

Case Nos. 06-5008 & 06-5009

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

In Re: Lucent Death Benefits ERISA Litigation

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

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

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*Appeal from the United States District Court for the District of New Jersey,  
Case Nos. 03-cv-5017, 04-cv-640, 04-cv-1099 (Cavanaugh, J.)*

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**BRIEF OF PLAINTIFFS-APPELLANTS EDWARD FOSS,  
SARAH CONDER, ARTHUR J. BERENDT, AND ROBERT HOWARD**

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## STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1132(e)(1), 1331. This Court has jurisdiction under 28 U.S.C. § 1291, as this is an appeal from a final order dismissing this action entered on November 27, 2006. (JA00042; Docket Entry 72).<sup>1</sup> Plaintiffs-Appellants Foss, Conder, Berendt, and Howard (collectively, the “Foss Plaintiffs”) filed a timely notice of appeal on December 6, 2006. (JA00001-3; Notice of Appeal; JA00042; Docket Entry 73).

## STATEMENT OF RELATED PROCEEDINGS

These cases have not been before this Court previously. The Foss Plaintiffs are aware of two other potentially related matters: *Chastain v. AT&T Corp.*, No. 04-281 (W.D. Okla.), and *Raetsch v. Lucent Tech., Inc.*, No. 05-5134 (D.N.J.).

## STATEMENT OF THE ISSUES

I. Is a post-retirement benefit, which is payable upon death from a trust that is part of a defined benefit pension plan to mandatory beneficiaries of retirees who met certain age and service requirements, a welfare benefit that can be terminated at will if: a) the benefit is tied to the retired employees’ compensation and annual pension; b) the benefit is payable

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<sup>1</sup> These consolidated appeals involve three actions that were ultimately consolidated in the district court. Citations to the master docket appear as “Docket Entry \_” while citations to the dockets in the other two actions appear as “*Lucas* Docket Entry \_” or “*Berendt* Docket Entry \_.”

after termination of the plan; and c) the benefit is eligible for rollover treatment?

**II.** Is a post-retirement benefit, which is payable upon death from a trust that is part of a defined benefit pension plan to mandatory beneficiaries of retirees who met certain age and service requirements and tied to the retired employees' compensation and annual pension, protected from elimination under Section 204(g) of ERISA?

**III.** If a defined benefit pension plan provides that a post-retirement benefit payable upon death to the mandatory beneficiaries of retirees who met certain age and service shall survive the termination of the plan for those employees who had met the age and service requirements prior to termination, may a successor sponsor, having voluntarily assumed all liabilities to its predecessor's retirees under the plan and received assets to fund those liabilities, unilaterally revoke the benefit for retirees who met the age and service requirements prior to retirement, but have not yet died?

The Foss Plaintiffs raised these issues in opposing defendants' motion to dismiss or for summary judgment. (JA0039-40; Docket Entries 54, 55, 56, 59). The district court ruled upon them in its opinion granting defendants' motion. (JA00014-29; slip op. 6-21).

#### **STATEMENT OF THE STANDARD OF REVIEW**

The district court granted defendants' motion to dismiss or for summary judgment. This Court's review of an order granting a motion to dismiss for

failure to state a claim is plenary. *Burstein v. Retirement Account Plan for Employees of Allegheny Health, Educ. and Research Found.*, 334 F.3d 365, 374 (3d Cir. 2003) (citing *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996)). As a consequence, this Court applies the same standard that governed the district court. See *California Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 143 (3d Cir. 2004). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 140 F.3d 478, 483 (3d Cir. 1998).

An order granting summary judgment is also subject to plenary review.<sup>2</sup> *Bellas v. CBS, Inc.*, 221 F.3d 517, 522 (3d Cir. 2000) (citations omitted). Consequently, this Court applies the same test the district court was required to apply. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976). An order granting summary judgment may be affirmed only where the record demonstrates that the moving party was entitled to judgment as

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<sup>2</sup> The defendants moved for dismissal under FED. R. CIV. P. 12(b)(6), and for summary judgment under FED. R. CIV. P. 56. The district court addressed both standards in its opinion (JA00013-14; slip op. at 5-6), but ultimately resolved the case under Rule 12(b)(6). (JA00029; slip op. at 21). This Court is free to affirm on any grounds supported by the record below. *Scirex Corp. v. Fed. Ins. Co.*, 313 F.3d 841, 849 (3d Cir. 2002) (citing *University of Md. v. Peat Marwick Main & Co.*, 923 F.2d 265, 275 (3d Cir. 1991)). Consequently, the summary judgment standard under Rule 56 remains relevant to the disposition of these appeals.

a matter of law and that there was no genuine issue of material fact. FED. R. CIV. P. 56(c); *see Bellas*, 221 F.3d at 522. The party opposing a motion for summary judgment is entitled to have the allegations set forth in his affidavits taken as true, and to have the benefit of the doubt when his assertions conflict with those of the moving party. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1362-63 (3d Cir. 1992). Further, the party opposing summary judgment is entitled to have all inferences from the underlying facts drawn in his favor. *Id.*

The interpretation of a plan document under ERISA is a question of law. *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co.*, 188 F.3d 130, 138 (3d Cir. 1999). As a consequence, plenary review applies to the question whether a particular document is ambiguous and to the district court's application of the parol evidence rule to determine the admissibility of extrinsic evidence. *Martin v. Monumental Life Ins. Co.*, 240 F.3d 223, 232 (3d Cir. 2001). The decision to admit or exclude particular evidence is reviewed for abuse of discretion. *Id.* A district court abuses its discretion if its decision "rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact." *Chao v. Community Trust Co.*, 474 F.3d 75, 79 (3d Cir. 2007) (*quoting NLRB v. Frazier*, 966 F.2d 812, 815 (3d Cir. 1992)).

### **STATEMENT OF THE CASE**

Historically, long-term management employees of AT&T Corp. ("AT&T") were entitled to have benefits paid to their qualified

beneficiaries from the assets of AT&T's defined benefit pension plan for management employees upon their death; we will refer to these as Pensioner Death Benefits. For many AT&T retirees, this benefit obligation was transferred to Lucent Technologies Inc. ("Lucent") in 1996, as part of a corporate reorganization. In 2003, Lucent announced that it was eliminating this benefit, giving rise to this litigation.

On October 23, 2003, Edward Foss filed a complaint, commencing the first of these actions. (JA00034; Docket Entry 1). Defendants filed an answer on February 9, 2004, which they amended on February 20, 2004. (JA00035; Docket Entries 7, 8). Two related actions were thereafter filed, one by Vincent R. Lucas,<sup>3</sup> and one by Arthur R. Berendt and Robert Howard. (JA00045; *Lucas* Docket Entry 1; JA00048; *Berendt* Docket Entry 1). Answers were filed in each of these actions as well.<sup>4</sup>

Defendants sought to file an early summary judgment motion, but the parties disagreed on the extent of the discovery that would be appropriate prior to such a motion. After receiving submissions from the parties, the Honorable Mark Falk directed that filing of defendants' motion for

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<sup>3</sup> Mr. Lucas died during the pendency of the litigation, and his surviving spouse sought to be substituted. The district court denied the request (JA00029; slip op. at 21), and Mrs. Lucas is the appellant in case no. 06-5009.

<sup>4</sup> The parties stipulated to the consolidation of the three actions, and the district court endorsed that stipulation on January 27, 2005. (JA00037; Docket Entry 30).

summary judgment would be conditioned upon them providing specified discovery. (JA00051-59; Trans. Jan. 11, 2005 at 25-32).

After the conclusion of the defendants' production of documents and production of documents by third parties, the plaintiffs notified the defendants that they wished to file an amended complaint. Thereafter, in July, 2005, they forwarded a proposed amended complaint to the defendants and inquired whether they would consent to its filing. (Letter dated Aug. 2, 2005; *see* JA00037; Docket Entry 32). On July 29, 2005, all defendants filed a motion for summary judgment.

On September 8, 2005, the magistrate judge held a telephone conference to discuss the dispute over the plaintiffs' request that they be granted leave to file an amended complaint. (JA00038; Docket, Minute Entry Sept. 8, 2005). Ultimately, plaintiffs were granted leave to amend by order dated November 9, 2005, and a consolidated amended complaint was filed November 10, 2005. (JA00038; Docket Entries 43, 44). In conjunction with the filing of the amended complaint, Mrs. Conder was added as an additional named plaintiff. (JA00066; Cons. Am. Compl. ¶ 19).

On December 30, 2005, defendants renewed their motion for summary judgment. (JA00038; Docket Entry 46). Defendants asserted that Pensioner Death Benefits were either ancillary benefits or welfare benefits and that their elimination was permitted because of the reservation of rights clause in the relevant plan documents.

Plaintiffs responded on March 8, 2006. (JA00039-40; Docket Entries 54-56). Plaintiffs supplemented their summary judgment response on March 16, 2006 by lodging in the record certain additional materials that had been subject to a designation of confidentiality that the defendants withdrew. (JA00040; Docket Entry 59).

On November 9, 2006, the district court held oral argument, and, on November 27, 2006, it entered an order dismissing the actions. (JA00042; Docket Entries 69, 71-72).

