UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-5008 & 06-5009

IN RE: LUCENT DEATH BENEFITS ERISA LITIGATION

Edward Foss; Sarah Conder; Arthur J. Berendt; and Robert B. Howard,
Appellants in No. 06-5008

Helen P. Lucas, as surviving spouse of Vincent R. Lucas,
Appellant in No. 06-5009

Appeals from the United States District Court for the District of New Jersey,
Nos. 03-CV-5017, 04-CV-0640, and 04-CV-1099 (Cavanaugh, J.)

BRIEF FOR APPELLANT HELEN P. LUCAS

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), and 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1291, as this appeal is taken from an order and final judgment dismissing all claims, entered November 27, 2006. (A 07-08, Dkt. #72). Appellant Lucas filed her timely notice of appeal on December 6, 2006. (A 04-06, Dkt. #73).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This appeal is consolidated for certain purposes with the appeal brought by Co-Appellants Edward Foss, et al., at No. 06-5008.[1] The case has not been before this Court previously.

The Court should be aware of the pending proceedings in *Kerber v. Qwest Pension Plan*, 05 CV 00478 (MSK-PAC) (D. Colo.), in which retirees of AT&T and U.S. West (now known as Qwest) seek declaratory relief to prevent elimination of death benefits "funded in the pension plan and payable as an entitlement upon the death of a retiree receiving a service pension and delivered to his or her surviving spouse or dependent beneficiaries." The Qwest Pension Plan is a successor to

[1] These appeals involve three actions consolidated in the district court. The Master Docket in No. 03-CV-5017 (D.N.J.) is cited as "Dkt. # _," while the other dockets are cited as "*Lucas* Dkt. # _ " or "*Berendt* Dkt. # _."

AT&T's Bell System Pension Plan. (*Kerber* Complaint, Dkt. #29 at ¶ 18; *Kerber* Answer, Dkt. #33 at ¶¶ 59, 70).

Kerber is related due to the fact that the Lucent Retirement Income Plan also is a successor to the Bell System Pension Plan. The Lucent and Qwest death benefit provisions are substantially similar due to this common origin. Both this action and *Kerber* concern the legal protections for the death benefit. It is significant that in *Kerber* the defendants conceded that the death benefit was a pension benefit. (*Kerber* Def. Mem. in Supp. of Summ. Judgment, Dkt. #69 at 4).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Death Benefit provided by defendants' pension plans to survivors of retired pension recipients was a *pension* benefit directly related to the service pension and payable upon death in a form other than an annual benefit, as alleged and as expressly permitted by the Internal Revenue Code and ERISA?

2. Whether the Death Benefit was an *accrued* pension benefit, as alleged and as defendants themselves and their pension actuaries consistently stated in their summary plan descriptions and in their Form 5500 Annual Returns to the IRS reporting the accrual and funding of the Death Benefit along with other pension benefits?

3. Whether the Death Benefit was a *vested* pension benefit, as alleged, as defendants themselves consistently recognized over more than 25 years in plan provisions they adopted to govern plan termination, which expressly placed the Death Benefit ahead of other vested pension benefits, and as AT&T consistently reported to the government in Form 5500 Annual Returns?

4. Whether the Death Benefit, even if not previously vested, became vested in 1999 when Lucent made the first of four pension asset transfers under Code § 420, thus triggering the required vesting of all accrued pension benefits just as if the pension plan had terminated and plan termination provisions became operative?

5. Whether it was error for the district court to rule, on the basis of the pleadings, that the Death Benefit was an unprotected welfare benefit when the allegations asserted and the undisputed record showed that defendants' plan documents, summary plan descriptions, annual returns and consistent conduct all correctly recognized that the Death Benefit was an accrued and vested "defined benefit" pension benefit that was subject to the minimum standards of ERISA and the Code, including vesting and benefit accrual?

6. Whether the district court should have granted the motion to substitute surviving spouse, Appellant Helen P. Lucas, as plaintiff?

Each question was answered in the negative by the district court.

These issues were raised in opposition to defendants' motion to dismiss and for summary judgment and ruled upon in the district court's Opinion and Order dated November 27, 2006. (A 0014, 0019-21, 0023-29; Op. at 6, 11-13, 15-21).

STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

Defendants moved for dismissal under Fed.R.Civ.P. 12(b)(6) and for summary judgment under Fed.R.Civ.P. 56. Although the district court's opinion recited the standards for decision under both rules, Op. at 5-6, A 0013-14, analysis of the Opinion shows that the court ruled solely on the pleadings under Rule 12(b)(6), and referred only to documents cited in the Complaint. *See, e.g.,* Op. at 11, 19, 21; A 0019, 0027, and 0029.

The Court has plenary review of orders dismissing cases for failure to state a claim under Fed.R.Civ.P. 12(b)(6). The Court does not determine whether appellants will ultimately prevail, but only whether they are entitled to offer evidence to support their claims. All facts alleged in the complaint, and all reasonable inferences that can be drawn from them in favor of appellants, are accepted as true. Dismissal will be affirmed only if it appears that appellants could prove no set of facts that would entitle them to relief. *See Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity,* 420 F.3d 220, 222 n. 4 (3d Cir. 2005).

Alternatively, treating the dismissal as a summary judgment ruling, review likewise is plenary. A motion for summary judgment may be granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In addition, "[i]nferences to be

drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt." *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1297-98 (3d Cir. 1993).

STATEMENT OF THE CASE

This proposed class action was filed on February 13, 2004 by the late Vincent R. Lucas, husband of Appellant Helen P. Lucas,[2] to challenge the January 2003 action of defendant Lucent Technologies, Inc. ("Lucent") to amend its pension plan for management retirees to retroactively eliminate death benefits (the "Death Benefit"). (*Lucas* Dkt. #1, A 0045). Until the amendment, the Lucent Retirement Income Plan ("the Plan") and predecessor pension plans sponsored by Lucent and its predecessor, defendant AT&T Corp. ("AT&T"), owed and paid the Death Benefit to certain enumerated survivors of service pension recipients. A Consolidated Amended Complaint ("Complaint" or "C.") presenting the claims of

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[2] Mr. Lucas died during the pendency of the litigation, and surviving spouse Appellant Helen Lucas sought to be substituted as plaintiff by motion filed April 26, 2006. (Dkt. #62, A 2476-79). Defendants opposed the motion, conceding that substitution was proper but arguing that the estate instead should become the substituted plaintiff (Dkt. #63, A 2482-83), despite the fact that the Death Benefit was payable to Mrs. Lucas as surviving spouse, not to the estate. The district court did not reach this question, but instead denied the motion to substitute as "moot" in light of its dismissal ruling. (Op. at 21, A 0029; Order at 2, A 0008). Substitution of a surviving ERISA beneficiary as plaintiff is a matter of routine. *See, e.g., Mushalla v. Teamsters Local No. 863 Pension Fund*, 300 F.3d 391, 396 n. 1 (3d Cir. 2002) (widow beneficiary of participant who died after noticing appeal "substituted as a party in this proceeding individually and as executrix of her husband's estate"); *Park v. Trustees of the 1199 SEIU Health Care Empl. Pension Fund*, 2005 WL 2254511 at * 5 (S.D.N.Y. Sept. 15, 2005) (late plaintiff's husband, "who, as her spouse, is the beneficiary designated by the terms of the plan" substituted as plaintiff).

Mr. Lucas and of plaintiffs-appellants in the related actions was filed on November 10, 2005. (A 0060-0109, Dkt. #44).

In general, the Complaint alleged that the Death Benefit is a protected post-retirement pension benefit payable from the Lucent pension trust to the Mandatory Beneficiaries of retirees receiving "service pensions."[3] (A 0060, 0072-75; C. ¶¶ 1, 37, 40-43). The Complaint set forth four counts:

Count I was based upon Lucent's admitted transfers of approximately $ 888 million of "surplus" Plan assets during the period 1999-2001 to fund retiree medical benefits under provisions implementing Internal Revenue Code § 420. One statutory condition for such transfers is that the plan must vest all accrued pension benefits as of the moment of transfer. The Complaint charged that the Lucent defendants' failure to vest the Death Benefit violated Plan terms and was a breach of fiduciary duty. (A 0098-0100, C. ¶¶ 106-109).

Count II claimed that Lucent's elimination of the Death Benefit violated Plan terms and ERISA, in that the Death Benefit was a defined pension benefit subject to ERISA's minimum vesting standards, Plan provisions governing

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[3] Many documents referred to the Death Benefit as a "Sickness Death Benefit." (A 0061, C. ¶ 1). The Plan document also included provisions defining *other* forms of death benefits which are *not* subjects of this case. Those benefits were pre-retirement death benefits, paid from operating income, to active and disabled employees who were not receiving service pensions. They were assigned to different plans for regulatory purposes (plan #525 at AT&T and plan #522 at Lucent) and were specifically designated as welfare benefit plans. (A 0079, 0089, C. ¶¶ 53, 79; A 0188-89, 0205-06, PS ¶¶ 47, 94).

Pension Plan Termination Arrangements expressly confirmed that the Death Benefit became vested on retirement, and the vested status was further established by the Plan's "reservation of rights" clause and defendants' course of conduct. (A 0100-0102, C. ¶¶ 110-117).

Count III claimed that a unilateral contract had been created by the act of retirement for each pension recipient, that defendants breached their obligations under the Employee Benefit Agreement governing the transfer of benefits obligations from AT&T to Lucent, and that elimination of the Death Benefit violated the Plan itself. (A 0102-104, C. ¶¶ 122-23).

Count IV claimed that the Death Benefit was an accrued, defined pension benefit and/or a "retirement-type subsidy" that was protected from cut-back by ERISA § 204(g), 29 U.S.C. § 1054(g). (A 0104-05, C. ¶¶ 125-30).

