. June 9, 2021) (stating that New Jersey law provides a six-year statute of limitations for contract claims and quasi-contract claims) (citing *Penn Nat'l Ins. Co. v. N. River Ins. Co.,* 783 F. App'x 195, 200 (3d Cir. 2019); *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp. Ltd.,* 181 F.3d 410, 425 (3d Cir. 1999) ("Under New Jersey law, the statute of limitations for fraud is six years, see N.J. Stat. Ann. § 2A:14–1").

Although state law furnishes the statute of limitations, the date of accrual of the ERISA non-fiduciary duty claims is determined as a matter of federal common law. *Romero v. Allstate Corp.,* 404 F.3d 212, 221 (3d Cir. 2005); *see also Union Pacific R.R. Co. v. Beckham,* 138 F.3d 325, 330 (8th Cir.) (stating in ERISA action, "despite determining the limitations period by analyzing state law, this Court looks to federal common law to determine the time at which a plaintiff's federal claim accrues"), *cert. denied,* 525 U.S. 817 (1998).

Under federal law, the statute of limitations begins to run when the plaintiff "knew or has reason to know of the injury upon which its action is based." *See Kach v. Hose*, 589 F.3d 626, 634 (3d Cir. 2009); *Northern California Retail Clerks Unions and Food Employers Joint Pension Trust Fund v. Jumbo Markets, Inc.,* 906 F.2d 1371, 1372 (9th Cir. 1990); *Michigan United Food and Commercial Workers Unions and Drug and Mercantile Employees Joint Health and Welfare Fund v. Muir Co.,* 992 F.2d 594, 597–98 (6th Cir. 1993); *Cullen v. Margiotta,* 811 F.2d 698, 725 (2d Cir. 1987). Regardless of how Verizon's claims are characterized – whether under the theory of unjust enrichment or another New Jersey law claim, those claims would have accrued far too long ago for Verizon to bring this action.

Verizon knew long before it issued any payment to Mr. Irizzary as to the type of distribution he was entitled. By its own concession, Verizon was aware of and retained a copy of the QDRO since December 1999 when it issued a letter to

both Edgar and Sara Irizzary notifying them of same and stating, "when application is made for payment of pension benefit, the provisions of the [QDRO] will be followed." *See* Ex. C to Compl. The letter further noted that "the participant will be required to elect a Qualified Joint Survivor Annuity Option upon his retirement." *Id.* at p. 2. As an administrator of the Pension Plan, it was incumbent upon Verizon to know and keep track of its accounts, to document the QDRO, to place some sort of flag on Mr. Irizzary's account, and to follow the QDRO procedures upon application for payment. Verizon's attempt to blame administrative turnover does not change the result.

Indeed, the QDRO structure was passed by Congress when it amended ERISA with the Retirement Equity Act ("REA") of 1984 to protect divorced spouses' interest in retirement funds earned during marriage, *Boggs v. Boggs*, 520 U.S. 833, 848, 854 (1997). The REA amendments require each pension plan to provide for "the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order," 29 U.S.C. § 1056(d)(3)(A), and furthermore require "[e]ach plan [to] establish reasonable procedures to determine the qualified status of domestic relations orders ***and to administer distributions under such qualified orders***." 29 U.S.C. § 1056(d)(3)(G)(ii) (emphasis added). Verizon confirmed in its letter sent to the parties in early 2000 that it would follow the QDRO procedures. Ex. C to Compl.

It is, therefore, unreasonable for Verizon to plead ignorance when it had an affirmative obligation to follow the terms of the QDRO.

In an effort to trigger the discovery rule to salvage its decade-plus year-old claims, Verizon purports to characterize its action as one sounding fraud by accusing Mr. Irizzary of falsely misrepresenting in the benefit election form that his pension is not subject to a QDRO. Putting aside the moment the lack of any evidence that Mr. Irizzary's signature on Verizon's authorization form containing the QDRO language was the product of intentional fraud as opposed to simple mistake in him overlooking fine print on a boiler-plate looking document, even if this were a fraud action, the discovery rule could not resurrect Verizon's stale claim.