In dismissing the actions, the district court reasoned as follows: first, the court concluded that the terms of the plan documents were unambiguous, and that extrinsic evidence was therefore not relevant to construe them (JA00014-16; slip op. at 6-8); second, the court held that the decision to spin-off Lucent<sup>5</sup> and to amend the successor plan to eliminate Pensioner Death Benefits were non-fiduciary decisions (JA00016-19; slip op. at 8-11); third, the court ruled that Pensioner Death Benefits were properly classified as welfare benefits (JA00019-22; slip op. at 11-14); fourth, the district court determined that Pensioner Death Benefits did not vest under the relevant plan documents (JA00023-27; slip op. at 15-19); fifth, the district court ruled that Pensioner Death Benefits were not protected from elimination under a unilateral contract theory. (JA00027-29; slip op. at 19-21). In view of its

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<sup>5</sup> Plaintiffs did not contend that the spin-off of Lucent was a fiduciary function, nor did they attack the decision to spin-off plan liabilities and assets.

disposition of this motion, the district court did not address a pending motion by the surviving spouse of Vincent R. Lucas to be substituted as a plaintiff.

The Foss Plaintiffs filed a timely notice of appeal and seek reversal of the judgment below. Helen P. Lucas, the surviving spouse of Vincent R. Lucas, also filed a timely notice of appeal, and this Court ordered that these appeals be consolidated for purposes of scheduling, joint appendix and disposition.

### STATEMENT OF FACTS

For many years, plaintiffs Foss, Berendt and Howard were participants in a defined benefit pension plan that AT&T sponsored for its management employees,<sup>6</sup> which, at the time they retired, was known as the AT&T Management Pension Plan (the “AT&T Plan”). Mr. Foss retired in 1985 with over twenty-nine years of service. (JA00065; Cons. Am. Compl. ¶ 15; JA00173; Pls.’ Statement under Local Rule 56.1 (“Pls.’ St.”) ¶ 1). Mr. Berendt retired in 1989 with more than forty-one years of service, and Mr. Howard retired in 1984 with over twenty-eight years of service. (JA00065-66; Cons. Am. Compl. ¶¶ 17-18; JA00173; Pls.’ St. ¶ 1).

Upon retirement, plaintiffs Foss, Berendt and Howard began to receive payments under the terms of the AT&T Plan, which provided that they would receive a “service pension.” This benefit was called a service

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<sup>6</sup> AT&T, and its successor, Lucent, maintained separate plans for their unionized workforce, which are not implicated here.

pension because eligibility was restricted to those who met certain age and service requirements. (*See, e.g.*, JA00905; Pls.' Ex. 7 at D001294).

Plaintiff Conder is the surviving spouse of a deceased retiree who was a participant in the same plan. Mrs. Conder's husband, Joseph B. Conder, retired in 1985 with thirty-eight years of service. (JA00066; Cons. Am. Compl. ¶ 19). Mr. Conder was receiving a service pension when he died. (JA00085; Cons. Am. Compl. ¶ 69).

Under the AT&T Plan, service pensions had two additional benefits that were not made available to other retirees: participants eligible for service pensions were entitled to subsidized early retirement benefits that permitted them to retire early with an unreduced pension, and they were also entitled to Pensioner Death Benefits. (*See, e.g.*, JA00924, 975-77; Pls.' Ex. 7 at D001313, 1364-66).

#### *AT&T Spins Off Lucent.*

In 1996, AT&T spun off Lucent, creating an independent company. This was accomplished under an agreement known as the Separation and Distribution Agreement. (JA00194; Pls.' St. ¶ 64). At the same time, AT&T spun off a portion of its pension assets and liabilities to newly formed plans sponsored by Lucent, effective October 1, 1996. (JA00085; Cons. Am. Compl. ¶ 68; JA00194; Pls.' St. ¶ 64). In connection with the spin-off, AT&T and Lucent entered into an Employee Benefits Agreement (the "Benefits Agreement") to address benefit plan obligations. (JA00086; Cons. Am. Compl. ¶ 70; JA00195-96; Pls.' St. ¶ 66). The Benefits Agreement was an

“Ancillary Agreement” to the Separation and Distribution Agreement.  
(JA00195; Pls.’ St. ¶ 66; JA01159 Pls.’ Ex. 9, § 1.6).

Under the Benefits Agreement, AT&T delegated its duty to pay benefits, and Lucent agreed to “pay, perform, fulfill and discharge” AT&T’s “Liabilities to or relating to Lucent Individuals and Transferred Individuals and their respective dependents and beneficiaries, in each case relating to, arising out of or resulting from employment by AT&T or an AT&T Entity before becoming Lucent Individuals or Transferred Individuals . . . .”<sup>7</sup>  
(JA00195; Pls.’ St. ¶ 66; JA01200; Pls.’ Ex. 10 at D008901; *see also* JA00086; Cons. Am. Compl. ¶ 70).

The Separation and Distribution Agreement defined “Liabilities” as follows:

. . . any and all losses, claims, charges, debts, demands, actions, causes of action, suits, damages, obligations, payments, costs and expenses, sums of money, accounts, reckonings, bonds, specialties, indemnities and similar obligations exonerations, covenants, contracts, controversies, agreements, promises, doings, omissions, variances, guarantees, make whole agreements and similar obligations, and other liabilities, including all contractual obligations, **whether absolute or contingent, matured or unmatured, liquidated or unliquidated, accrued or unaccrued . . . .**

(JA00196; Pls.’ St. ¶ 67; JA01165-66; Pls.’ Ex. 9, § 1.62) (emphasis supplied).

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<sup>7</sup> Each of the Foss Plaintiffs was a Transferred Individual under the Benefits Agreement. (JA00086; Cons. Am. Compl. ¶ 27; JA00196; Pls.’ St. ¶ 68).

In return for assuming this obligation to “pay, perform, fulfill and discharge,” AT&T’s benefits liabilities to the plaintiffs and others, Lucent received an allocation of assets from the AT&T Plan that exceeded the present value of the liabilities it accepted.<sup>8</sup> (JA00086; Cons. Am. Compl. ¶ 71; JA00197; Pls.’ St. ¶ 70; *see* JA01694-95; Pls.’ Ex. 27 at D009016-17).

To comply with the Benefits Agreement, Lucent established the Lucent Technologies Inc. Management Pension Plan (the “Lucent Plan”), which was effective October 1, 1996. (JA00087; Cons. Am. Compl. ¶ 75; JA00198; Pls.’ St. ¶ 73). In light of Lucent’s obligations to assume and perform all of AT&T’s benefits liabilities, the initial plan document provided that “[t]he Plan assumes and is solely responsible for all liabilities as of September 30, 1996 relating to Transferred Individuals.” (JA00198; Pls.’ St. ¶ 73; JA01215; Pls.’ Ex. 11 at D001436). Lucent’s initial plan expressly incorporated the terms of its predecessors at AT&T: “[f]or Transferred Individuals who terminated employment before October 1, 1996, the provisions of the AT&T Management Pension Plan in effect at termination of the Transferred Individual’s employment shall be deemed to be incorporated in this Plan and shall govern.” (JA01215; Pls.’ Ex. 11 at D001436; *see* JA00087-88; Cons. Am. Compl. ¶ 76; JA00199; Pls.’ St. ¶ 74).

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<sup>8</sup> The Benefits Agreement explicitly provided that Lucent’s receipt of assets from the AT&T Plan was conditioned upon its assumption of all of the AT&T Plan’s liabilities. (JA00086-87; Cons. Am. Compl. ¶ 72; JA00197-98; Pls.’ St. ¶ 71; JA01202; Pls.’ Ex. 10 at D008903).

As a result of this transaction, the Foss Plaintiffs were now covered by a defined benefit pension plan sponsored by Lucent that was funded with assets furnished by AT&T and that incorporated the terms of the plan documents that had governed their rights previously. All of their benefit obligations were honored by Lucent until 2003, when it announced that Pensioner Death Benefits would no longer be paid. As the validity of Lucent's decision to eliminate Pensioner Death Benefits turns, in large measure, on the language of the relevant plan documents, we discuss the plans at some length below.

*The Terms of the AT&T Plan.*

Pensioner Death Benefits were a long-standing feature of the AT&T Plan and its predecessors. (JA000175; Pls.' St. ¶ 11).

In 1964, the AT&T Plan was amended to provide that the amount of the Pensioner Death Benefit would equal the final twelve months of compensation.<sup>9</sup> (JA00176; Pls.' St. ¶ 14; JA00509-10; Pls.' Ex. 2 at D000303-04). At the same time, AT&T made two other significant changes. *First*, it established a trust fund for payment of Pensioner Death Benefits, which it agreed to pre-fund on an actuarial basis. *Second*, AT&T added a clause to the plan, requiring that assets of the plan be applied to pay Pensioner Death Benefits that would become payable after termination of the plan to

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<sup>9</sup> Pensioner Death Benefits had previously decreased over time, as the retirees drew on their pensions. The original formula was carried through in the plan documents for those who retired prior to October 31, 1963. (JA00510; Pls.' Ex. 2 at D000304).

the beneficiaries of existing retirees and of employees who were eligible for retirement as of the termination date, thereby ensuring future payment of Pensioner Death Benefits in the event of a plan termination.<sup>10</sup>

These two clauses provided as follows:

9. . . . The Company, . . . , has also established a trust fund, to be known as the "Second Pension Fund" for payment of certain death benefits as set forth in Paragraph 9 of Section 7. It undertakes to maintain this Fund by periodic charges to operating expenses and payments to the Fund in such amounts that there will be available in the Fund an amount sufficient to provide death benefits which may be payable from the Fund under the Plan. . . .