The initial presiding judge, the Honorable William J. Bassler, referred all discovery matters to Magistrate Judge Mark Falk, who ruled during a pretrial conference that plaintiffs would not be permitted to conduct deposition discovery but only some "basic written discovery." *See* Tr. of Conference, January 11, 2005, at 12-16 (A 0058-62). Plaintiffs therefore had no opportunity to conduct deposition discovery of witnesses knowledgeable about the legal character of the Death Benefit, including the companies' actuaries and accountants who prepared

actuarial and financial reports for the Plan, and benefits finance staff at each company who could amplify facts presented in company documents.

On August 22, 2006, following the retirement of Judge Bassler, the case was assigned to District Judge Dennis M. Cavanaugh. Judge Cavanaugh heard oral argument on November 9, 2006, and on November 27, 2006 entered a "not for publication" memorandum Opinion ("Op.") and Order dismissing the Complaint. (A 0007-0030).

The analysis set out in the district court's Opinion does not follow the parties' lines of argument. The court re-framed the motion as requiring resolution of "five issues." Op. at 6, A 0014. The court's first issue was "Whether the Plan terms are ambiguous" to permit consideration of "extrinsic evidence to ascertain the meaning of the Plan's terms." *Id.* The court concluded that, "From a review of the Plan's terms, this Court finds that the Plan Documents are not ambiguous." Op. at 7, A 0015. However, in this regard, the court considered only the Plan's definition of the term "Death Benefit" but no other Plan terms that plaintiffs cited. The second issue was "whether the challenged actions are subject to ERISA's fiduciary provisions." Op. at 6, A 0014. The court first recited that plaintiffs were challenging "AT&T's decision to spin-off Lucent and transfer AT&T's pension obligations to Lucent," Op. at 8, A 0016, but plaintiffs made no such claim. Regarding the question of whether Lucent's amendment of the Plan to eliminate

the Death Benefit could constitute a breach of fiduciary duty, the court acknowledged that an amendment "that violates a specific provision of ERISA triggers ERISA's fiduciary provisions" but did not analyze the question further. Op. at 10, A 0018. Rather, the court mistakenly stated that "Plaintiffs argue that Defendants, as plan sponsor, breached their fiduciary duties because they acted in violation of the plan itself in amending the plan to approve a reversion of assets to the employer." *Id.* Plaintiffs had asserted no such claim. The court dismissed Count I.

Regarding the court's third stated issue, whether the Death Benefit was a pension benefit or a welfare benefit, the court cited the statutory definition of "welfare benefit" at 29 U.S.C. § 1002(1), and concluded that the Death Benefit, "as defined by plan documents, satisfies the definition of an employee welfare benefit and is thus not an 'accrued benefit.'" The court further stated: "Looking at the Plan documents and the purpose served by the death benefit, it is apparent that it is not protected by the anti-cutback rule." Op. at 13, A 0021. The Death Benefit also did not satisfy the definition for a protected "retirement-type subsidy" because "it is not calculated in the manner" of early retirement subsidies. Op. at 14, A 0022.

On the fourth issue, whether the Death Benefit was vested even if it was a welfare benefit, the court believed that the Plan's termination provision, which gave funding priority to Death Benefits that would be payable on account of deaths

occurring after plan termination ahead of other vested pension benefits, “has no bearing” on the vesting issue. The court also concluded that summary plan descriptions stating the Death Benefit “will be paid” upon death did not express a vested status because certain “subsequent events could serve as grounds for Lucent to deny payment,” such as a beneficiary suit against the company for damages “on account of the death of an employee” or the failure of a qualified beneficiary to survive. Op. at 18, A 0026. The court also concluded that no vesting occurred as a result of transfers of excess pension assets because the Death Benefit was not an “accrued” benefit. Op. at 19, A 0027.

On the fifth issue, whether the act of retirement created a binding contractual right to payment of the Death Benefit, the court ruled that unilateral contract principles may not operate absent explicit promises in the ERISA plan documents themselves. Op. at 20, A 0028.

STATEMENT OF FACTS

AT&T in 1913 established a pension plan, later known as the Plan for Employees' Pensions, Disability Benefits and Death Benefits (the "AT&T Plan"). In 1980, that plan was restated and renamed the Bell System Management Pension Plan ("BSMPP"). Upon the 1984 Bell System break-up, BSMPP was restated as the AT&T Management Pension Plan ("AT&T MPP"). (A 0071-72, C. ¶¶ 32-34).

Deceased plaintiff Vincent R. Lucas was covered by the AT&T MPP at the time he retired in 1985 with a service pension. (A 0065, C. ¶ 16; A 0173, PS ¶¶ 1-2).[4] AT&T's summary plan descriptions advised Lucas and other participants that the Death Benefit was a "defined benefit." (A 0065, C. ¶ 52). AT&T consistently advised participants that the Death Benefit was an element of their pension, rather than a welfare benefit that it could terminate at will. (A 0081-83, C. ¶¶ 61-62). It also advised Lucas and other employees planning for retirement and making elections about pension payment options that they should consider the availability and amount of the Death Benefit in making their irrevocable retirement elections, including joint and survivor coverage for spouses. (A 0065, 0077-78, 0082-85, 0094; C. ¶¶ 16, 51, 62-65, 68, 93). Many participants, including Mr. Lucas, waived such coverage in the belief that the Death Benefit and life insurance would adequately protect their spouses. (A 0174, PS ¶ 5).

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[4] "PS" refers to Plaintiffs' Statement Under Local Rule 56.1, reproduced at A 0172-0230.

Lucent was spun-off from AT&T and became responsible for certain of its benefits obligations effective October 1, 1996. (A 0193, PS ¶ 61). In connection with this spin-off, the companies entered into an Employee Benefits Agreement ("EBA") addressing benefit plan obligations. (A 0086, C. ¶ 70; A 0195, PS ¶ 66). Under the EBA, AT&T delegated to Lucent its duty to pay benefits owed both to active employees and to Mr. Lucas and other retirees who worked for businesses transferred to Lucent, and Lucent agreed to "pay, perform, fulfill and discharge" these benefit obligations. (A 0195, PS ¶ 66; A 1200, EBA § 2.1). Lucent was thereby required to establish plans that incorporated the terms of the AT&T plans[5] and to provide all transferring participants, including retirees, full credit for all benefits earned before the spin-off. (A 1201-02, EBA § 2.3). In return, Lucent received significant assets from the AT&T MPP that exceeded the present value of the transferred liabilities. (A 0086, C. ¶ 70).

Mr. Lucas was a "Transferred Individual" under the EBA. As a 1985 AT&T retiree, he had never worked for Lucent.

Mr. Lucas was 80 years old when Lucent advised him in early 2003 that the Death Benefit he was promised during his career and at retirement 18 years earlier was being eliminated. (A 0065, 0094-95; C. ¶¶ 16, 93). AT&T has not attempted

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[5] References to "the Plan" include references to all predecessor plans at AT&T and Lucent, unless a particular amendment warrants specific identification. It is fundamental, and all Plan versions recognize, that once a plan document creates protected benefit rights, they must be preserved in all successor plans.

to retroactively eliminate the Death Benefit and it remains part of its management pension plan. (A 0184, PS ¶ 35; A 1458-59, 1998 AT&T SPD at M002876-877).

Terms of the Death Benefits

At both AT&T and Lucent, the Death Benefit was defined as being equal to the *greater of* the annual pension amount or one year's compensation (determined at retirement), and eligibility to receive it was tied to eligibility for a service pension.[6] The Death Benefit was payable to "Mandatory Beneficiaries" – i.e.,

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[6] A 0072-73, C. ¶ 37; A 0177, PS ¶ 19(d); *see also* A 0564, 1976 AT&T Plan § 7(3)(b); A 1118, 1995 AT&T Plan § 4(b); A 1282, Lucent Mgmt. Plan § 5.3(b). The Plan language governing the Death Benefit in the 1995 AT&T MPP (A 1117-18), in force at the time of the Lucent spin-off, stated in pertinent part:

> b. If such pensioner leaves any beneficiary bearing the relationship to the deceased and conforming to the other conditions stated with respect to the death of an Employee in Section 5.5(a) [defining "Mandatory Beneficiaries"], such *Death Benefit shall be paid* in accordance with the following:
>
> > *(i) If the pensioner retired under this Plan or any Predecessor Plan on or after the date specified in such Predecessor Plan for the payment of an unreduced death benefit subsequent to retirement, the Death Benefit shall be the amount of the maximum Sickness Death Benefit that could have been paid if the Pensioner died on his or her last day of active service before retirement on pension; . . .*
> >
> > ****
>
> *The Death Benefit payable under Section 5.4(b)(i) or (ii) shall not be less than the annual pension allowance as determined under Section 4.2*.

A 1118 (emphasis added).

spouses and other enumerated close dependents of the retiree. The Death Benefits were payable in either a lump-sum or installments, with employees being entitled to file an election to have the benefit paid in installments. Death Benefits also were eligible for tax-sheltered rollover treatment because they were paid from a tax-exempt pension trust, not from life insurance or corporate funds. The Plan document provided that the Death Benefit "shall be paid from the pension fund" either by making direct payments to the beneficiaries or by purchasing annuities.[7]

Death Benefits Treatment Under ERISA

Enactment of ERISA imposed new requirements on pension plans, including rules governing accrual and vesting. Consequently, AT&T faced new disclosure and reporting requirements for the Plan. AT&T, and later Lucent, provided disclosures to employees about their benefit rights in required "summary plan descriptions" ("SPDs").