Irrespective of any alleged misrepresentation by Mr. Irizzary (which was as likely to have been unintentional as it was purposeful, as Verizon claims), it was Verizon's responsibility to know that the account was subject to a QDRO and that lifetime annuity payments were due to an alternate payee (Sara Irizzary); its reliance on an employee's authorization form in distributing pension funds is unreasonable. In examining the history and principles underlying the discovery rule, the New Jersey Supreme Court explained,

> the doctrine "postpon[es] the accrual of a cause of action" so long as a party ***reasonably is unaware*** either that he [or she] has been injured, or that the injury is due to the fault or neglect of an identifiable individual or entity…Once a person ***knows or has reason to know of this***

> ***information,*** his or her claim has accrued since, at that point, he or she is actually or constructively aware "of that state of facts which may equate in law with a cause of action."

Mancuso v. Neckles ex rel. Neckles, 163 N.J. 26, 29 (2000)(internal citations and quotes omitted) (emphasis added); *see also Cty of Morris v. Fauver*, 707 A.2d 958, 972 (N.J. 1998) ("the discovery rule imposes on plaintiffs an affirmative duty to use reasonable diligence to investigate a potential cause of action, and thus *bars from recovery plaintiffs who had "reason to know" of their injuries."* The central premise underlying the application of the discovery rule focuses on reasonableness and imposes an affirmative obligation upon a plaintiff to do basic reasonable diligence. Verizon has failed to adhere to that basic premise and thus, should be prohibited from relying on the discovery rule.

That was the conclusion reached by a Northern District of Texas court, later affirmed by the Fifth Circuit, involving overpayments by Verizon. *See Verizon Emp. Benefits Comm. v. Frawley*, No. CIV.A. 305CV2105-P, 2007 WL 2051113, at *1 (N.D. Tex. July 12, 2007). In that case, Defendant, who retired from Verizon, received a lump sum payment of $563,982.19 from the Verizon's Pension plan, which was calculated based on thirty-four years of continuous service. *Id.* at *1. Verizon subsequently advised Defendant that the plan administrators erred in calculating his retirement package by crediting 15 years of service with a company that was not a member of the plan and sought the return of $239,872.10 that it paid

Defendant due to an "administrative error." *Id.* Like here, Verizon sought relief under § 502(a)(3) of the ERISA seeking to impose a constructive trust on the alleged overpayment and to receive restitution of the money. *Id.* Defendant moved for a judgment on pleadings under Fed. R. Civ. P. 12(c). *Id.*

Recognizing that ERISA does not provide a statute of limitations for claims under § 502(a)(3), the issue before the court was which was the most analogous claim under forum state law. After analogizing the ERISA § 502(a)(3) claim for recovery of money Verizon claims was overpaid to Defendant to various Texas state law claims (including breach of contract and unjust enrichment), the Northern District of Texas ultimately concluded that the claim was one of "money had and received," a claim in which a contract has been overpaid but, unlike unjust enrichment, is not based on wrongdoing; it is an action "for money obtained lawfully but… retained wrongfully." *Id.* at *2.

Although at that time, the court held that that the applicability of the discovery rule was factually driven, the court later held in subsequent summary judgment proceedings that Verizon could not benefit from the discovery rule. *Verizon Emp. Benefits Comm. v. Frawley*, 655 F. Supp. 2d 644 (N.D. Tex. 2008), aff'd, 326 F. App'x 858 (5th Cir. 2009). Noting that under § 1132, the statute of limitations "does not begin to run until the party bringing suit knows, or has *reason to know,* of the injury," the court held that Verizon was aware of potential

overpayments well before the expiration of the limitations period. *Id.* at 649 (emphasis in original). There was evidence produced in discovery that Verizon's employees knew that Defendant may not be eligible for pension accrual from his prior employer and a "flag" was added to his account but payments were miscalculated anyway.