10. In the event of the termination of the Plan, the balances in the Pension Fund and the Second Pension Fund shall, for purposes of this Paragraph 10, be considered together as "Pension Fund" and shall be applied as follows:

*First:* . . .

*Second:* To making provision (but only from that portion of the Pension Fund representing the balance in the Second Pension Fund) for the payment of death benefits attributable to deaths occurring prior to the date of termination which would have been payable from the Second Pension Fund, and for the payment, upon the deaths of retired employees who were on the pension roll as of the date of termination and of employees eligible as of that date for retirement at their own request, of death benefits which would have been payable from the Second Pension Fund, had the Plan not been so terminated.

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<sup>10</sup> The two changes were related: once AT&T established a tax-exempt trust under Section 401(a) of the Internal Revenue Code, it was required to apply its assets to the "satisfaction of all liabilities with respect to employees and their beneficiaries under the trust . . . ." I.R.C. § 401(a)(2).

*Third:* To making provision, to the extent permitted by the balance, if any, remaining in the Fund after the foregoing provision shall have been made, for the payment of deferred pensions . . . .

(JA00499-501; Pls.' Ex. 2 at D000293-95).

These two changes to the AT&T Plan became standard features of successor pension plans at AT&T. The provision of the plan document providing that AT&T would pre-fund Pensioner Death Benefits was designed "to provide security for the participants by making the receipt of the promised benefits independent of what happens to the company."

(JA00192; Pls.' St. ¶ 56; JA01963; Pls.' Ex. 34 at D015298).

AT&T's plan documents gave it the right to amend or terminate the plan, but that right was qualified:

The Committee, with the consent of the President and subject to the approval of the Board of Directors, may from time to time make changes in the Plan . . . , and the Company may terminate said Plan, **but such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder.**

(JA00524; Pls.' Ex. 2 at D000318) (emphasis supplied). This qualification of the power to amend the plan became a standard feature of successor plans at both AT&T and Lucent.<sup>11</sup>

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<sup>11</sup> (JA00586; Pls.' Ex. 3 at D000564; JA00658; Pls.' Ex. 4 at D000958; JA00742; Pls.' Ex. 5 at D010266; JA00874; Pls.' Ex. 6 at D001263; JA01034; Pls.' Ex. 7 at D001423; JA01151; Pls.' Ex. 8 at D010378; JA01315; Pls.' Ex. 11 at D001536; JA01329; Pls.' Ex. 12 at D001714).

Under the AT&T Plan, Pensioner Death Benefits had a number of common features:

- Pensioner Death Benefits were payable to spouses and other dependents.<sup>12</sup>
- These benefits were payable either in installments or in a lump sum.<sup>13</sup>
- Employees were entitled to file a directive indicating that they wanted the Pensioner Death Benefit paid out in installments.<sup>14</sup>
- The amount of the benefit was set at one year's compensation.<sup>15</sup>
- Eligibility for the benefit was tied to the age and service requirements for a service pension.<sup>16</sup>
- Finally, Pensioner Death Benefits were paid from a tax-exempt pension trust, not from life insurance.<sup>17</sup>

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<sup>12</sup> (JA00073; Cons. Am. Compl. ¶ 37(e); JA00177; Pls.' St. ¶ 19(a); JA00509-10; Pls.' Ex. 2 at D000303-304; JA00711-14; Pls.' Ex. 5 at D010235-238; JA00828-31; Pls.' Ex. 6 at D001217-220; JA00975-978; Pls.' Ex. 7 at D001364-367; JA001117-19; Pls.' Ex. 8 at D010344-346; JA001282-83; Pls.' Ex. 11 at D001503-504).

<sup>13</sup> (JA00073; Cons. Am. Compl. ¶ 37(f); JA00177-78; Pls.' St. ¶ 19(b); JA00512; Pls.' Ex. 2 at D000306; JA00716; Pls.' Ex. 5 at D010240; JA01120; Pls.' Ex. 8 at D010347; JA01284; Pls.' Ex. 11 at D001505).

<sup>14</sup> (JA00178; Pls.' St. ¶ 19(c); JA00834; Pls.' Ex. 6 at D001223; JA00980-81; Pls.' Ex. 7 at D001368-70).

<sup>15</sup> (JA00073; Cons. Am. Compl. ¶ 37(a); JA00178; Pls.' St. ¶ 19(d); JA00509-10; Pls.' Ex. 2 at D000303-304; JA00711-12; Pls.' Ex. 5 at D010235-36; JA01117-18; Pls.' Ex. 8 at D010344-345; JA01282; Pls.' Ex. 11 at D001503).

<sup>16</sup> (JA00073; Cons. Am. Compl. ¶ 37(b); JA00178; Pls.' St. ¶ 19(e); JA00494-95, 509-10; Pls.' Ex. 2 at D000288-289, D000303-304; JA00676, 711-12; Pls.' Ex. 5 at D010200; D010235-236; JA01060, 1117-18; Pls.' Ex. 8 at D010287; D010344-345; JA01228, 1282; Pls.' Ex. 11 at D001449, D001503).

AT&T did make periodic changes to the terms of the AT&T Plan. For example, in 1976, the plan was amended to identify particular dependents who were “Mandatory Beneficiaries.” These were: a spouse of the retiree (if living with the retiree at the time of death); unmarried children under age 23; children over age 23 who were mentally or physically incapable of self-support; and dependent parents who were housed by the retiree.<sup>18</sup> (JA00073-74; Cons. Am. Compl. ¶ 40; JA00179; Pls.’ St. ¶ 21; JA00565; Pls.’ Ex. 3 at D000543). The plan also had provisions for potential death benefits payable to “Discretionary Beneficiaries.” (JA00565-66; Pls.’ Ex. 3 at D000543-44). The revised 1976 plan document differentiated between the two classes of beneficiaries; while death benefits for Mandatory Beneficiaries “shall be paid,” death benefits to Discretionary Beneficiaries “may be paid.” (JA00565; Pls.’ Ex. 3 at D000543).

At the same time, the formula for Pensioner Death Benefits was amended to provide that “[t]he Death Benefit . . . shall not be less than the annual pension allowance . . . .” (JA00564; Pls.’ Ex. 3 at D000542).

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<sup>17</sup> (JA00073; Cons. Am. Compl. ¶ 37(c); JA00178; Pls.’ St. ¶ 19(f); JA00514; Pls.’ Ex. 2 at D000308; JA00719-20; Pls.’ Ex. 5 at D010243-244; JA01122; Pls.’ Ex. 8 at D010349; JA01286; Pls.’ Ex. 11 at D001507).

<sup>18</sup> This definition became a standard feature of all of the successor plans at AT&T and Lucent. (JA00179; Pls.’ St. ¶ 21; JA00635-36; Pls.’ Ex. 4 at D000935-936; JA00713-14; Pls.’ Ex. 5 at D010237-238; JA00830-31; Pls.’ Ex. 6 at D001219-220; JA00977-78; Pls.’ Ex. 7 at D001366-67; JA01118-19; Pls.’ Ex. 8 at D010345-346; JA01283; Pls.’ Ex. 11 at D001504; *see also* JA00306; Foss Decl. Ex. 4 at EF000259).

In 1979, AT&T merged the separate trust fund it had established to pay Pensioner Death Benefits with the trust fund used to pay other pension benefits, thereby creating a single tax-exempt trust fund for Pensioner Death Benefits and other pension benefits under Section 401(a) of the Internal Revenue Code. (JA00074; Cons. Am. Compl. ¶ 42; JA00176; Pls.' St. ¶ 15; JA00617-18; Pls.' Ex. 4 at D000917-918).

At the same time, AT&T restated the termination provisions to account for the merger of the two separate trust funds, again placing Pensioner Death Benefits in the second highest category, ahead of a variety of deferred vested pension benefits. (JA00075; Cons. Am. Compl. ¶ 44; JA00180; Pls.' St. ¶ 24; JA00620-22; Pls.' Ex. 4 at D000920-22).

In 1980, the existing AT&T pension plan was restated and renamed the Bell System Management Pension Plan (the "Bell Plan"). (JA00071; Cons. Am. Compl. ¶ 33; JA00174; Pls.' St. ¶ 7). In conjunction with the break-up of the Bell System, the Bell Plan was restated and renamed the AT&T Management Pension Plan. (JA00072; Cons. Am. Compl. ¶ 34; JA00175; Pls.' St. ¶ 8). As part of that transaction, assets and liabilities of the Bell Plan were spun-off to the regional bell operating companies, such as Bell Atlantic and Nynex. (JA00072; Cons. Am. Compl. ¶ 34; JA00174-75; Pls.' St. ¶ 8). In calculating the amount of assets to be transferred under Section 414(l) of the Code, Pensioner Death Benefits were included. (JA02137-38; Confidential Supplement to Pls.' St. ("Conf. Supp.") ¶¶ 1-3; JA02144-45; Pls.' Ex. 39 at M007514-15).

Although there were subsequent amendments to the AT&T Plan, they did not alter the basic terms relating to Pensioner Death Benefits. (JA00075-76; Cons. Am. Compl. ¶ 46). AT&T issued new plan documents in 1984 and 1985 that republished the standard provisions relating to Pensioner Death Benefits. (JA00743-874; Pls.' Ex. 6; JA00875-1039; Pls.' Ex. 7). These were the plans that were in place when plaintiffs Howard and Foss retired and when plaintiff Conder's husband retired. (JA00065-66; Cons. Am. Compl. ¶¶ 15, 18-19).