SPDs from both companies acknowledged that the "Plan is classified as both a pension plan and welfare plan under the definitions of ERISA." However, SPDs repeatedly advised participants that Death Benefits were part of the "defined benefit pension plan."[8] SPDs thus stated that the Plan was one of three separate plans being summarized – two welfare plans and one pension plan – and that

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[7] A 0072-74, C. ¶¶ 37, 40-42; A 0176-78, PS ¶15, 19, 21-22; A 0188, 0206, PS notes 21 & 31; A 0189, PS ¶ 49.

[8] A 0078-79, 0089, C. ¶¶ 52-53, 79; A 0185-86, 0204, PS ¶¶ 40-42, 93-94.

different plan numbers were assigned to each for regulatory purposes. The "pension plan" providing service pensions and Death Benefits was identified as AT&T plan number 006.[9] At Lucent, participants were advised that the Plan was assigned plan number 001.[10] The only plans relevant to this case are AT&T plan #006 and its successor, Lucent plan #001.

To comply with ERISA reporting requirements, AT&T filed Annual Reports on IRS Form 5500 for the separate pension and welfare plans. In these annual reports, AT&T consistently funded and reported the Death Benefit and service pension together in the defined benefit pension plan (plan #006), which filed, as part of its Form 5500, a "Schedule B" dealing with plan funding and actuarial reporting.[11] A 0190, PS ¶¶ 50-52. Lucent likewise funded and reported the Death Benefit and service pension together as elements of the defined benefit pension plan (plan #001) with a Schedule B. *See* A 0207, PS ¶¶ 97-98. Both AT&T and

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[9] A 0079, 0089, C. ¶¶ 53, 79; A 0188-89, 0205, 0186, PS ¶¶ 47, 94, 42.

[10] A 0205-06, PS ¶ 94.

[11] In October 1995, AT&T filed its Form 5500 report for 1994 for the Plan, the AT&T MPP. This was the last Form 5500 filed for the Plan before the Lucent spin-off. A 0190, PS ¶ 51. The Schedule B included in the valuation of the Plan's defined benefit pension liabilities actuarial calculations of the amounts that would become payable as Death Benefits. Significantly, this Schedule B treated the Death Benefits as *vested* defined benefit pension benefits. A 0190, PS ¶ 52; *see also* Schultz Declaration, ¶ 3 (A 0438).

Lucent filed entirely separate Form 5500 reports for the distinct welfare benefit plans described in the SPDs.[12]

To address ERISA regulation, AT&T also made various changes to the terms of the Plan. ERISA § 4044, 29 U.S.C. §1344, required AT&T to define, in advance, the funding priority each benefit would receive in the event of a plan termination. The architecture of ERISA § 4044 requires plans to assign a higher priority to nonforfeitable (vested) benefits than to forfeitable ones. Accordingly, AT&T had to determine which benefits were nonforfeitable under the Plan and then categorize them in conformity with ERISA priorities. In 1976, AT&T restated the Plan to do this, placing the Death Benefit in the *second* highest category, *ahead* of a variety of other deferred *vested* pension benefits. The Death Benefits which received this priority were not limited to those payable on account of deaths that had already occurred. Rather, the Plan mandated creation of a reserve to fund all Death Benefits that would become due upon the inevitable, future deaths of both (1) current retirees then receiving service pensions, and (2) those *eligible* for but not yet receiving pensions on the termination date. Both AT&T and Lucent drafted the Plan to incorporate the same language on termination priorities.[13]

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[12] Footnote 3 *supra* describes these distinct welfare plans.

[13] A 0062, 0074-75, C. ¶¶ 5, 43-45; A 0180-81, PS ¶¶ 24-25.

Death Benefits At Lucent

The EBA obligated Lucent to establish plans that reproduced the terms of the AT&T plans and to provide all transferring participants full credit for all benefits earned before the spin-off. (A 0086, C. ¶ 71). Accordingly, Lucent established the Lucent Technologies, Inc. Management Pension Plan ("LMPP"), effective October 1, 1996. (A 0175, 0198; PS ¶¶ 9, 73). Consistent with Lucent's obligation to perform all of AT&T's benefits "liabilities," the initial LMPP document provided that "[t]he Plan assumes and is solely responsible for all liabilities as of September 30, 1996 relating to Transferred Individuals." (A 1215, 1996 LMPP). The EBA provided that, to the extent liabilities were not effectively assumed by Lucent, the amount of transferred assets would be reduced and an appropriate amount of assets returned to AT&T's plan. (A 1202, EBC § 2.4; A 0086-87, C. ¶ 72; A 0197-98, PS ¶ 71).

Between September 1999 and December 2001, Lucent made four separate transfers of "excess pension assets" in the Plan, as permitted by Code § 420 and implementing Plan provisions, to fund medical benefits for retired participants. These transfers exceeded $ 888 million. *See* A 0208-10, PS ¶¶ 102-05.

In 1997 Lucent amended the Plan to prospectively eliminate the Death Benefit for employees who retired after January 1, 1998. (A 0089, C. ¶ 81; A

0201, PS ¶ 81). AT&T made a similar decision, freezing its Death Benefit at approximately the same time. (A 0184, PS ¶ 35; A 1458-59, 1998 AT&T SPD).

Lucent Acts to Eliminate Death Benefits

In early January 2003, Lucent announced that it was eliminating the Death Benefit for Mr. Lucas and all other service pension recipients. The company admitted its financial motive in making this dramatic change:

> By eliminating the death benefit, we will conserve approximately $35 million in pension assets annually, for a number of years, and reduce the present value of our management pension plan's funding obligation by about $400 million.

(A 0094-95, C. ¶ 93; A 0168, Q&A regarding benefit elimination). AT&T, in contrast, has not eliminated the Death Benefit for those who retired before 1998. (A 0184, PS ¶ 35; A 1458-59, 1998 AT&T SPD).

SUMMARY OF ARGUMENT

The district court's dismissal under Rule 12(b)(6) is based on a fundamental error about the law governing pension plans under ERISA and the Internal Revenue Code. The court also erred in disregarding plaintiffs' allegations and factual showing which established, at a minimum, that they can prove facts entitling them to relief.

First, plaintiffs properly alleged that the Death Benefit provided by defendants' pension plans to survivors of retired service pension recipients was a *pension* benefit. The court could not disregard these allegations, because the Internal Revenue Code and ERISA recognize that pension benefits may be payable on death and take a form other than an annual benefit. The court's conclusion that all death benefits must be welfare benefits was contrary to the allegations and the law.

Second, plaintiffs properly alleged that the Death Benefit was an *accrued* pension benefit. The plan documents considered by the court established that defendants and their pension actuaries consistently stated, in their summary plan descriptions to participants, as well as in the Form 5500 Annual Returns they submitted to the IRS under penalty of perjury to report benefit accrual and funding, that the Death Benefit was a pension benefit subject to the requirements of Code § 401(a) and was being accrued and funded in tandem with the service pensions to which they were directly related. Defendants received substantial tax preferences from their funding of the Death Benefit as a pension benefit. This Court can properly

conclude that this conduct was correct and lawful, and defendants are bound by their conduct.

Third, plaintiffs properly alleged that the Death Benefit was a *vested* pension benefit. Plan documents considered by the court established that defendants themselves consistently recognized for more than 25 years, in the plan provisions they adopted to govern pension plan termination, that the Death Benefit was vested and could lawfully be given priority over other vested pension benefits and receive terminal funding for all benefits payable on account of deaths that would occur after plan termination. In addition, and as plaintiffs' expert actuary confirmed in his affidavit, AT&T reported to the government in Form 5500 Annual Returns that the Death Benefit was vested and subject to Code § 401(a).

Fourth, even if the Death Benefit had not previously vested, it became a vested benefit in September 1999 when Lucent made the first of four pension asset transfers under Code § 420 to fund retiree medical benefits. Under plan provisions incorporating statutory requirements, each transfer caused all accrued pension benefits to vest, just as though the pension plan had terminated and its plan termination provisions had become operative. Indeed, the financial statements for the plan that were filed from 1999-2001 reflected the vesting of the Death Benefit.

The district court therefore erred in ruling, on the basis of the pleadings, that the Death Benefit was an unprotected welfare benefit when the allegations and the

undisputed record showed that plaintiffs could prove facts to establish their claims. Defendants' plan documents, summary plan descriptions, annual returns, and consistent conduct all correctly recognized that the Death Benefit was an accrued and vested defined pension benefit that was subject to the minimum standards of ERISA and the Code, including vesting and benefit accrual.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE DEATH BENEFIT WAS A WELFARE BENEFIT RATHER THAN AN ACCRUED PENSION BENEFIT.

The district court's analysis and dismissal depended entirely on its conclusion that the Death Benefit was an unprotected welfare benefit rather than an accrued and vested pension benefit. The court's brief analysis was essentially as follows:

> Thus, pension benefits are often paid upon retirement and may be paid in the form of an annual benefit. In contrast, employee welfare benefits are payments made in the event of "sickness, accident, disability, death or unemployment." 29 U.S.C. §1002(1);
>
> ****
>
> The death benefit, according to the Plan documents, is not an annual benefit. Because the death benefit was not paid annually or at normal retirement age it does not satisfy the statutory definition of an accrued benefit and is not protected by the anti-cutback rule.

Op. at 12-13, A 0020-21.

As the court itself noted, pension benefits "are often" – but not always – "paid upon retirement" and they "may" – but need not – "be paid in the form of an annual benefit." In actuality, pension benefits can be paid upon death in *pension* plans. *See* Treas. Reg. § 1.401-1(b)(1)(i). For example, pension benefits are paid to beneficiaries upon the death of a participant in plans providing joint and

survivor benefits,[14] or those providing that a beneficiary will receive the balance of the credit or account owed to the participant, or those providing term-certain benefits (i.e., 5-year certain or 10-year certain benefits).