Notably, the court stated, "the Committee persistently points the finger at [Defendant] for accepting and electing to receive the lump sum on this miscalculation even though he had been informed by Chase that his RH Donnelley service was not to be included," but found that "this is not relevant… to the issue of the Committee's knowledge of the error." *Id.* at 650. The court concluded that certain employees were aware of the issue – knowledge that is imputed to Verizon by virtue of their agency – which renders Verizon in possession of information from which it could have and should have known about its mistaken calculation. As such, Verizon could not be shielded by the discovery rule. *Id.* That decision was affirmed by the Fifth Circuit. *Verizon Emp. Benefits Comm. v. Frawley*, 326 F. App'x 858, 859 (5th Cir. 2009).

The *Frawley* case is on all fours with this one, and with no Third Circuit precedent directly on point that Defendant could find, the *Frawley* case provides useful guidance. Here, however, unlike in *Frawley,* no discovery is needed to demonstrate that Verizon and/or its predecessor knew that Mr. Irizzary was not

eligible for a lump sum payment; that evidence is clearly set forth in the documents attached to the complaint. The relevant documentation has always been in Verizon's possession; it just apparently fell through the cracks during Verizon's merger and transition of pension accounts from one third-party administrator to another. Yet, the information was swiftly located upon inquiry from Sara Irizzary about her entitlement to benefits. Those facts illustrates that, apparently, for the last two decades, no internal audits, verification of accounts, or any other diligence has been done by Verizon to ensure that their data was properly transitioned. Now Verizon seeks to use its administrative failure as justification to invoke the discovery rule and seek recoupment for payments made twelve years ago.

The attempt by Verizon to blame Mr. Irizzary for the misinformation on the authorization form – whether the product of intentional misrepresentation or an innocent mistake – is unavailing. It is not relevant to the issue of Verizon's knowledge as to what benefit election Mr. Irizzary was entitled. Verizon knew upon receipt of the QDRO that Mr. Irizzary was ineligible to receive a lump sum payment and that it needed to set aside a portion of his pension to an alternate payee. It failed to do so. It cannot now cloak its administrative error -whether the result of a merger or a turnover in beneficiary administrator - under the discovery rule and its claims have long expired.

The Third Circuit's application of the discovery rule in the ERISA context concerning a denial of benefits further supports Defendant's position. The discovery rule in the ERISA context has developed into the "clear repudiation" rule whereby a non-fiduciary cause of action accrues at the time a claim for benefits has been denied. *Miller v. Fortis Benefits Ins. Co.,* 475 F.3d 516, 520–21 (3d Cir. 2007). Significantly, there need not be a *formal* denial so long it was *clear* and made known to the beneficiary that there had been a repudiation of benefits. *Id.; Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan,* 201 F.3d 44, 48 (2d Cir.1999) ("We ... follow the Seventh, Eighth, and Ninth Circuits in holding that an ERISA claim accrues upon a clear repudiation by the plan that is known, or should be known, to the plaintiff—regardless of whether the plaintiff has filed a formal application for benefits."). In other words, some "event other than a denial of a claim" may trigger the statute of limitations *by clearly alerting the plaintiff* that his entitlement to benefits has been repudiated. *Id.* (citations omitted) emphasis added).

That logic is similarly applicable here. Verizon need not have been formally advised that it overpaid a claim, like when Sara Irizzary called to inquire about the status of her benefits. Nor should it have relied on the authorization form submitted by Edgar Irizzary, as errors in application forms are not uncommon. Nor is Verizon's mega merger an excuse to properly and accurately migrate the data on

the 100,000 pension plans that were transferred. A large company undergoing a merger or changing administrators on pension plans is also not an uncommon occurrence, nor is spontaneous or unexpected; undoubtedly hundreds if not thousands of hours of due diligence had to go into such a merger to ensure accuracy in the transition data.