At the time they retired, the governing plan documents provided that a pensioner death benefit "shall be paid" if they were survived by a mandatory beneficiary. (JA00829, 831; Pls.' Ex. 6 at D001218, 220; JA00976, 978; Pls.' Ex. 7 at D001365, 367). The Plan still provided that Pensioner Death Benefits would survive termination of the plan. (JA00817-18; Pls.' Ex. 6 at D001206-07; JA00964-66; Pls.' Ex. 7 at D001353-55). And the AT&T Plan still provided that an amendment to the plan could not deprive a participant "of any benefit or pension to which he may have previously become entitled hereunder." (JA00874; Pls.' Ex. 6 at D001263; *see also* JA01034; Pls.' Ex. 7 at D001423).

At the time of the spin-off that created Lucent, the AT&T Plan provided for Pensioner Death Benefits as follows:

- a. In the event of the death of any person who at the time of death is receiving a pension granted under Section 4.1(a) [relating to service pensions] or 4.1(c) of this Plan [relating to disability pensions] or any Predecessor Plan, the Committee or the BCAC, as applicable, in its discretion, but subject to the

following provisions of this Section 5.4, may authorize a Death Benefit to the spouse or dependent relatives of the pensioner . . . .

b. If such pensioner leaves any beneficiary bearing the relationship to the deceased and conforming to the other conditions stated with respect to 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 had died on his or her last day of active service before retirement on pension . . . .

(ii) . . . .

The Death Benefit payable under Sections 5.4(b)(i) or (ii) shall not be less than the annual pension allowance under Section 4.2.

(JA01117-18, Pls.’ Ex. 8 at D010344-45 (emphasis supplied); *see* JA01060, 1065, 1118-19; Pls.’ Ex. 8 at D010287, 292, 345-46).

Under this version of the AT&T Plan, Pensioner Death Benefits continued to be paid from the pension trust fund, while death benefits to retirees receiving disability pensions or death benefits to discretionary beneficiaries were not. (JA01122, Pls.’ Ex. 8 at D010349).

As of the time of the spin-off, AT&T’s right to amend or terminate the plan was still qualified, barring changes that would interfere with an employee’s right “to any benefit or pension to which he or she may have previously have become entitled hereunder.” (JA01151; Pls.’ Ex. 8 at D010378). If the plan terminated, Pensioner Death Benefits remained

protected, receiving the second highest priority upon distribution under the termination provisions of the AT&T Plan, ahead of a variety of other pension benefits. (JA01113-14; Pls.' Ex. 8 at D010340-41).

*AT&T's Disclosures About the Plan.*

AT&T provided disclosures to employees about their benefits in Summary Plan Descriptions ("SPDs"). The SPDs that AT&T issued referred to the Pensioner Death Benefits as "Sickness Death Benefits" (JA00078-79; Cons. Am. Compl. ¶ 52; JA00184-86; Pls.' St. ¶¶ 36, 39, 41), and advised participants that "[a] benefit equal to one year's pay at retirement **will be paid** to the qualified beneficiary of an employee who retires with a Service or Disability Pension." (JA01335; Pls.' Ex. 14 at D010406 (emphasis supplied); *see also* JA01356; Pls.' Ex. 15 at D010448; JA01395; Pls.' Ex. 16 at D010487; JA01415; Pls.' Ex. 17 at D010565).

AT&T advised its employees that their benefits were being offered under both a pension plan and a welfare plan:

**Type of Plan**

The Plan is classified as both a pension plan and a welfare plan under the definitions of the Employee Retirement Income Security Act of 1974. It is a "defined benefit pension plan" for Service and Deferred Vested Pension purposes and for payment of certain Sickness Death Benefits at the death of a Pension Plan participant. The plan is a "welfare plan" for purposes of providing certain other death benefit payments and disability benefit payments.

(JA01337; Pls.' Ex. 14 at D014012; *see also* JA01361; Pls.' Ex. 15 at D010453; JA01398; Pls.' Ex. 16 at D010490; JA01417; Pls.' Ex. 17 at D010568).

Because the SPDs for its pension plan described benefits under both a defined benefit pension plan and under separate welfare benefit plans, AT&T began assigning different plan numbers to the defined benefit plan and the welfare plans, and disclosing the assigned plan numbers in its SPDs, as follows:

#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 policy underwritten by The Continental Insurance Company.

(JA01398-99; Pls.' Ex. 16 at D010490-91; *see also* JA01417-18; Pls.' Ex. 17 at D010568-69).

What the SPD characterized as "certain death benefits" under the pension plan (Plan #006) included the Pensioner Death Benefits payable to Mandatory Beneficiaries of retirees receiving service pensions, because these benefits were "paid from the [pension] Trust Fund." The plan documents provided that Pensioner Death Benefits payable on account of the deaths of service pensioners "shall be paid from the Pension Fund," either by direct payment to the survivor or by applying pension fund money to buy an annuity for the survivor.<sup>19</sup> (JA00839-40; Pls.' Ex. 6 at

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<sup>19</sup> This portion of the plan provided in relevant part as follows:

**. . . Death Benefits payable pursuant to Paragraph 3(b) of this Section 5 to the initial beneficiary or beneficiaries on account of deaths of service pensioners, exclusive of any amount**

D001228-229). In contrast, death benefits payable to disabled employees who were not receiving a service pension were paid from corporate funds. (JA01398; Pls.' Ex. 16 at D010490). This disclosure about the different plans became a standard feature of the SPDs. (JA00079; Cons. Am. Compl. ¶ 53; JA00188-89 Pls.' St. ¶ 47; JA01417-18; Pls.' Ex. 17 at D010568-69; JA01420; Pls.' Ex. 18 at D002007).

To comply with ERISA's reporting requirements, AT&T filed Annual Reports on Form 5500, which consistently treated Pensioner Death Benefits payable to Mandatory Beneficiaries of retirees who were receiving service pensions as a "liability" of Plan #006, the defined benefit pension plan. (JA00080-81; Cons. Am. Compl. ¶¶ 58, 59; JA01463, 1506; Pls.' Ex. 21 at D015885, 15928; JA01550, 1573; Pls.' Ex. 24 at 1, Sch. B, Att. I, pg. 3). Lucent would later adopt the same practice. (See JA00091; Cons. Am. Compl. ¶¶

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(Footnote Continued)

payable under Subparagraph (ii) of Paragraph 3(b) in excess of the minimum set forth in said Paragraph 3(b), **shall be paid from the Pension Fund either directly or through the purchase of annuities from an insurance company as the Company may determine.**

(JA00839-40; Pls.' Ex. 6 at D001228-229) (emphasis added).

Paragraph 3(b) of Section 5 of the plan provided for payment of the Pensioner Death Benefit "[i]f 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 Subparagraph 4(a) of this Section." (JA00829; Pls.' Ex. 6 at D001218). Paragraph 4(a) of Section 5 of the Plan, in turn, provided for payment of death benefits to "Mandatory Beneficiaries" of employees. (JA00831; Pls.' Ex. 6 at D001220).

84-85; JA00206-07; Pls.' St. ¶¶ 95-98; JA01673, 1701; Pls.' Ex. 27 at D008995, 9023; JA01748, 1772; Pls.' Ex. 29 at D009203, 9227; JA01820, 1832; Pls.' Ex. 32 at D009409, 9421). AT&T filed entirely separate Form 5500s for the distinct welfare benefit plans described in its SPD. (JA00190; Pls.' St. ¶ 50; JA01665-72; Pls.' Ex. 26).

To assist its human resources personnel in administering its plan, AT&T issued death benefit guidelines. According to guidelines it published just prior to the spin-off, Pensioner Death Benefits were eligible for rollover treatment:

. . . effective January 1, 1993, the taxable amount of any death benefits payable from the AT&T Pension Trust to a surviving spouse are eligible for rollover to an IRA. The law further requires that for such eligible rollover distributions, the beneficiary be offered the option to roll over all or any portion of the taxable amount of each death benefit payment directly to an IRA.

(JA02078; Pls.' Ex. 38 at AT&T001126) (emphasis in the original).

*Pensioner Death Benefits at Lucent.*

After AT&T spun off Lucent, the terms of the Lucent Plan were essentially identical to the AT&T Plan. The initial plan document expressly incorporated the terms of the AT&T Plan for those who had retired prior to the spin-off, and all of the subsequent plan documents that Lucent used did so as well. (JA00087-88, 90-91; Cons. Am. Compl. ¶¶ 76, 82, 83; JA00198-99; Pls.' St. ¶ 73; JA01215; Pls.' Ex. 11 at D001436; *see also* JA00265; Foss Decl. Ex. 4 at EF000218; JA01321; Pls.' Ex. 12 at D001660).

Lucent's initial plan document incorporated all the standard features of the Pensioner Death Benefit that had been developed under the AT&T Plan, including the formula for the amount of the payment, the funding obligation (JA01270-71; Pls.' Ex. 11 at D001491-492), the installment provisions (JA01284; Pls.' Ex. 11 at D001505), the standard limitation on the employer's ability to amend or terminate the plan (JA01315; Pls.' Ex. 11 at D001536), and the standard requirement that assets be allocated to pay death benefits upon termination for those employees who had met the age and service requirements for a service pension. (JA01277-80; Pls.' Ex. 11 at D001498-1501).