Moreover, pension plans are permitted to pay benefits either in one lump-sum or annually in annuity form as an "annual benefit." For uniformity of measurement, ERISA defines "accrued benefit" in a pension plan as "the individual's accrued benefit determined under the plan and, except as provided in section [1054](c)(3), *expressed* in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23)(A) (emphasis added). ERISA therefore provides only that an accrued benefit should be "expressed" in the form of an annual benefit. However, the included exception states that "if an employee's accrued benefit is to be determined as an amount other an annual benefit commencing at normal retirement age, . . . the employee's accrued benefit . . . shall be the actuarial equivalent of such benefit." ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3).

[14] ERISA explicitly provides for a death benefit for spouses in retirement plans. 29 U.S.C. § 1055(a)(1).

As noted in Sacher, Steven J., et al. (eds.), *Employee Benefits Law* (2d ed. 2000)[15] at 258:

> For a defined benefit plan, a lump sum distribution will be the actuarial equivalent of the vested accrued benefit. The statute sets forth the maximum interest rates that may be used to determine actuarial equivalence for this purpose.

The district court's summary conclusion that benefits payable upon death must be welfare benefits therefore reflects a fundamental legal error.

A. Defined Benefit Pension Plans Under ERISA and the Internal Revenue Code.

By way of background, the Court may first consider the tax consequences of characterizing a plan as a welfare or pension plan.[16] Taxpayers and the IRS have long fought over this question due to its substantial consequences for the timing and amount of tax deductions that can be taken for pension and welfare benefits. In the seminal case of *Lundy Packing Company v. United States*, 302 F. Supp. 182 (E.D.N.C. 1969), *aff'd,* 421 F2d 850 (4th Cir. 1970) (*per curiam*), the court ruled that the proper characterization of a benefit was determined by "an examination of the way in which the plaintiff's plan was conceived and established and the way in

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[15] This authoritative treatise is prepared jointly by management and participant-side members of the Employee Benefits Committee of the ABA Section of Labor and Employment Law.

[16] The Code recognizes a third type of plan, "deferred compensation" plans. *See Wellons v. Commissioner*, 31 F.3d 569, 572 (7th Cir. 1994). Such plans are disfavored by the Code, in that funding contributions are deductible only when a benefit is actually paid out.

which it was actually operated." 302 F. Supp at 185. This Court in *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1144 (3d Cir. 1993), held that many ERISA sections have a "mirror-like counterpart in the Internal Revenue Code" and approved the practice of looking "for guidance to sources which interpret [an ERISA provision's] Code counterpart . . .." *Id.*

In this case, the plan sponsors consistently treated the Death Benefit as a "*defined benefit*" pension benefit in their Annual Returns (Form 5500s), summary plan descriptions, and internal administrative "Tax Guidelines." *See* A 0061-62, C. at ¶ 4.

Understanding the regulatory distinction between pension and welfare benefits requires some background on the history and meaning of pension plans and welfare plans under the Internal Revenue Code ("Code") and ERISA.

A pension plan, under the Code, is one of three recognized "tax-qualified retirement plans" – i.e., pension plans, profit-sharing plans and stock bonus plans. *See* Code § 401(a) and Treas. Reg. § 1.401-a. As such, pension plans are subject to the minimum standards of Code § 401(a), including vesting and benefit accrual rules.[17] *Hamlin v. Commissioner,* T.C. Memo. 1993-89 (U.S. Tax Ct. 1993).

[17] Code § 401(a) includes the requirement that plan assets be held in trust and that the plan satisfy the requirements of Code § 411. *See* Code §§ 401(a)(1), (7). Code § 411 addresses benefit accrual and vesting. The parallel vesting and benefit accrual provisions in ERISA Title I are §§ 203 and 204, 29 U.S.C. §§ 1053 and 1054, respectively.

In contrast to these Code provisions, ERISA provides that a pension plan is a plan, fund or program which:

> (i) provides retirement income to employees, or
>
> (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,
>
> *regardless of* the method of calculating the contributions made to the plan, *the method of calculating the benefits under the plan or the method of distributing benefits from the plan.*

ERISA §3(2)(A), 29 U.S.C. § 1002(2)(A) (emphasis added).

ERISA divides "pension plans" into individual account (or "defined contribution") plans and other ("defined benefit") plans. ERISA §§ 3(34) and (35), 29 U.S.C. §§ 1002(34) and (35).[18] All pension plans are subject to the minimum standards of ERISA Title I, including participation, vesting and benefit accrual requirements. ERISA §§ 202-204, 29 U.S.C. §§ 1052-54; *see also* Code §§ 410-11; *Employee Benefits Law* at 29. Welfare benefit plans are not subject to these standards. *Employee Benefits Law* at 355.

Under Treas. Reg. § 1.401-1(b)(1)(i), the principal features of a pension plan are that the benefit is "definitely determinable" from the terms of the plan itself; distributions may be made only in the event of retirement, death, disability, or termination of employment; and the plan may pay death benefits (other than

[18] The Code, in contrast, divides "pension plans" into "defined benefit plans" and "money purchase plans." *Employee Benefits Law* at 29.

survivor annuities) that are "incidental" to the main purpose of the plan. Therefore, the law governing pension plans specifically recognizes that death benefits may be retirement/pension benefits, provided that they are "incidental" to the principal purpose of providing service pensions.[19]

Since a defined benefit pension plan makes a promise, not of the amount that will be contributed, but of the benefit that *will be paid* in the *future*, it is also subject to minimum funding requirements of both the Code and ERISA. Code § 412(a). The deductibility of employer contributions to pension plans depends upon a complex formula requiring satisfaction of minimum funding standards under Code § 404(c)(1)(A). *See Employee Benefits Law* at 246.

In summary, a defined benefit plan is a "pension plan" under both the Code and ERISA, and it therefore must satisfy the minimum standards of Code § 401(a) and ERISA Title I, including those relating to benefit accrual and vesting. *See Employee Benefits Law* at 29-30, 172.

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[19] The regulation's use of the term "incidental" stems from longstanding IRS concern "to ensure that the qualified plan is primarily used to provide retirement income and not as an estate planning or inter-generational wealth transfer device." McGill, Brown, Haley & Schieber, *Fundamentals of Private Pensions* (8th ed. 2005) at 264. In various rulings, the Treasury Department has established a benchmark of "100 times the anticipated monthly normal retirement benefit" as the point at which pre-retirement death benefits cease to be "incidental" to the main purpose of providing pension annuities. *See, e.g.,* Rev. Ruling 74-307, 1974-2 C. B. 126. There is no issue in this case of whether the Death Benefit satisfies this "incidental" standard inasmuch as the Plan repeatedly received tax qualification.

B. Welfare Benefit Plans Under ERISA and the Internal Revenue Code.

ERISA's definition of a welfare benefit plan includes a long list of non-pension benefits, including:

> medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment . . . or (B) any benefit described in § 302(c) of the Labor Management Relations Act, 1947 (*other than pensions on retirement or death*, and insurance to provide such pensions).

ERISA §3(1), 29 U.S.C. § 1002(1) (emphasis added). This definition specifically recognizes that there are "pensions [payable] on retirement or death" and that these death benefits are not welfare benefits.

The district court partially quoted this definition twice. But, regrettably, the court never quoted its critical concluding qualification, which excludes "pensions on retirement or death." *See* Op. at 12, A 0020.

When ERISA was enacted in 1974, Congress stated its intent to occupy the field of welfare benefits and subjected all state laws attempting to regulate them to broad preemption. Despite this preemption, ERISA subjected welfare benefit plans to virtually no substantive regulation other than reporting and disclosure rules. *Employee Benefits Law* at 355. In contrast to ERISA, welfare benefit plans are subject to "extensive" regulation under the Internal Revenue Code. Therefore, it is not unusual for welfare benefits to be defined in relation to their interaction with various Code provisions. *Id.* In fact, Code § 419(e)(2) defines "welfare

benefits" by virtue of the deduction provisions which *do not apply to them.*

C. Tax Treatment of Defined Benefit Pension Plans and Welfare Plans Under the Internal Revenue Code.

Welfare benefit plans and pension plans are subject to very different tax treatment. An understanding of this treatment is essential to determining the type of benefit a plan sponsor intended to provide and the tax and ERISA consequences that flow from this designation.

Turning first to welfare benefit plans, Canan and Mitchell, *Employee Fringe and Welfare Benefit Plans* (2002) at 336, explains that an unfunded welfare benefit plan permits a sponsor to make a current deduction for amounts paid or accrued within a taxable year to the extent that this constitutes an ordinary and necessary business expense in a reasonable in amount. *See also* Code § 162; Treas. Reg. § 1.162-10(a); *Lundy Packing Company,* 302 F. Supp at 185. If the welfare plan is funded, for contributions paid or accrued after December 31, 1985, the deduction must be deductible under Code § 162 and also under the limitations prescribed under Code §§ 419 and 419A. *Employee Fringe and Welfare Benefit Plans* at 185. The Tax Court in *Schneider v. Commissioner,* T.C. Memo 1992-24 (U.S. Tax Ct. 1992), ruled as follows:

> In general, sections 419 and 419A limit the amount which an employer can deduct under section 162 for contributions to a welfare benefit fund to the fund's "qualified cost" for the taxable year. Sec. 419(b). For purposes of this case, it is pertinent to note that the "qualified direct cost" of a welfare benefit fund is the aggregate

> amount which would have been allowable as a deduction, if the employer provided the benefits directly to its employees and used the cash receipts method of accounting.