The receipt of the QDRO triggered Verizon's knowledge concerning the type of benefits to which Mr. Irizzary was entitled and imposed an affirmative obligation to ensure compliance with the terms therein.

As the Third Circuit noted,

> statutes of limitations are intended to encourage rapid resolution of disputes, repose for defendants, and avoidance of litigation involving lost or distorted evidence. These aims are served when the accrual date anchors the limitations period to a plaintiff's reasonable discovery of actionable harm. This ensures that evidence is preserved and claims are efficiently adjudicated." In contrast, a statute of limitations not based on reasonable discovery is effectively no limitation at all.

Id. (quoting *Romero v. Allstate Corp.,* 404 F.3d 212, 223 (3d Cir.2005)). If the Court were to accept Verizon's position – that its cause of action accrued only upon learning of the error from Sara Irizzary, then the statute of limitations would essentially become indefinite, as Ms. Irizzary could have inquired about her claim five, ten, or twenty years later, decades after Verizon paid the pension to Edgar Irizzary. The Court should decline to invite such an absurd result.

II. The Principles of Equity Bar Verizon from Recouping any Alleged Overpayments

Federal courts have recognized that equitable defenses may be appropriate defenses to ERISA claims. *See, e.g., Fotta v. Trustees of United Mine Workers of Am., Health & Ret. Fund of 1974*, 165 F.3d 209, 214 (3d Cir. 1998) (Holding that claims brought under ERISA's "equitable relief" provision, section 502(a)(3)(B), are subject to laches, and that district court should have, but failed to, considered laches in connection with a motion to dismiss); Teamsters *& Employers Welfare Trust of Ill. v. Gorman Bros. Ready Mix,* 283 F.3d 877, 881 (7th Cir. 2002) (holding that laches is an available defense in ERISA cases); *Wells v. U.S. Steel & Carnegie Pension, Inc.*, 950 F.2d 1244, 1250 (6th Cir. 1991) (stating that laches could be applied to deny an insurer recoupment of overpayments of ERISA benefits); *United Mine Workers of America v. Panther Branch Coal Co.*, 2008 WL 149142 *6 (S.D.W.Va. 2008) ("several courts in other jurisdictions have held that federal common law allows for the assertion of equitable defenses in ERISA cases"). "[W]hen the defense of laches is clear on the face of the complaint, and where it is clear that the plaintiff can prove no set of facts to avoid the insuperable bar, a court may consider the defense on a motion to dismiss." *Kaufhold v. Caiafa*, 872 F. Supp. 2d 374, 380 (D.N.J. 2012) (internal quotations omitted).

To prove laches, the defendant must show an unreasonable delay or lack of diligence by the plaintiff and prejudice to itself. *E.E.O.C. v. Great Atl. & Pac. Tea*

Co., 735 F.2d 69, 80 (3d Cir. 1984). Although the burden of showing those elements is on the defendant, "if a statutory limitations period that would bar legal relief has expired, then the defendant in an action for equitable relief enjoys the benefit of a presumption of inexcusable delay and prejudice. In that case, the burden shifts to the plaintiff to justify its delay and negate prejudice." *Id.*

The period of delay is measured from the date the Plaintiff "knew, or in the exercise of reasonable diligence should have known" of its claim. *See, e.g., Stryker Corp. v. Zimmer, Inc.,* 741 F. Supp. 509, 512 (D.N.J. 1990) (in infringement cases delay measured from when plaintiff knew or should have known of the allegedly infringing activity); *Trustees of the S. Cal. Bakery Drivers Sec. Fund v. Middleton,* 366 Fed.Appx. 810, 813 (9th Cir.2010) (in ERISA case, stating that for laches to apply, defendant "must show (1) inexcusable delay in Bakery Drivers' assertion of a known right; and (2) prejudice to [defendant]").