Lucent also issued an SPD to explain the terms of its plan to its employees.<sup>20</sup> Modeled upon the SPDs AT&T had distributed, Lucent's SPD indicated that it was summarizing benefits under a defined benefit pension plan which would be the source of service pensions, deferred vested pensions, and certain death benefits (including Pensioner Death Benefits), and under a separate "welfare plan" which would be the source of disability pensions and certain other death benefit payments. (JA00089; Cons. Am. Compl. ¶ 79; JA00204-05; Pls.' St. ¶ 93; JA01440; Pls.' Ex. 19 at D002266). Lucent explained that these plans had different plan numbers;

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<sup>20</sup> Lucent's SPDs are relevant to show how it construed its obligations under the Lucent Plan, but they were never distributed to anyone who had retired prior to the October 1, 1996 effective date of the spin-off from AT&T. (JA00204; Pls.' St. ¶ 90; JA02025-26, 2030, 2036-37; Defs.' Resp. to Pls.' First Set of Req. for Adm. at 25-26, 30, 36-37).

plan #001 was described as “[t]he plan number assigned by Lucent Technologies Inc. for pensions and certain death benefits paid from the pension trust fund.” (JA01441; Pls.’ Ex. 19 at D002267; *see also* JA00089; Cons. Am. Compl. ¶ 79).

The relevant plan documents provided that Pensioner Death Benefits were paid from the assets of the pension trust fund, in language that mirrored the terms of the predecessor AT&T Plan.<sup>21</sup> Consequently, what Lucent’s SPD described as “certain death benefits” that were part of Plan #001 included Pensioner Death Benefits payable to Mandatory Beneficiaries of retirees receiving service pensions, since these benefits were paid from the pension plan trust fund.

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<sup>21</sup> (JA01286; Pls.’ Ex. 11 at D001507). This part of the plan provided as follows:

**. . . Death Benefits payable pursuant to Section 5.4(b) to the initial beneficiary or beneficiaries on account of deaths of service pensioners, exclusive of any amount payable under Section 5.4(b)(ii) in excess of the minimum set forth in said Section 5.4(b), shall be paid from the Pension Fund either directly or through the purchase of annuities from an insurance company as the Company may determine.**

(JA01286; Pls.’ Ex. 11 at D001507) (emphasis added). Section 5.4(b) of the plan provided for payment of the Pensioner Death Benefit “[i]f 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).” (JA01282; Pls.’ Ex. 11 at D001503). Section 5.5(a) of the Plan, in turn, provided for payment of death benefits to “Mandatory Beneficiaries” of employees. (JA01283; Pls.’ Ex. 11 at D001504).

In 1997, Lucent amended its plan to eliminate the Pensioner Death Benefit for those who retired after January 1, 1998. (JA00089-90; Cons. Am. Compl. ¶ 81; JA00201; Pls.' St. ¶ 81; JA00305; Foss Decl. Ex. 4 at EF000258). For those who had retired before that date, Pensioner Death Benefits continued in force; the revised plan document carried forward the funding requirement and the protection for Pensioner Death Benefits upon termination of the plan. (JA00297-98, 301-02; Foss Decl. Ex. 4 at EF000250-51, 254-55). AT&T made a similar decision, freezing its Pensioner Death Benefit at approximately the same time. (JA01459-60; Pls.' Ex. 20 at M002876-877).

In 2003, Lucent announced that it was eliminating the Pensioner Death Benefit altogether. This announcement came in a letter, which stated that the decision was made to avoid "the likelihood that we would have to make a contribution to the plan in the near future." (JA00095; Cons. Am. Compl. ¶ 93; JA00213; Pls.' St. ¶ 111; *see* JA00168; Goodwin Decl. Ex. J at 1). This mailing advised participants that the Pensioner Death Benefit was an "ancillary benefit" provided at Lucent's discretion. (JA00168; Goodwin Decl. Ex. J at 1).

The amendment to the plan document provided, in part, as follows:

1. Article V of the Plan as amended and restated as of January 1, 1998, entitled "Death Benefits," is hereby deleted in its entirety with respect to retirees who die on or [sic] February 1, 2003.
2. Any provision of any predecessor or prior version of the Plan that may have provided or authorized the payment of a death benefit upon the death of a retiree who retired

before January 1, 1998 is hereby deleted in its entirety with respect to retirees who die on or after February 1, 2003.<sup>22</sup>

(JA00095; Cons. Am. Compl. ¶ 95; JA00214; Pls.' St. ¶ 113; *see* JA00161; Goodwin Decl. Ex. H).

*Overview of Plaintiffs' Evidence.*

In opposing defendants' motion, plaintiffs submitted a statement of material facts and a series of plan documents, SPDs, 5500s, and other documents.<sup>23</sup> We have summarized those documents above.

In addition, plaintiffs submitted a series of declarations, including the following:

- A declaration from plaintiff Conder, providing a series of communications received by her late husband. (JA00231-51; Conder Decl.). These included letters from AT&T and Lucent indicating that a

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<sup>22</sup> The Plan Amendment also purported to alter the duties of the Plan trustees by eliminating their responsibility to pay Pensioner Death Benefits; it amended the sections of the Plan governing the pension funding policy and method to eliminate references to the obligation of Lucent to provide sufficient funds to pay Pensioner Death Benefits; and it revised the provisions of the Plan governing payments on termination or partial termination to eliminate the obligation to fund Pensioner Death Benefits upon termination or partial termination.

<sup>23</sup> Plaintiffs submitted an appendix of some eight volumes of material to the trial court. Due to the bulk of the material, they were directed not to file their appendix through the ECF system. In designating the contents of the appendix on appeal, appellants have endeavored to reduce the volume by eliminating potentially duplicative material and, where appropriate, providing excerpts of some documents. To the extent that the Court notes references in the record to additional materials that it wishes to review, counsel will make them available.

death benefit “will be paid” if he was survived by an appropriate beneficiary, such as a surviving spouse. (JA00234, 243; Conder Decl. Exs. 1, 4).

- A declaration from plaintiff Foss, which provided a series of materials that he had received from AT&T and Lucent. (JA00252-379; Foss Decl.). These materials included a letter from AT&T indicating that a death benefit “will be paid” upon his death if he was survived by an appropriate beneficiary. (JA00256; Foss Decl. Ex. 1). Plaintiff Foss also attested to the fact that he had declined a joint and survivor annuity under the terms of the plan because of the Pensioner Death Benefit. (JA00252-53; Foss Decl. ¶ 2).
- A declaration from Doris Burgess, a participant who retired from AT&T in December 1989. (JA00380-436; Burgess Decl.). In her declaration, Ms. Burgess described seminars held by AT&T personnel in which retirees were advised that Pensioner Death Benefits were “an automatic payment that is part of the pension package.” (JA00380-81, 386; Burgess Decl. ¶ 2 & Ex. 1 at DB000004). Mrs. Burgess also received a letter from Lucent indicating that “[t]he proceeds of the Company’s Sickness Death Benefit . . . will be paid if you are survived by a qualified beneficiary . . . .” (JA00436; Burgess Decl. Ex. 3).
- A declaration from Richard K. Schultz, an enrolled actuary. (JA00437-39; Schultz Decl.). Mr. Schultz opined that the 1994 5500 filed by AT&T for the AT&T Management Pension Plan treated liabilities for future death

benefits payable from plan assets upon the death of eligible retirees as vested in reporting the current liabilities of the plan on Schedule B. (JA000438; Schultz Decl. ¶ 3). Mr. Schultz further opined that the plan's actuaries had included the death benefit in calculating the funding obligations of the plan, and that "the death benefit payable from the pension trust upon the death of eligible retirees represents an additional benefit over and above the value of a single life annuity commencing at age 65 or its actuarial equivalent." (JA000438; Schultz Decl. ¶¶ 3, 4).

### **SUMMARY OF ARGUMENT**

I. Pensioner Death Benefits were intended to be protected pension benefits under the plan documents. The documents used mandatory language to describe Pensioner Death Benefits, which is consistent with their status as a protected pension benefit. The fact that eligibility for Pensioner Death Benefits was tied to eligibility for a service pension and that the formula for Pensioner Death Benefits was tied to the annual pension allowance also support their status as protected pension benefits. The provisions in the plan documents providing that Pensioner Death Benefits would be pre-funded on an actuarial basis and would survive termination of the plan also are consistent with their status as protected pension benefits.

Under the plan documents, the plan could not be amended to eliminate or reduce a benefit to which a participant had previously become entitled. Since Pensioner Death Benefits would survive the termination of

the plan for those retirees receiving a service pension and for those employees who were eligible for a service pension, retirees receiving service pensions had become entitled under the plan to have Pensioner Death Benefits paid if they were survived by a Mandatory Beneficiary.

While the parties dispute the appropriate construction of the plan documents, the extrinsic evidence supports plaintiffs' contention that they became entitled to Pensioner Death Benefits when they met the criteria for a service pension. As plaintiffs presented a reasonable construction of the relevant plan documents showing that they were entitled to Pensioner Death Benefits, there were factual issues over the proper construction of the plan documents that precluded the dismissal of their claims.

**II.** As a post-retirement benefit, paid from a trust associated with a defined benefit plan, and tied directly to plaintiffs' service pension, Pensioner Death Benefits were "accrued benefits" protected under Section 204(g) of ERISA, 29 U.S.C. § 1054(g). Alternatively, they were a protected retirement-type subsidy as they result in the receipt of a benefit that is greater than the actuarial equivalent of a single life annuity commencing at normal retirement age.