Welfare benefit plans therefore are entitled to a current deduction, generally limited to the amount of the actual, annualized cost of the benefit. The tension begins when welfare benefit plans attempt to fund future costs. This will not be permitted if the employer retains too much control over the benefit, which would enable it to get a current funding deduction for future benefits that may be illusory. For example, in *Connecticut Mutual Life Ins. Co. v. Commissioner*, 106 T.C. 445 (1966), the taxpayer wanted to deduct, in a single tax year, a $ 20 million contribution to a voluntary employees' beneficiary association ("VEBA"). The underlying VEBA benefit was a welfare benefit, and so the question was whether the taxpayer could deduct the contribution currently as a business expense or, alternatively, had to capitalize the expense. A "business expense is currently deductible, while a capital expenditure is normally amortized . . .." *Id.* at 453. The Tax Court noted:

> At the outset, this Court explained that "We have traditionally analyzed the deductibility of an employer's contributions to a welfare benefit plan by taking into consideration, among other things, both the degree of control which an employer retains over the plan and the degree to which the employees, as opposed to the employer, are benefited." *Schneider v. Commissioner, supra;* see also *Weil Clothing Co. v. Commissioner,* 13 T.C. 873, 879-880 (1949).

Id. at 456. The court denied the deduction on the ground that the welfare benefits were not vested and "Petitioner could reduce its holiday pay benefits or even

liquidate the VEBA II trust without incurring any liability to its employees for future holiday pay." *Id*. at 458.

Tax treatment of defined benefit pension plans is much different. In contrast to welfare plans, advance funding payments for pension plans are fully deductible under Code § 404. *Employee Benefits Law* at 246. As noted in *Lundy Packing Company,* 302 F. Supp. at 185:

> In the case of contributions by accrual basis taxpayers to (1) pension trusts, (2) employees' annuities, or (3) stock-bonus and pension-sharing trusts, section 404(a)(6) permits the deduction in the year of accrual only if payment is in fact made not later than the time prescribed by law for filing the return during the following year.

Pension plans thus enjoy "substantial" tax preferences. *Employee Benefits Law* at 171. The Code allows current deductions for employer funding payments, but the participant does not recognize income equal to the value of the benefit until actually received, in either lump-sum or periodic payments. *Id.*

Consequently, a plan sponsor which elects to apply its funds to a defined pension benefit, rather than a welfare benefit, can reap all the current tax benefits associated with funding a tax-qualified retirement plan under the Code (and a pension plan under ERISA). But the sponsor must also comply with the minimum standards of ERISA and the Code.

Although plaintiffs alleged that the Death Benefit was a defined pension benefit subject to the minimum standards of ERISA (A 0061, 0100, C. ¶¶ 4, 111),

the court did not consider these allegations in concluding that the Death Benefit was a welfare benefit. The allegations are sufficient to state a claim under Counts I, II and IV.

The conclusion that the district court erred is reinforced when one reviews the documents under which the Plan was established and operated[20] and the conduct of Plan sponsors AT&T and Lucent in funding and administering the Plan, which consistently and correctly treated the Death Benefit as an accrued pension benefit.

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[20] Summary plan descriptions, Form 5500 Annual Returns, and plan documents are "instruments under which the plan was established or is operated." ERISA §§ 104(b)(2), 402(a)(1), 29 U.S.C. §§ 1024(b)(2), 1102(a)(1).

II. THE DISTRICT COURT ALSO ERRED IN FAILING TO CONSIDER THE ALLEGATIONS AND FACTS ESTABLISHING THAT PLAN SPONSORS AT&T AND LUCENT CONSISTENTLY TREATED THE DEATH BENEFIT AS AN ACCRUED PENSION BENEFIT.

The district court did not give full consideration to the law governing pension and welfare benefit plans and thus erred in concluding that the Death Benefit necessarily was a welfare benefit. The court also erred by failing to consider plaintiffs' allegations and factual showing that AT&T and Lucent consistently recognized and treated the Death Benefit as an accrued pension benefit. This treatment was manifested in sworn regulatory filings by the companies and their pension actuaries, in SPDs prepared and distributed to participants assuring them that Death Benefits were part of the defined benefit pension Plan, and in the manner they administered Death Benefit payments.

A. Defendants Consistently Filed Annual Reports Identifying the Death Benefit as a Defined Benefit Pension Plan Benefit Subject to Section 401(a) of the Code

ERISA § 103, 29 U.S.C. § 1023, generally requires an annual report (IRS Form 5500, "Annual Return/Report of Employee Benefit Plan") to be filed by every "employee benefit plan" (including pension and welfare plans) covered by the reporting and disclosure provisions of ERISA Title I.[21] Each Form 5500 must

[21] The Form 5500 is filed with the IRS, which provides copies to the Department of Labor and the Pension Benefit Guaranty Corporation. *United States v. Coyle*, 63 F.3d 1239, 1242 (3d Cir. 1995).

include a detailed statement of financial, actuarial, participant, service provider and plan fiduciary data. In addition, defined benefit pension plans (but not welfare plans) must file a “Schedule B” providing actuarial information on the value of assets and liabilities and the funding standard account. The Supreme Court in *Mead Corp. v. Tilley*, 490 U.S. 714, 717 (1989), stated:

> A defined benefit plan is one which sets forth a fixed level of benefits. See § 1002(35). Contributions to a defined benefit plan are calculated on the basis of a number of actuarial assumptions about such things as employee turnover, mortality rates, compensation increases and the rate of return on invested plan assets.

There are penalties for noncompliance with the annual reporting requirement. *See generally* Code § 6652(e); ERISA § 502(c)(2), 29 U.S.C. § 1132(c)(2); *Employee Benefits Law* at 130. Any person committing a willful violation of the reporting and disclosure requirements will, upon conviction, be fined up to $5,000 ($100,000 if the violator is not an individual) and imprisoned for up to 1 year or both. ERISA § 501, 29 U.S.C. § 1131. *See also United States v. Coyle, supra,* 63 F.3d at 1247 (recognizing illegality of making “false statements . . . to the government on required forms”).

As noted earlier, defendants consistently stated in their SPDs that the Plan included both defined pension benefit and welfare benefit components. Each of these distinct welfare and pension plans was obligated to file separate Form 5500s, under different plan numbers assigned by AT&T and Lucent.

At AT&T, SPDs advised participants that the Death Benefit was part of plan #006 together with the service pension. For example, the 1984 AT&T SPD stated:

> **Plan Identification Numbers**
>
> #13-4924710-assigned by IRS
>
> #006-assigned by AT&T for pensions and certain death benefits paid from the Trust Fund
>
> #525-assigned by AT&T for disability pensions and certain death benefits paid from a Participating Company's operating income
>
> #512-assigned by AT&T to the special accidental death insurance policy underwritten by the Continental Insurance Company

A 1398, 1984 AT&T SPD.[22] Similarly, Lucent's SPDs advised participants that plan #001 was "[t]he plan number assigned by Lucent for pensions and certain death benefits paid from the pension trust fund." (A 1441, 1996 LMPP SPD).

In every Form 5500 report that was received in discovery for plan #006 at AT&T and plan #001 at Lucent, service pensions and Death Benefits were reported together on the same report, with the same, unitary Schedule B actuarial report. Both benefits were designated as part of a "defined benefit plan" that was subject to minimum funding and Code § 401(a). (A 0080-81, 0091; C. ¶¶ 57-58, 84-85). For example, AT&T's 1994 Form 5500 (A 1550-1607) in response to Question 5a lists the plan name as the "AT&T Management Pension Plan." The response to

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[22] Plan ##525 (AT&T) and 522 (Lucent) are the *pre-retirement* death benefits discussed in note 3 *supra*.

Question 5c lists the plan number as #006. In response to Question 6a, a filer must state whether the plan is a welfare benefit plan or a pension benefit plan. The box for a pension benefit plan was checked. In response to Question 15a, whether the plan is a defined benefit plan subject to the minimum funding standards, the stated answer is yes. Question 22(a) asks whether it is or ever was intended that this plan qualify under Code section 401(a)? The stated answer is yes. (A 1550, 1552, 1553). Welfare plans do not complete questions 15(a) or 22(a), or any other part of lines 15 through 24. *See* A 1552.

By definition, the participant pool eligible to receive payments of service pensions and Death Benefits consisted of retirees and their beneficiaries. The attachments to the Schedule B demonstrate that the "accrual rates" for both service pensions and Death Benefits were considered in tandem and were functionally indistinguishable. For example, the 1994 Schedule B contained an attachment entitled "Annual Rates of Retirement on Service Pension Assumed in Determining 1994 Accrual Rate for Service Pension and Death Benefits."[23] It clearly indicates that the funding assumption for accruing both service pensions and Death Benefits was "retirement" as determined under the Plan, i.e., normal retirement age. Thus, for accrual calculations and funding purposes, both the service pension and Death Benefits were "expressed in the form of an annual benefit commencing at normal

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[23] A 1581. Similar attachments can be found in each annual Form 5500 filing by AT&T and Lucent for the Plan until Lucent eliminated the Death Benefit.

retirement age," or an actuarial equivalent, thus meeting the ERISA definition of "accrued benefit." *See* 29 U.S.C. §§ 1002(23)(A) and 1054(c)(3).

Defendants also contended that the Death Benefit is a "contingent" benefit. However, the attachments to the Form 5500 Schedule B filings employ the *same* mortality assumptions for the Death Benefit as for service pensions. For example, in 1994, the Schedule B for plan #006 included a chart entitled, "Annual Rates of Mortality Among Active Employees Assumed in Determining 1994 Accrual Rates For Service Pensions and Death Benefits." (A 1576). The Schedule B also contained a chart entitled, "Percentage of Active and Retired Employees Dying Who Have Qualified Beneficiaries Assumed in Determining 1994 Accrual Rate for Service Pensions and Death Benefits." (A 1578). Although there was a contingency whether eligible beneficiaries for Death Benefits would survive, the same contingency existed for service pension joint and survivor annuities payable upon a retiree's death. The actuaries used the same mortality and survival assumptions to fund both accrued pension benefits.