As to unreasonable delay, the analysis above on the statute of limitations is largely applicable here. The question is what Verizon *should have* known and when. The answer is clear – Verizon *should have* known precisely what benefits Mr. Irizzary is entitled to receive the moment it received the QDRO, and upon his election of benefits, Verizon *should have* known that the nature of those payments (annuity) and the amount. An unreasonable delay should be measured from the moment the alleged overpayment was made and not, as Verizon would have it,

from the time that Mrs. Irizzary alerted Verizon to its error a decade-plus later. To accept the latter would be to hold that transition of responsibility from one administrator to another absolves a pension administrator of its obligation to properly maintain the pension plan and condones corporate mismanagement to the detriment of a beneficiary who has relied on the payment for many years.

Moreover, and significantly, the elements of a laches defense are conjunctive, *Great Atl. & Pac. Tea Co.*, 735 F.2d at 84, and as such, must give way to considerations of prejudice. Irizzary has and will continue would suffer undue prejudice if Verizon is permitted to proceed with this action. In addition to the typical evidentiary prejudice, including lost documentary evidence, faded memories, and missing witnesses (as Verizon readily admits that the individuals responsible for administering Mr. Irizzary's pension plan have long been out of the picture), Mr. Irizzary will suffer insurmountable financial hardship. Mr. Irizzary received his pension payment more than a decade ago and has lived his life under the impression that the entire sum of money rightfully belonged to him. It would defy all bounds of fairness and equity to permit Verizon to recoup that money at this late stage when the overpayment was issued due to Verizon's failure to properly maintain records.[2] *See Phillips v. Mar. Ass'n-I.L.A. Loc. Pension Plan,*

[2] The Sixth Circuit has held that although a pension plan administrator might have a *legal* right to obtain overpayments, it must yield to equitable considerations. *See, e.g., Wells v. U.S. Steel & Carnegie Pension Fund, Inc.,* 950 F.2d 1244 (6th

194 F. Supp. 2d 549, 558 (E.D. Tex. 2001) (holding that pension plan could not avail itself of restitution for overpayments made to four divorced women who received overpayments of distributions under their QDROs, noting "[t]hese older women depended on the dollar …[and] actually distributed to them for years, when planning the rest of their lives" and "[t]he overpayments were the result of more than just a mistake, they were the result of [the Pension plan's] breach of fiduciary duty"; "he court does not believe it would be equitable for the Plaintiffs to bear the weight of an error that Hunt could have prevented by upholding her duty as plan administrator and allowing an actuary to check the QDROs.").

Cir.1991) (stating, "[a]lthough the Plan language permits recoupment, this court is concerned with the possible inequitable impact recoupment may have on the individual retirees. The retirees submitted affidavits describing the hardship they would suffer if they were forced to pay back benefits which they had received and depended upon. We thus remand this case to the district court to consider whether, under the principles of equity or trust law, relief is unwarranted"); *Id.* at 1255 (Feikens, J., dissenting in part and concurring in part) ("the Pension Fund is bound by the equitable principles that govern trusts. Those principles allow a trustee or administrator of a trust to recoup overpayments to a beneficiary even if the excess payment was the product of a unilateral mistake on the part of the trustee. [citations omitted]. However, recovery is precluded if the beneficiary, in reliance on the correctness of the amounts of benefits, changes his position so that it would be inequitable to compel him to make restitution"); *Redall Industries, Inc. v. Wiegand*, 870 F. Supp. 175, 178 (E.D.Mich.1994) (noting that in addition to overpayment, the "Trustees must also show that equity requires [the beneciary] to return the overpaid benefits.").