**III.** The Benefits Agreement was a plan document enforceable under ERISA. Since the Benefits Agreement provided that Lucent was responsible for all of the liabilities that the AT&T Plan owed to the plaintiffs, it was not free to eliminate Pensioner Death Benefits.

## ARGUMENT

### I. PENSIONER DEATH BENEFITS WERE INTENDED TO BE PENSION BENEFITS THAT WERE PROTECTED UNDER THE PLAN DOCUMENTS.

The language of the relevant plan documents demonstrates that the Pensioner Death Benefits were intended to be pension benefits that were protected under the terms of the AT&T Plan and the Lucent Plan. This was also confirmed by extrinsic evidence, including the course of dealing under the plans.

#### A. *The Plan Documents Demonstrate that Pensioner Death Benefits Were Protected Pension Benefits.*

While the district court concluded that Pensioner Death Benefits were welfare benefits that the plan sponsor could terminate at will (JA00020, 24-26; slip op. at 12, 16-18), that conclusion is at odds with the terms of the plan documents.

The plan authorized the payment of death benefits upon the death of retirees who were receiving service or disability pensions; the same clause further provided that, where a pensioner receiving a service or disability pension was survived by a “Mandatory Beneficiary,” the payment “shall be made” in the amount of the final year’s compensation, or of the annual pension allowance, if greater. (JA00829; Pls.’ Ex. 6 at D001218; JA00976; Pls.’ Ex. 7 at D001365; JA01118; Pls.’ Ex. 8 at D010345).

Both AT&T and Lucent confirmed the mandatory nature of the payment in their SPDs,<sup>24</sup> repeatedly stating that a benefit “equal to one year’s pay at retirement **will be paid** to the qualified beneficiary” of retirees receiving service pensions (JA01331; Pls.’ Ex. 13 at D001907; *see also* JA01335; Pls.’ Ex. 14 at D010406) (emphasis added), or to the “mandatory beneficiary” of a retiree receiving a service pension. (JA01395; Pls.’ Ex. 16 at D010487; JA01433; Pls.’ Ex. 19 at D002258-259).

This Court has held that similar language was consistent with a vested pension benefit. *See In re New Valley Corp.*, 89 F.3d 143, 151-52 (3d Cir. 1996). Citing plan language which indicated that deferred compensation benefits “will be paid” and that eligible participants “will receive” deferred compensation, this Court explained that “[t]he mandatory language of these provisions denotes benefits that will be provided by the company once the participant retires, *i.e.*, benefits that vest at retirement.”<sup>25</sup> *Id.* at 152.

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<sup>24</sup> Given then central role that SPDs play under ERISA, this Court has held the language of an SPD trumps the formal plan document, and a participant may enforce the terms of an SPD without demonstrating detrimental reliance. *Burstein*, 334 F.3d at 378, 380. In light of this holding, the Foss Plaintiffs believe that SPDs should be treated as if they are plan documents, and should not be deemed “extrinsic evidence.”

<sup>25</sup> Under ERISA, vesting is generally associated with pension benefits, not welfare benefits. *See DiGiacomo v. Teamsters Pension Trust Fund of Phila.*, 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.’”) (*quoting Central Laborers’ Pension Fund v. Heinz*, 541 U.S. 739, 749 (2004)) Welfare benefits are not subject to ERISA’s vesting requirements, although they can vest if a plan document provides for it. *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 95-96 (3d Cir. 1992)

The fact that the plan documents differentiated between “Mandatory Beneficiaries” and “Discretionary Beneficiaries” also suggests that Pensioner Death Benefits were vested, as the plan employed “mandatory language.” *Id.*

The fact that eligibility for Pensioner Death Benefits was tied to the requirements for a service pension under the plan is also consistent with their status as a vested pension benefit. In *New Valley*, this Court noted that eligibility for top hat plan benefits was tied to participation during employment, retirement and “receipt of a pension under the Basic plan.” 89 F.3d at 153. This Court concluded that this provision also supported the plaintiffs’ claim that their top hat benefits vested upon retirement. *Id.* Moreover, the underlying requirements for a service pension, which also triggered eligibility for Pensioner Death Benefits, were age and service. The use of these criteria for eligibility is consistent with pension benefits:

A pension plan within the meaning of section 401(a) [of the Code] is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement. **Retirement benefits generally are measured by, and based on, such factors as years of service and compensation received by the employees.**

Treas. Reg. § 1.401-1(b)(1)(i) (2006) (emphasis added). In contrast, welfare benefits, such as medical insurance coverage, are generally not related to years of service or compensation.

While Pensioner Death Benefits were payable to a beneficiary instead of a participant, that fact is not inconsistent with their status as pension

benefits. *See* Treas. Reg. § 1.401-1(a)(2)(i) (2006) (pension plan is an arrangement “to provide for the livelihood of the employees **or their beneficiaries** after the retirement of such employees through the payment of benefits determined without regard to profits”) (emphasis supplied).<sup>26</sup>

Federal labor law has long recognized that certain pensions are payable upon death. *See* 29 U.S.C. § 186(c) (exempting payments from a trust maintained for the purpose of providing “pensions on retirement or death of employees” from ban on payments to union representatives); *see also* 29 U.S.C. § 1002(1). In passing ERISA, Congress sought to protect not only the interests of employees, but also the expectations of their families, by imposing a requirement that pension plans offer a joint and survivor annuity for married participants. Pub. L. 93-406, Title I, § 205, 88 Stat. 862 (1974).

The formula for the death benefit is also significant. The plan documents provided that Pensioner Death Benefits were payable in the amount of one year’s compensation, or in the amount of the annual pension allowance, which was set as a minimum. (JA00564; Pls.’ Ex. 3 at D000542; *see also* JA00830; Pls.’ Ex. 6 at D001219; JA00977; Pls.’ Ex. 7 at D001366; JA01118; Pls.’ Ex. 8 at D010345). This strongly suggests that Pensioner Death Benefits

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<sup>26</sup> “The term beneficiaries of an employee within the meaning of [I.R.C.] section 401 includes the estate of the employee, dependents of the employee, persons who are the natural objects of the employee’s bounty, and any persons designated by the employee to share in the benefits of the plan after the death of the employee.” Treas. Reg. § 1.401-1(b)(4) (2006).

were intended as pension benefits, as benefits under a pension plan “generally are measured by, and based on, such factors as . . . compensation received by the employees.” Treas. Reg. § 1.401-1(b)(1)(i) (2006).

Moreover, the fact that the minimum amount of the Pensioner Death Benefit was tied to the annual pension allowance is also significant, as there is a direct relationship between the Pensioner Death Benefit and the pension being paid to the retiree. Where death benefits are directly related to the pension being received by the retiree, they are protected. *Berger v. Xerox Ret. Income Guar. Plan*, 231 F. Supp. 2d 804, 816-17 (S.D. Ill. 2002), *aff’d*, 338 F.3d 755, 764 (7th Cir. 2003); *see also Crosby v. Bowater Inc. Ret. Plan for Salaried Employees of Great N. Paper, Inc.*, 212 F.R.D. 350, 362 (W.D. Mich. 2002) (death benefit that “was directly related to the value of retirement benefits” was protected), *vacated on other grounds*, 382 F.3d 587 (6th Cir. 2004); *United Foods, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 816 F. Supp. 602, 609 (N.D. Cal. 1993) (distinguishing lump sum death benefits which are directly related to pension benefits from a fixed death benefit which is essentially an allowance for funeral costs that was not related to service or age of participant), *aff’d*, 41 F.3d 1338 (9th Cir. 1994); *but cf. Huber v. Casablanca Indus., Inc.*, 916 F.2d 85 (3d Cir. 1990) (uniform funeral allowance paid from plan assets was not “non-forfeitable” under PBGC regulations).

When AT&T and Lucent wanted to make clear that a particular benefit offered under their pension plans was not a protected pension benefit, they knew how to do it. Both companies included language in their plans providing that post-retirement health benefits “shall not constitute a portion of any Participant’s ‘accrued benefit.’” (JA01126; Pl. Ex. 8 at D010353-54; JA01291; Pl. Ex. 11 at D001512).

The fact that Pensioner Death Benefits were funded and survived termination of the plan also supports their status as vested pension benefits. *See* 29 U.S.C. § 1081(a)(1) (exempting welfare plans from funding requirement); 29 U.S.C. § 1103(d) (assets of terminated pension plan governed by Section 4044 of ERISA, 29 U.S.C. § 1344). Even after ERISA was passed, both AT&T and Lucent issued plan documents providing for the distribution of assets from the pension trust fund, and granted a higher priority to Pensioner Death Benefits than other pension benefits under the plan documents.

Moreover, the fact that SPDs issued by both Lucent and AT&T distinguished between the welfare benefits and the pension benefits offered to employees and classified their plans as defined benefit pension plans for purposes of death benefits paid from the pension trust fund also shows that Pensioner Death Benefits were intended to be protected pension benefits.

AT&T and Lucent treated Pensioner Death Benefits in their annual 5500 filings in a way that was also consistent with their status as pension

benefits protected under the relevant plan documents.<sup>27</sup> Both companies consistently treated the Pensioner Death Benefits as liabilities of their defined benefit pension plans. (JA01463, 1506; Pls. Ex. 21 at D15885, 15928; JA01673, 1701; Pls.' Ex. 27 at D008995, 9023).