The Schedule B for the Plan also contained attachments in which annual salary increases were assumed for the relevant population who were entitled to service pensions and Death Benefits. For example, the 1994 Schedule B included a chart entitled, "Annual Rates of Salary Increases Assumed in Determining 1994 Accrual Rate for Service Pensions and Death Benefits." A 1584.

These documents establish that at AT&T and Lucent, service pensions and Death Benefits were being *accrued* together on each successive annual Schedule B using the same actuarial factors, i.e., assumptions as to mortality, salary increases, and retirement rates. Since payment of both service pensions and Death Benefits commenced at retirement and the population pool had the same age and compensation history, actuarial calculations were made to fund these two benefits payable in the *future* while taking current deductions. This treatment confirms that Death Benefits and service pensions are *directly related* and were accrued together as defined pension benefits. Ultimately, if the Death Benefit is not "accrued" then neither is the service pension, given that their funding and reporting are functionally indistinguishable.

In opposing the motion, plaintiffs submitted the Affidavit of actuary Richard K. Schultz providing this assessment of these Form 5500s:

> I have reviewed the Form 5500 filings made for the AT&T Management Pension Plan, plan #006, and the schedules and attachments thereto for plan years 1994 and 1995. I have also reviewed the actuarial reports prepared by the plan actuaries for those years. *Based upon my review, it is my opinion that in the 1994 [Form] 5500 filed for the AT&T Management Pension Plan, liabilities for future death benefits payable from plan assets upon the death of eligible retirees are treated as vested in reporting the current liabilities of the plan on Schedule B. It is my further opinion, based upon my review, that the Plan's actuaries included the death benefit in the calculation of the Plan's funding requirements.*

Schultz Affidavit, A 0438 (emphasis added).

Plaintiffs do not currently possess any tax returns which would demonstrate the relationship between the funding calculations for service pensions and Death Benefits and the company's deductions. However, it can be inferred that plan sponsors make deductions consistent with their reporting on Form 5500 Annual Returns. Both AT&T and Lucent, under penalty of perjury, signed certifications on the first page of each Form 5500 that the information in the report and schedules was "true, correct and complete." *See, e.g.,* A 1550, 1994 Form 5500; *see also* A 1556, 1994 Schedule B (certified as "complete and accurate" by plan actuary).

The Court should apply the presumption of legality to defendants' longstanding behavior treating the Death Benefit as a pension benefit and recognize that, as defendants certified under penalty of perjury, the Death Benefit is a "pension benefit" that was qualified under Code § 401(a) and its parallel provisions in ERISA Title I.

The district court failed to address the allegations, supported by the actual Form 5500 reports filed by AT&T and Lucent, that the Death Benefit was an accrued, defined pension benefit. These alleged facts must be assumed to be true and they establish (or at least establish the possibility, for purposes of defeating dismissal) the correct nature of the Death Benefit. Further, the court failed to acknowledge the Schultz affidavit confirming that the Death Benefit was treated by AT&T (after each plaintiff had retired) as a *vested* pension benefit. Even under a

strict Rule 12(b)(6) posture, the affidavit and the other evidence showing that the Death Benefit was reported as a defined pension benefit and was ratably accrued and funded as a pension benefit in tandem with the service pension, establish that there are facts that plaintiffs can prove to establish their allegation that the Death Benefit was an *accrued*, defined benefit pension benefit. Dismissal of the claims under Counts I, II and IV of the Complaint therefore was error.

B. Defendants Consistently Stated in their Mandated Summary Plan Descriptions that the Death Benefit was Part of a Defined Benefit Pension Plan and Would be Treated as a Pension Benefit.

ERISA § 102, 29 U.S.C. § 1022, requires that a summary plan description ("SPD") be provided to every plan participant, whether it provides pension or welfare benefits. The SPD must be written in a manner calculated to be understood by the average participant and must be sufficiently accurate and comprehensive to apprise participants and beneficiaries of their rights and obligations under the plan. 29 U.S.C. § 1022(a).

In this case, both AT&T and Lucent prepared and distributed SPDs which advised participants that the Death Benefit was a "defined benefit" pension benefit and that it was being so reported to the IRS. For example, the SPDs included a paragraph entitled, "Type of Plan." The 1984 AT&T SPD stated that it was a defined benefit pension plan insofar as it provided death benefits to service pensioners:

> Type of Plan
>
> The Plan is classified as both a pension plan and a welfare plan under the definitions of ERISA. *It is a "defined benefit plan" for service and deferred vested pension purposes and for the payment of certain sickness death benefits upon the death of a Pension Plan participant*. The Plan is a "welfare plan" for purposes of providing disability pensions and certain other death benefits payments.

A 01398 (emphasis added). Lucent SPDs adopted this language essentially verbatim. For example, the 1996 SPD, in the paragraph entitled, "Plan Records, Plan Year and Type of Plan" stated, in pertinent part:

> The Plan is classified as both a pension plan and a welfare plan under the Employee Retirement Income Security Act of 1974, as amended (ERISA). *It is a defined benefit pension plan for service and deferred vested pension purposes and for payment of certain sickness death benefits upon the death of a participant under the pension provisions of the Plan.* The Plan is a "welfare plan" for purposes of providing disability pensions and certain other death benefits payments.

A 1440 (emphasis added).

Defendants demonstrated the significance of this evidence by refusing to even admit that their SPDs reported the Death Benefit as a pension benefit. *See* A02015, Request to Admit No. 29 and Def. Response. At oral argument, defendants addressed the issue as follows:

> The one interesting point that he brings up is that he says, well, you know, there's something in these SPDs and in these plans that make reference to the fact for some purposes, the death benefits are considered pension benefits. And that's not setting forth any – first off, if that was put in error, it wouldn't change anything here. I don't know – you know, I'm not going to opine for you since I don't write plans whether or not there was something required to make the

> disclosure that way as opposed to what I would consider a litigator's point of view you want to call a welfare plan, *but if that was done in error – I doubt that it was; AT&T had some of the finest people on this,* but if it was done in error, it wouldn't change your standard here, your Honor, because it is a legal determination whether it is a pension or welfare benefit, not simply a statement made in a SPD or a plan.

Tr. of Hearing, November 9, 2006, A 2537 (emphasis added).

It is not known whether the court credited this argument of "mistake," made by defense counsel who admitted he lacked any factual basis for his belief. However, it is clear that the court did not acknowledge or address the facts of record including the SPD texts – even though alleged in the Complaint – showing that both AT&T and Lucent consistently understood and treated the Death Benefit as an accrued, defined pension benefit.

It is the law of this Circuit that SPDs and plan language have legal significance in determining the rights and obligations of parties in ERISA-qualified plans. For example, in *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Foundation*, 334 F3d 365, 378, 380 (3d Cir. 2003), the Court held that because of SPDs' pivotal role in ERISA's disclosure scheme, SPD language can trump a formal plan document, and a participant can enforce SPD terms without demonstrating detrimental reliance. Defendants' disclosure in their SPDs that the Death Benefit was a defined pension benefit was equivalent to advising participants that it was a protected benefit subject to accrual and vesting rules. Indeed, as alleged, many participants including Mr. Lucas elected to forego

joint and survivor annuities for their spouses in reliance on the company's assurance that the Death Benefit "will be paid" upon death.

Plaintiffs therefore stated claims under Counts I, II and IV of the Complaint and those claims should not have been dismissed. At best for defendants, the record presents disputed questions of fact as to the proper legal characterization of the Death Benefit.

C. Defendants Consistently Administered their Payment of the Death Benefit to Allow Tax-Qualified Rollovers of Benefits Paid, a Practice that Was Only Permitted by the Tax Code if the Death Benefit Was a Pension Benefit Subject to Code § 401(a).

Defendants also administered payment of the Death Benefit in a manner that confirmed it was a tax-qualified pension payment entitled to "rollover" treatment. Internal administrative "Tax Treatment Guidelines and Procedures," promulgated by AT&T for use by benefits staff shortly before Lucent was spun off, provided that "the taxable amount of any *death benefits* payable from the AT&T Pension Trust Fund to a surviving spouse *are eligible for rollover* to an IRA." (A 2078) (emphasis added).

AT&T's administration of the Plan to permit tax-free rollovers of Death Benefit payments provides additional confirmation that the Death Benefit is a pension benefit that was payable from an exempt pension trust and eligible for either a lump sum distribution or rollover to an IRA. Code § 402(e)(4) specifies that a lump sum distribution is *only* available from an exempt trust which is part of

a pension, profit-sharing, or stock bonus plan qualified under Code § 401(a) or from an annuity plan qualified under Code § 403. Similarly, to be eligible for rollover treatment, Code § 402(c)(4) requires plan distributions to come from a "qualified trust." Under Code § 402(c)(8), a "qualified trust" is defined as "an employees' trust described in section 401(a)," i.e., a stock bonus, pension plan or profit sharing plan.

III. AT&T AND LUCENT CONSISTENTLY TREATED THE DEATH BENEFIT AS A VESTED PENSION BENEFIT.

The consistent historic conduct by plan sponsors AT&T and Lucent showed not only that the Death Benefit was an accrued pension benefit, but also that it was a *vested* pension benefit.

A defined benefit pension plan is subject to the minimum standards of Code § 401(a) and their parallel provisions in ERISA Title I. *See Central Laborers v. Heinz*, 541 U.S. 739, 746 (2004). As noted above at pages 27-29, these minimum standards include vesting and benefit accrual.