III. The Crossclaim by Sara Irizzary against Edgar Irizzary Should be Dismissed

Sara Irizzary's counterclaim against Verizon and Crossclaim against Edgar Irizzary consists of a single allegation: "Defendant is entitled to monthly benefits pursuant to the QDRO that include a pro rata share of the early retirement subsidy." *See* Answer, ECF No. 26, at ¶ 46. The relief sought by Ms. Irizzary stems from a lack of clarity in the QDRO. As explained in Verizon's complaint, when he commenced receipt of his pension benefit in February 2011 based on a January 1, 2011 benefit commencement date, Edgar Irizarry was entitled to a subsidized early retirement benefit under the Pension Plan. The QDRO does not clearly address whether Sara Irizarry, as alternate payee, is entitled to share in Edgar Irizarry's early retirement subsidy, or whether, in the alternative, Sara Irizarry's monthly annuity benefit is to be subjected to early retirement discounting. Compl., ¶ 42. If Ms. Irizzay is entitled to share in Mr. Irizzary's early retirement subsidy, her monthly annuity benefit would be $696.81 as opposed to $208.05 if she does not. *Id.* at ¶ 43.

Although Sara Irizzary seeks to clarify the confines of the QDRO and the amounts to which she is entitled, her crossclaim fails to set forth any basis for asserting relief against Edgar Irizzary. The QDRO entitled Sara Irizzary to a "right to a pension *from Bell Atlantic through the Bell Atlantic [now Verizon] Pension Plan*" and the intent of the QDRO was "to create and recognize the existence of the

alternate payee's right to receive a portion of the participant's benefit under the Bell Atlantic Pension Plan." Ex. B to Compl., at 1. Ms. Irizzary has failed to plead any facts that entitle her to enforce the QDRO against Mr. Irizzary personally, rather than a claim against Verizon for failing to follow the terms of the QDRO. The claim against Mr. Irizzary should be dismissed.

IV. In the Alternative, the Court Should Stay Proceedings and Transfer Count II of Verizon's Claim to the Monmouth County Court for Disposition

If the Court denies Mr. Irizzary's motion to dismiss, which it should not, it should stay these proceedings and allow the New Jersey Family Court to resolve the issue of Sara Irizzary's potential entitlement to an early retirement subsidy under the QDRO. Verizon expressly alleges in the Amended Complaint that "[t]he amount of the monthly benefits to which Sara Irizarry and Edgar Irizarry are entitled under the terms of the QDRO is unclear because of a lack of clarity in the QDRO as to whether Sara Irizarry is entitled to receive a portion of an early retirement subsidy under the Plan [and] [t]he QDRO does not clearly address whether Sara Irizarry, as alternate payee, is entitled to share in Edgar Irizarry's early retirement subsidy, or whether, in the alternative, Sara Irizarry's monthly annuity benefit is to be subjected to early retirement discounting." (Amended Complaint., ¶ 48.) As a result of the QDRO's lack of clarity on this key issue,

Verizon alleges that QDRO could be interpreted it at least two potential ways concerning early retirement subsidies. (Amended Complaint., ¶ 49.)

While Mr. Irizzary submits that interpreting the QDRO should be deemed a moot point because this case should be dismissed, alternatively, he also agrees with Verizon that QDRO is unclear on its face as to the parties' entitlement to early retirement subsidies, and that understanding what the Family Court intended when it entered the QDRO is necessary to the resolution of certain parts of this case (if it is permitted to continue).

It is respectfully submitted that the Court should defer on interpreting the QDRO to the Superior Court of New Jersey, Monmouth County, Family Part, which issued the QDRO as part of Edgar and Sara's divorce. Issuing a decree as to a spousal support obligation – which is essentially what the QDRO is – typically falls beyond the jurisdiction of Federal Courts. *See Brown v. Brown*, 783 F. App'x 267, 268 (3d Cir. 2019) (Noting "divorce, alimony, and child custody decrees fall under 'domestic relations exception' to federal courts' subject matter jurisdiction") Moreover, it is respectfully submitted that the Family Court, which specializes in such matters, may be better situated to construe the QDRO in a manner that is not only equitable, but consistent with that court's intent when it issued the QDRO two decades ago.

Accordingly, if the Court does not dismiss this case, it should stay proceedings and allow the New Jersey Family Court to interpret the unclear parts of the QDRO entered by that court.

CONCLUSION

For the foregoing reasons, all claims against Edgar Irizzary should be dismissed.

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Date: September 1, 2023

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