*B. The Foss Plaintiffs Became Entitled to Pensioner Death Benefits Under the Plan Documents Upon Retirement.*

A central issue is when a participant under the relevant plans at Lucent and AT&T became “entitled” to the death benefit. This question is pivotal in light of the qualification on the reservation of rights clause contained in the AT&T and Lucent plan documents, which precluded an amendment or change to the plan that would interfere with a participant’s right “to any benefit or pension to which he or she may have previously have become entitled hereunder.” (See, e.g., JA01151; Pls.' Ex. 8 at D010378). The Seventh Circuit has characterized an analogous clause as a “private anti-cutback provision” that could not be unilaterally eliminated. *Call v. Ameritech Mgmt. Pension Plan*, 475 F.3d 816, 820 (7th Cir. 2007); see also *Hozier v.*

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<sup>27</sup> As set forth in note 24 above, the Foss Plaintiffs believe that the Court’s holding in *Burstein* that participants can enforce the language of an SPD as if it were a plan document suggests that an SPD is to be treated as a plan document, and not as “extrinsic evidence.” The annual form 5500s are part of ERISA’s reporting and disclosure scheme, just as SPDs are, and sponsors are required to furnish them to participants upon request. 29 U.S.C. §§ 1022(a) (imposing obligation to issue SPD), 1024(a),(b)(2), (b)(4) (imposing obligation to file annual reports, make them available for inspection and furnish them to participants upon request). The similar statutory roles of the two required disclosures suggest that, by analogy, a 5500 should also be treated as a plan document, and not as “extrinsic evidence.”

*Midwest Fasteners, Inc.*, 908 F.2d 1155, 1161 n.6 (3d Cir. 1990) (restriction on sponsor's authority to amend plans enforceable through action for equitable relief).

Given the various indicia in the plan documents that Pensioner Death Benefits were a protected pension benefit, the Foss Plaintiffs submit that they became "entitled" to the Pensioner Death Benefit no later than their retirement, as the termination provisions of the plan documents provided that death benefits payable from the pension trust fund for retirees receiving service pensions and employees who were service pension eligible would survive the termination of the plan.<sup>28</sup> The beneficiary, of course, would have to survive the retiree to receive the payment, but the same was true of the beneficiary of a retiree under a joint and survivor annuity; if the beneficiary predeceased the retiree, then the payments would not be made. In essence, death is simply the time at which vested benefits are paid out to the beneficiaries of plan participants. *United Foods*, 816 F. Supp. at 608.

The conclusion that participants became entitled to the Pensioner Death Benefit either upon retirement with a service pension or when they became eligible to do so is also consistent with the basic notion that a pension plan is "a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the

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<sup>28</sup> (JA00621-22; Pls.' Ex. 4 at D000921-922; *see also* JA00819; Pls.' Ex. 6 at D001318; JA00966; Pls.' Ex. 7 at D001315; JA01114; Pls.' Ex. 8 at D010341).

requisite number of years.” *Hurd v. Illinois Bell Tel. Co.*, 234 F.2d 942, 946 (7th Cir. 1956) (discussing predecessor plans); *see also In re New Valley Corp.*, 89 F.3d at 151; *Kemmerer v. ICI Americas Inc.*, 70 F.3d 281, 287 (3d Cir. 1995). Since the right to Pensioner Death Benefits vested on performance, neither AT&T nor Lucent could eliminate them absent a specific provision in the plan authorizing them to do so after the employees performed. *Kemmerer*, 70 F.3d at 287.

This Court recently re-examined the applicability of unilateral contract principles under ERISA in *Hooven v. Exxon Mobil Corp.*, 465 F.3d 566 (3d Cir. 2006), holding that unilateral contract principles are properly applied under ERISA “where the asserted unilateral contract is based on the explicit promises in the ERISA plan documents themselves.” *Id.* at 573 (quoting *Carr v. First Nationwide Bank*, 816 F. Supp. 1476, 1490 (N.D. Cal. 1993)). Here, as the Foss Plaintiffs seek to enforce the promise set forth in the plan documents that Pensioner Death Benefits “shall be paid,” application of unilateral contract principles remains appropriate.

Defendants took a different view of when participants became entitled to Pensioner Death Benefits, arguing successfully in the district court that death was what gave rise to the entitlement. This construction of the plan documents is inconsistent with their language and should be rejected.

First, while the district court noted a provision in an SPD indicating the death benefits would not be paid in certain circumstances, it was not applicable. The court focused on language in an SPD indicating that death

benefits would not be paid if a suit was brought “against the company outside the provisions of this plan on account of the death of an employee.” (JA00025; slip op. at 17) (*quoting* JA01335; Pls.’ Ex. 14 at D010406). There is nothing to suggest this provision could have any application to retirees receiving service pensions. Instead, the SPD provision appears to be aimed at plan provisions that applied to an accidental death benefit, which was only payable on the death of an employee. (JA00569; Pls.’ Ex. 3 at D000541; *see also* JA00826-27; Pls.’ Ex. 6 at D001215-16). As an employee who died in the course of employment might have survivors who would take legal action, the plan had provisions dealing with lawsuits brought on the death of an employee that conditioned payment of accident death benefits upon an election and release by the deceased employees’ beneficiaries. (JA00579-80; Pls.’ Ex. 3 at D000557-58; *see also* JA00857-58; Pls.’ Ex. 6 at D001246-47). Nor is the fact that benefits might not be paid under certain predetermined conditions inconsistent with the idea that Pensioner Death Benefits are protected. *See Central Laborers’ Pension Fund v. Heinz*, 541 U.S. 739, 742 (2004) (discussing plan that provided early retirement benefits could be lost if retiree entered into post-retirement employment).

Second, treating the retiree’s death as the event creating an “entitlement” is inconsistent with the plan’s termination provisions, which called for death benefit payments not only to beneficiaries of those who had died before termination, but to the beneficiaries of living retirees and employees who were eligible for service pensions as well. (JA00817-19; Pls.’

Ex. 6 at D001206-08; JA00964-66; Pls.' Ex. 7 at D001353-55; JA01113-14; Pls.' Ex. 8 at D010340-41).

Third, if participants did not become entitled to Pensioner Death Benefits when they became eligible for a service pension or retired, then defendants could revoke Pensioner Death Benefits at any time until a particular claim was allowed by the plan administrator. This result would be inconsistent with the plan's specific distinction between Mandatory Beneficiaries (for whom Pensioner Death Benefits were paid from plan assets in a definitely determinable amount), and Discretionary Beneficiaries (who were paid from company funds in whatever amount the administrator deemed appropriate). (See JA830-32; Pls.' Ex. 6 at D001219-21; JA00977-79; Pls.' Ex. 7 at D001366-68; JA01118-19; Pls.' Ex. 8 at D010345-46).

Defendants' construction would also render the promise contained in the plan document that Pensioner Death Benefits "shall be paid" illusory:

Suppose an employer and employee enter into a contract stating that employee will work forty hours per week for \$500, payable at the end of the week. The contract further states that employment is at will and employer can change employee's wages "at any time." After working a week, employee goes to pick up her pay check. Employer informs employee that it has exercised its right to change her wages "at any time," and will be paying her \$300 for that week's work. Despite the seemingly unambiguous "at any time" language, it seems reasonable that an employee would not expect the reduction in salary to take place post-performance.

*New Valley*, 89 F.3d at 151. This, of course, is precisely where plaintiffs Foss, Berendt and Howard find themselves. Long after they retired, deferred

compensation that they earned to provide for their beneficiaries has been taken away by Lucent, even though AT&T gave Lucent the assets to pay Pensioner Death Benefits.

C. *Extrinsic Evidence Supports Plaintiffs' Position that Pensioner Death Benefits Were Protected Pension Benefits to which They Were Entitled.*

Plaintiffs and defendants offered the district court diametrically opposed views over when someone became “entitled” to Pensioner Death Benefits. This made extrinsic evidence relevant to assess whether the construction of the plan documents offered by plaintiffs was reasonable. *New Valley*, 89 F.3d at 150 (courts are required to consider extrinsic evidence to determine ambiguity). The district court held that extrinsic evidence was not relevant here because the plan documents were unambiguous. (JA00014-16; slip op. at 6-8). This ruling was inconsistent with controlling authority.

To assess whether contractual language is ambiguous, a court must read the relevant language in context, considering, among other things, “the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning.” *Pacitti v. Macy's*, 193 F.3d 766, 773 (3d Cir. 1999) (quoting *Mellon Bank v. Aetna Bus. Credit*, 619 F.2d 1001, 1011 (3d Cir. 1980); see also *In re New Valley*, 89 F.3d at 150; *Teamsters Indus. Employees Welfare Fund v. Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132, 135 (3d Cir. 1993). Acceptable extrinsic evidence includes “the structure of the contract, the bargaining history, and

the conduct of the parties that reflects their understanding of the contract's meaning." *In re New Valley Corp.*, 89 F.3d at 150 (quoting *Rolls-Royce Motor Cars*, 989 F.2d at 135). As we have already reviewed the structure of the plan documents, including SPDs and 5500s, we turn to other extrinsic evidence.

First, the actuaries at both AT&T and Lucent included death benefits paid from the pension trust fund in calculating the annual accrual rate under the plans. (JA01964; Pls.' Ex. 34 at D15299; JA02150; Pls.' Ex. 40 at AT&T 001410; JA02361; Pls.' Ex. 43 at D009835).