The EBA obligated Lucent to establish plans that incorporated the terms of the corresponding AT&T plans. (A 1201-02, EBA § 2.3; A 0086, C. ¶ 71). If, as the allegations state and the evidence shows, the Death Benefit was a defined pension benefit when it resided in AT&T's plan, it must have remained a defined pension benefit when it was transferred to and resided in Lucent's successor plan. Similarly, if the Death Benefit was an *accrued* pension benefit in AT&T's plan, it must have remained an accrued pension benefit in the Lucent's plan. Finally, if the Death Benefit was recognized as vested at any time at either AT&T or Lucent, it must retain its vested status in perpetuity. By definition, a vested benefit is irrevocable and cannot be taken away. *See DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity,* 420 F.3d 220, 223 (3d Cir. 2005) ("Vesting is 'the process by which an employee's already-accrued pension account becomes

irrevocably his property.'") (emphasis added), *quoting Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 749 (2004).

A. Plan Provisions Drafted and Adopted by AT&T and Lucent Recognized that the Death Benefit was a Vested Pension Benefit that Must be Protected and Funded Ahead of Other Vested Pension Benefits

"ERISA abounds with the language and terminology of trust law." *Firestone v. Bruch,* 489 U.S. 101, 110 (1989). "One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets. Bogert § 582, at 346, and this encompasses 'determin[ing] exactly what property forms the subject-matter of the trust [and] who are the beneficiaries.' *Id.* § 583, at 348." *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 572 (1985). If a plan establishes accrued, vested benefits that must be provided until the last beneficiary dies, these future benefits must be protected even if the plan terminates. Consequently, specific plan provisions dictating the treatment of unpaid benefits and assets on the event of plan termination are highly informative as to the sponsor's intent to provide vested benefits and the priority these benefits have under the plan.

The Plan at both AT&T and Lucent contained essentially identical plan termination provisions entitled, "Pension Plan Termination Arrangements." The very title of these provisions, "Pension Plan Termination Arrangements," establishes that they only allocated Plan benefits that were "pension" benefits. The

Death Benefit was specifically enumerated therein and was accorded the second highest level of protection, right after service pensions and *before* other deferred but *vested* service pensions.

The drafters of ERISA were sensitive to the potential for abuse by plan sponsors when terminating pension plans. ERISA's minimum standards could be easily circumvented if sponsors were able to terminate plans and allocate available assets to fund benefits in whatever priority they chose. ERISA § 4044, 29 U.S.C. § 1344, was designed to prevent such an inappropriate result. As stated in a 1973 Senate explanation of the draft ERISA legislation, Congress "recognized that employers might be tempted to create new benefits for themselves or for favored employees, terminate their plans, and then (in accordance with the provisions of their plans) allocate existing plan assets to these benefits."[24] ERISA therefore requires plans to determine and state, in advance of any plan termination, the priority in which assets would be applied to particular benefits in the event of termination. 29 U.S.C. § 1344.

Under Section 4044, accrued benefits must take priority over benefits that are not accrued, and "nonforfeitable" (vested) benefits must be funded before forfeitable (non-vested) benefits. 29 U.S.C. § 1344(a)(1)-(5). The section sets up as six-tier order of priority. The first and second tiers require payment of all

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[24] *See* 119 Cong. Rec. 30134, 30137 (September 18, 1973), *reprinted in* 2 ERISA Legislative History 1725 (G.P.O. 1976)

accrued benefits derived from employees' voluntary and mandatory contributions. *See* 29 U.S.C. § 1344(a)(1)-(2). Next, the third tier covers benefits that have been in pay status for the three-year period preceding plan termination or that would have been in pay status if the participant had retired. The fourth tier requires distribution of all benefits generally that are guaranteed by the PBGC through its pension plan termination insurance program. *See* 29 U.S.C. § 1344(a)(3)-(4). Finally, the fifth tier provides for benefits that are vested (other than by reason of plan termination), and the sixth tier provides for "all other benefits under the plan." 29 U.S.C. § 1344(a)(5)-(6).

The operative language of the Plan Termination provisions in the Plan at both AT&T and Lucent first appeared in a 1976 Restatement and remained functionally the same until Lucent retroactively eliminated the Death Benefit.[25] This operative language contains a boilerplate provision that the fund assets must be first applied in the order and to the extent required by ERISA § 4044. Thereafter, the Plan Termination provisions provide that the allocation shall be applied to a 7-tier system expressly stated in the Plan, insofar as ERISA permits and unless already provided under the earlier allocation. For example, the Lucent Management Pension Plan Document ("LMPP") establishes the following priorities:

[25] A 0180-81, PS ¶¶ 24-25; A 0702-05, 1976 AT&T Plan; A 1113-16, 1995 AT&T MPP Plan; A 1277-80, 1996 LMPP Plan; A 1324-25, 2000 LRIP Plan.

Tier One, the highest priority, includes full payment of service pensions or deferred vested pensions for retired employees, or those eligible for the same and the service pensions or survivor benefits for active employees who are retirement-eligible. (A 1277-78, LMPP § 4.11, First Tier).

Tier Two includes full payment of the *Death Benefits* payable on account of deaths occurring before the date of plan termination, *or which would become payable after the date of plan termination on account of the future deaths of retired employees or other employees who are eligible for retirement*. (A 1278).

Tiers Three, Four and Five encompass certain other deferred *vested* benefits. (A 1278-79).

Tiers Six and Seven, the lowest priorities, cover non-vested, "forfeitable" benefits. (A 1279).

These Plan Termination provisions had been in effect for more than 25 years before Lucent terminated the Death Benefit. They protect not only the service pensions and Death Benefits of those who were retired as of the date of termination, but also protect these benefits for employees *eligible for retirement*. With respect to the Death Benefit, the Plan Termination provisions protect not just beneficiaries of those who have *died* as of the termination date but also provide for the payment of Death Benefits upon the "*future deaths* of retired employees or other employees who

are eligible for retirement." (emphasis added).[26]

These Plan Termination provisions are strong confirmation that the Death Benefit has protected, defined benefit status. As protected defined pension benefits, the Plan would have already funded and accrued the future Death Benefits and service pensions of participants eligible for retirement. Actuarial calculations were made to fund these future retirement benefits and these termination provisions protect these accruals by dictating that a funding source be maintained.

It is significant that the terms of the "Pension Plan Termination Arrangements" list the Death Benefit *between* two other types of vested benefits. Applying "the canon of construction *noscitur a sociis* ["a word is known by the company it keeps"], which instructs that a provision should not be viewed 'in isolation but in light of the words that accompany it and give [it] meaning,'" *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 688 (3d Cir. 1991), it is clear that AT&T and Lucent placed Death Benefits on the *vested* side of the benefits ledger.

[26] Until Lucent's 2003 amendment, these termination provisions also demonstrated the Plan's compliance with the "anti-cutback rule" of Code § 411(d)(6) and ERISA § 204(g), 29 U.S.C. § 1054(g), which protects accrued benefits by prohibiting sponsors from making plan amendments that reduce or eliminate them other than on a prospective basis. The Plan Termination provisions recognized that the Death Benefits were *accrued* when the participant became *eligible* for a service pension and had to be preserved. In this regard, it bears repeating that AT&T, which initially designed and sponsored the Death Benefit, has only eliminated the benefit prospectively and has preserved it for all current retirees. (A 0184, PS ¶ 35; A 1458-59, 1998 AT&T SPD). Had plaintiffs' pensions not been involuntarily transferred to Lucent in 1996, appellant Lucas would have received the Death Benefit upon her husband's passing.

These Plan Termination provisions establish that the Death Benefit is nonforfeitable or vested. The Death Benefit was accorded a higher priority than other deferred *vested* pensions in the allocation hierarchy. A plan sponsor would not – and under ERISA could not – give non-vested benefits priority over vested ones. Applying the presumption of legality to the conduct of AT&T and Lucent in establishing this hierarchy of benefits on Plan termination, then it follows that the companies understood the Death Benefit to be a vested benefit. It simply is not logical or lawful for a sponsor to give non-vested benefits priority over vested ones. The Plan Termination provisions thus are "clear and express"[27] language confirming that the Death Benefit was vested. Because the subject Death Benefit is not a "stand alone" benefit, but rather a death benefit *directly related*[28] to the retirement benefit, a participant became vested in the subject Death Benefit at the same time as the service

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[27] *In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 58 F.3d 896, 902 (3d Cir. 1995).

[28] *See Crosby v. Bowater Inc. Retirement Plan,* 212 F.R.D. 350, 362 (W.D. Mich. 2002), *vacated on other grounds,* 382 F.3d 587 (6th Cir. 2004), holding that "under [Treas. Reg.] § 1.411(a)-7, 'accrued benefits' include not only retirement benefits themselves, but also death benefits which are 'directly related' to the value of the retirement benefits." *See also*, *United Foods, Inc. v. Western Conference of Teamsters Pension Trust Fund,* 816 F. Supp. 602, 609 (N.D. Cal. 1993), *aff'd,* 41 F.3d 1338 (9th Cir. 1994) (distinguishing lump sum death benefits directly related to pension benefits from fixed amount death benefits, which are essentially allowances for funeral costs that are unrelated to age or service of participant), *citing Huber v. Casablanca Indus. Inc.*, 916 F.2d 85 (3d Cir. 1990).

pension.[29] That is why the Plan's termination provisions mandate protection and funding for Death Benefits owed to all participants "who are eligible for retirement."[30]

B. The District Court Erred in Concluding that the Plan Provisions Adopted by AT&T and Lucent and Recognizing that the Death Benefit was Vested Could be Ignored.

The district court mistakenly believed it could disregard the Plan Termination Provisions based upon *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989). The court reasoned that ERISA "prioritization pursuant to Section 4044 does not create vesting rights; but rather 'insurance' upon termination of a plan." Op. at 16, A 0024. The court also concluded that:

> Therefore, Defendants' act of categorizing the death benefit as a Category Two benefit has no bearing on when a participant's entitlement to the death benefit vested. Furthermore, because the Plan itself was not terminated, Section 4044 offers Plaintiffs no protection.

Op. at 17, A 0025.

The district court was mistaken. *Mead* does not preclude the conclusion that the Plan's termination hierarchy expresses the plan sponsors' own understanding and intention regarding the vested status and protections that must be accorded to

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[29] The Death Benefit is a funded future benefit. As with other forms of pension benefits paid to surviving beneficiaries, death is merely the event which triggers the obligation to actually begin paying the benefits.

[30] The unrebutted Affidavit of actuary Richard K. Schultz also confirmed that the Death Benefits were "treated as vested" in the ERISA-mandated Form 5500 reports. (A00438).

the actual benefits enumerated. *Mead* also did not consider or rule upon the evidentiary significance of the priorities that a plan sponsor actually established and wrote into a plan termination provision.

Mead actually underscores the controlling weight that must be given to these Plan Termination provisions. In *Mead*, the plan had a 30-year subsidized early retirement benefit, but the plaintiffs had not satisfied age and service requirements when the plan terminated. These benefits, or at least those for participants who had not yet qualified for them, were not specifically named in the plan's termination provisions. Nevertheless, the *Mead* plaintiffs argued their benefits were protected under "catch-all" category six of § 4044. *Mead*, 490 U.S. at 721. The Supreme Court held that § 4044 only refers to "the allocation of benefits *under the terms of the terminated plan*." *Id.* at 722-23 (emphasis added). The Court therefore concluded that the benefits had to find protection in the plan itself, and that § 4044(a)(6) "does not create benefit entitlements but simply provides for the orderly distribution of plan assets required by the terms of a defined benefit plan or other provisions of ERISA." *Id.* at 725.

Mead thus does not permit plan sponsors (or courts) to ignore the significance of benefit designations in plan documents. Appellants are not asking the Court to recognize new rights based on statutory language alone, but rather, to enforce existing plan language which these plan sponsors advisedly selected and

adopted as their own to confer a protected status and priority to Death Benefits ahead of other vested benefits. If the Death Benefit must have this high priority when the plan is in *extremis*, the protection is no less secure when the plan is on-going.

If a benefit is recognized as accrued and vested under a plan's termination provisions, the plan sponsor has no power to eliminate the benefit. But this is exactly what Lucent attempted to do. In its amendment removing the Death Benefit, Lucent also purported to amend the "Pension Plan Termination Arrangements" as follows:

> Section 4.9 of the Plan, as amended and restated as of January 1, 2000 ("Pension Plan Termination Arrangements"), is hereby amended by deleting the subparagraph "Second", relating to making provision for the payment of death benefits, and renumbering the succeeding subparagraphs "Third" and "Fourth", respectively, to "Second" and "Third."

(A 0162).

Defendants did not identify, and the district court did not cite, any authority granting a plan sponsor the power to eliminate by amendment a right to pension benefits which the sponsor itself recognized in plan documents to be both accrued and vested. By definition, vested benefits cannot be taken away. *See DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity, supra.* Plaintiffs state a claim under Counts I, II and IV of the Complaint.

C. Defendants Also Distributed SPDs that Confirmed the Vested Status of the Death Benefit. The District Court Erred in Concluding that the SPDs Were Not Relevant to the Vesting Question.

The language adopted by AT&T and Lucent for their SPDs also demonstrates that the Death Benefit is a protected, vested benefit. As demonstrated in Section II(B), the companies consistently advised participants through SPD provisions that the Death Benefit was a "defined benefit" in a defined benefit pension plan. As stated in Section I(A), defined benefit pension plans are subject to the minimum standards of ERISA Title I and Code § 401(a). These minimum standards include vesting and protection under the anti-cutback rule. While defendants may attempt to argue that the repeated identification of the Death Benefit as a defined pension benefit was an error, it remains undisputed that this supposed "error" was repeatedly and consistently made in SPDs and Form 5500 Annual Returns, and also was the basis for a history of valuable tax preferences.

The companies' SPDs also adopted language that was consistent with vesting of the Death Benefit. AT&T and Lucent repeatedly stated that a benefit "equal to one year's pay at retirement *will be paid* to the qualified beneficiary" of retirees receiving service pensions (A 0083, 0092, C. ¶¶ 64, 87) (emphasis added), or to the "mandatory beneficiary" of a retiree receiving a service pension. (A 0074, C. ¶ 41; A 0179, PS ¶ 21). This Court has held that similar language is consistent with an intent to vest. *In re New Valley Corp.*, 89 F.3d 143, 151-52 (3d Cir. 1996) (language that a

benefit "will be paid" consistent with vesting). The companies' adoption of the plan term "*Mandatory Beneficiary*" also expresses vesting. *Id.* at 152 ("The mandatory language denotes benefits that will be provided by the company once the participant retires, i.e., benefits that vest at retirement.").

Due to the pivotal informative role that SPDs play in ERISA's disclosure scheme, a participant can enforce SPD terms without demonstrating detrimental reliance. *Burstein v. Retirement Account Plan, supra*. Consequently, every participant had the right to understand that the Death Benefit was a protected pension benefit subject to the vesting requirements of ERISA and the Code. Plaintiffs state a claim under Counts I, II and IV of the Complaint.

IV. ALTERNATIVELY, EVEN IF NOT VESTED PREVIOUSLY, THE DEATH BENEFIT BECAME VESTED WHEN LUCENT FIRST TRANSFERRED EXCESS PENSION ASSETS UNDER CODE SECTION 420 IN 1999.

The Death Benefit was an accrued, defined pension benefit, and was also a vested benefit under express Plan terms. Assuming, without conceding, that the Death Benefit was an accrued pension benefit that had not yet vested as to some or all class members, it nevertheless became vested no later than September 1999, when Lucent first tapped into excess Plan assets to fund retiree health care benefits.

Between September 1999 to December 2001, Lucent made four separate transfers of "excess pension assets" in the Plan under Code § 420 to help fund medical benefits for management retirees. These transfers totaled over $ 888 million. *See* A 0208, PS ¶¶ 101-02.

Diverting pension assets for non-pension uses reduces funding security for pension benefits, so Congress acted to ensure that benefits expectations of each participant were fully protected. Lucent's asset transfers were "qualified" under Code § 420 only if they complied with all statutory conditions, including a requirement that the Plan expressly provide "that the accrued pension benefits of any participant or beneficiary under the plan become nonforfeitable in the same manner which would be required if the plan had terminated immediately before"

the transfer. Code § 420(c)(2)(A). Lucent included this language in the Plan.[31]

As demonstrated in Section III(A), the Plan Termination Arrangements dictated how Death Benefits would be funded upon Plan termination and thus make the consequences of the § 420 transfers simple to ascertain. Under § 420, all accrued pension benefits must vest immediately before the moment of the transfer, in the same way that benefits would vest upon a plan termination. Since the Plan provided that upon termination all Death Benefits were nonforfeitable and funding would be dedicated for all future payments, the Plan also required the Death Benefits to be nonforfeitable in connection with a § 420 transfer as if the Plan were then terminating.

The record also shows that Lucent reported to the Department of Treasury under penalty of perjury that all pension plan benefits had become fully vested. The Plan's Financial Statements attached to the 1999 Form 5500 expressly state, for example, that "As a result of a transfer of pension assets during 1999 pursuant to IRC 420, all participants became vested in their accrued pension benefits." (A 0209, PS ¶ 104; A 1793, 1798-99, 1999 Financial Statements). The same filings also show that, from December 31, 1998 to December 31, 1999, total nonvested benefits (which previously had included the actuarial value of Death Benefits) dropped from $ 837 million to zero, so that no pension benefits remained

[31] A 203, PS ¶¶ 87-88; A 1326-27, § 5.6(b) 2000 LRIP Plan Doc.; A 312, § 6.6(b) 1998 LMPP Plan Doc.

nonvested. *Id.* The Financial Statements explained that this change had occurred precisely because of the vesting effect of § 420 transfers in 1999. *Id.*[32] Although plaintiffs presented these facts in opposing the motion, the court did not consider them due to its erroneous conclusion that the Death Benefit must be a welfare benefit. Even if the Death Benefits had not previously vested, they became vested not later than Lucent's first § 420 transfer in 1999. Once vested, they remained vested.

Plaintiffs state a claim under Count I of the Complaint.

V. APPELLANT LUCAS INCORPORATES ARGUMENTS BY CO-APPELLANTS FOSS, ET AL.

Pursuant to F.R.A.P. 28(i), Appellant Lucas respectfully adopts the arguments made in Section III of the Brief for Appellants Foss, et al. in the related appeal.

[32] This was not an isolated occurrence. In 2000, the only nonvested benefits reported were for new hires and other new Plan entrants who did not benefit from § 420 vesting. (A 0209-10, PS ¶ 105). In 2001, the final year in which a transfer occurred, the nonvested benefits again were reported as zero based on vesting due to the § 420 transfers. *Id.*

CONCLUSION

For the foregoing reasons, Appellant Lucas respectfully requests that this Court reverse the judgment and remand this case for further proceedings.

Dated: April 20, 2007

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned attorneys hereby certify that they are members of the bar of this Court.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because this brief contains 13,896 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: April 20, 2007

s/ Scott M. Lempert
Scott M. Lempert

CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

I hereby certify that the text of the electronic PDF version of the foregoing Brief of Appellant Helen P. Lucas that was filed electronically with the Court is identical to the text of the hard copies of the brief that were filed with the Court and served on counsel.

I hereby further certify that a virus check of the electronic PDF version of the brief was performed using McAfee Antivirus Software, and the PDF file was found to be virus-free.

s/ Scott M. Lempert

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2007, I caused two copies of the foregoing Brief of Appellant Helen P. Lucas to be served by UPS Overnight Service upon the following counsel:

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