Second, when AT&T spun-off components of the Bell System Plan, the actuaries included death benefit obligations in the calculation of the assets and liabilities that were to be transferred under Section 414(l) of the Internal Revenue Code. (JA02144-45; Pls.' Ex. 39 at M007514-15).

Third, the fact that AT&T issued administrative guidelines indicating that Pensioner Death Benefits qualified for rollover treatment also shows that these were not freely terminable welfare benefits, as welfare benefits are not eligible for rollover treatment. *See* I.R.C. § 402(c)(4) (restricting rollover treatment to distributions of "all or any portion of the balance to the credit of the employee in a qualified trust").

Fourth, both companies used informal communications that were consistent with the treatment of Pensioner Death Benefits as protected pension benefits:

- Both AT&T and Lucent routinely issued letters to retirees indicating that “[t]he proceeds of the Company’s Sickness Death Benefit, amounting to \$ [amount] **will be paid** if you are survived by a qualified beneficiary under the provisions of the plan (such as your spouse living with you, or an unmarried dependent child under the age of 23).” (JA00234, 243; Conder Decl. Exs. 1, 4 (emphasis supplied); *see also* JA00256; Foss Decl. Ex. 1; JA00436; Burgess Decl. Ex. 3). These letters never alerted anyone that the death benefit could be taken away at anytime.
- Similarly, in seminars for its employees who were planning for retirement, AT&T representatives characterized the Pensioner Death Benefit as “an automatic payment” that was “part of the pension package.” (JA00380-81, 386; Burgess Decl. ¶ 2 & Ex. 1 at DB000004).

Fifth, there was evidence that participants perceived Pensioner Death Benefits as pension benefits and that their availability influenced the decisions participants made about the form in which they would receive their service pension. Plaintiff Foss declined a joint and survivor annuity due to the availability of pensioner death benefits. (JA00252-53; Foss Decl. ¶ 2). This was apparently a common decision: in calculating plan liabilities, AT&T’s actuaries assumed that “55% of future male retirees and 10% of future female retirees will elect the survivor option.” (JA01574; Pls.’ Ex. 24, Att. I to Sch. B at 4).

Sixth, when the companies acted to curtail Pensioner Death Benefits, they initially did so on a prospective basis. Indeed, AT&T froze the death benefit, permitting individuals to qualify for Pensioner Death Benefits based upon their salary as of December 31, 1997. (JA01459; Pls.' Ex. 20 at M002876). This treatment of the Pensioner Death Benefit was analogous to the treatment of retirement-type subsidies under Section 204(g) of ERISA, 29 U.S.C. § 1054(g), which requires that sponsors permit employees to "grow into" the protected benefit to the extent it had accrued prior to an amendment terminating it prospectively. *See Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1144-46 (3d Cir. 1993).

The parties' course of dealing is highly relevant in construing the relevant language. *See Rolls-Royce Motor Cars*, 989 F.2d at 137 ("past dealings of contracting parties pursuant to an agreement" is often highly probative of the intended meaning of their agreement).<sup>29</sup>

Here, the extrinsic evidence offered by plaintiffs was consistent with their theory that they became "entitled" to Pensioner Death Benefits prior to the time when they retired. While the Foss Plaintiffs believe that their

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<sup>29</sup> *See generally* Restatement (Second) of Contracts, § 202(5) ("Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with any relevant . . . course of dealing"). Evidence of a course of conduct is particularly persuasive when it occurs over a substantial time period. *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 (1913) ("the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence").

construction of the plan documents is more plausible than that proffered by defendants and accepted by the trial court, they need only show that they have a plausible construction of the documents that is distinct from that offered by defendants. *See In re New Valley Corp.*, 89 F.3d at 152 (“Before it can be said that no ambiguity exists, it must be concluded that the questioned words or language are capable of only one interpretation”). At a minimum, the record created a fact issue on the appropriate construction of the plan documents, which precluded either dismissal of plaintiffs’ complaint or the grant of summary judgment against them. *Id.*

Moreover, since even welfare benefits can vest if a plan document provides for it, *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 95-96 (3d Cir. 1992), the district court should have denied defendants’ motion since the record supported plaintiffs’ construction of the plan documents.

## **II. PENSIONER DEATH BENEFITS WERE PROTECTED FROM ELIMINATION UNDER SECTION 204(g) OF ERISA.**

The Foss Plaintiffs also asserted that Pensioner Death Benefits were protected under Section 204(g) of ERISA, 29 U.S.C. § 1054(g). (JA00104-05; Cons. Am. Compl. ¶¶ 124-30). The district court rejected this claim, reasoning that Pensioner Death Benefits were not accrued benefits and were not retirement-type subsidies. (JA00019-22; slip op. at 11-14).

At the time that Lucent amended the plan to eliminate Pensioner Death Benefits, the relevant Treasury Regulations promulgated under the parallel

provision of the Code<sup>30</sup> provided in relevant part as follows: “The following benefits are examples of items that are not section 411(d)(6) protected benefits: (1) Ancillary life insurance protection; (2) Accident or health insurance benefits.” Treas. Reg. § 1.411(d)-4 Q&A-1(d)(1),(2) (2002). Pensioner Death Benefits cannot be characterized as “life insurance” or “accident or health insurance benefits,” since they are not paid by an insurance company.

While defendants had indicated that Pensioner Death Benefits were an ancillary benefit in announcing their termination, that contention was not consistent with the existing regulations. At that time, there were two

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<sup>30</sup> The Treasury Department did not begin to consider regulations defining a retirement-type subsidy under Section 411(d)(6) of the Code until January 10, 2003, when it issued a notice requesting comments on that subject to assist it in formulating regulations. Notice No. 2003-10, 2003-1 C.B. 369 (Jan. 10, 2003). In March 2004, the Treasury Department issued a notice of proposed rulemaking outlining proposed new regulations under Section 411(d)(6) of the Code. *Section 411(d)(6) Protected Benefits*, 69 Fed. Reg. 13769 (Mar. 24, 2004). The preamble to the proposed regulations indicated that “ancillary benefits, other rights or features, and any other benefits not described in section 411(d)(6) are not benefits protected under section 411(d)(6).” *Id.* at 13771. The proposed regulations adopted the definition of “ancillary benefit” set forth in Section 1.401(a)(4)-4 of the Treasury Regulations, *id.*, which provides that the term ancillary benefits includes “preretirement death benefits under a defined benefit plan.” Treas. Reg. § 1.401(a)(4)-4(e)(2). The proposed regulations were to go into effect upon final publication. 69 Fed. Reg. at 13776.

After the expiration of the comment period, final regulations were issued that differed significantly from the original proposal. *Section 411(d)(6) Protected Benefits*, 70 Fed. Reg. 47109 (Aug. 12, 2005). The final regulations do not apply to plan amendments prior to August 12, 2005. *See* Treas. Reg. § 1.411(d)-3(j) (2006).

prevailing definitions. First, section 1.401(a)(4)-4(e)(2) of the Treasury Regulations provided as follows:

The term ancillary benefit means social security supplements (other than QSUPPs), disability benefits not in excess of a qualified disability benefit described in section 411(a)(9), ancillary life insurance and health insurance benefits, death benefits under a defined contribution plan, **preretirement death benefits under a defined benefit plan**, shut-down benefits not protected under section 411(d)(6), and other similar benefits.

Treas. Reg. § 1.401(a)(4)-4(e)(2) (2002) (emphasis supplied). Second, section 1.412(c)(3)-1(f)(2) provided as follows:

(2) Ancillary benefit defined. For purposes of this paragraph an ancillary benefit is a benefit that is paid as a result of a specified event which--

(i) Occurs not later than a participant's separation from service, and

(ii) Was detrimental to the participant's health.

Thus, for example, benefits payable if a participant dies or becomes disabled prior to separation from service are ancillary benefits because the events giving rise to the benefits are detrimental to the participant's health.

Treas. Reg. § 1.412(c)(3)-1(f)(2) (2002). Under these regulations, Pensioner Death Benefits are not "ancillary benefits" because they are payable after retirement.

Moreover, Pensioner Death Benefits were directly related to the service pension: qualification for Pensioner Death Benefit was tied to the same eligibility standards, and the minimum amount of the Pensioner Death Benefit was the annual pension allowance. These factors strongly suggest that Pensioner Death Benefits were part of the participant's accrued benefit:

In general, the term “accrued benefits” refers only to pension or retirement benefits. Consequently, **accrued benefits do not include ancillary benefits not directly related to retirement benefits**, such as payment of medical expenses . . . , disability benefits not in excess of the qualified disability benefit . . . , life insurance benefits payable as a lump sum, incidental death benefits, current life insurance protection, or medical benefits described in section 401(h).

Treas. Reg. § 1.411(a)-7(a) (2006) (emphasis supplied). Where death benefits are directly related to pension benefits, they are protected as accrued benefits. *See Berger*, 231 F. Supp. 2d at 816-17; *United Foods*, 816 F. Supp. at 609-10.

Significantly, the regulation excludes only “incidental death benefits” from the definition of accrued benefit; the term “incidental death benefit” is derived from the way that the Treasury Regulations define a pension plan as a plan maintained “primarily” to provide for payment of benefits after retirement. Treas. Reg. § 1.401-1(b)(1)(i) (2006). As the IRS has explained, the word “primarily” is used in the definition to make clear that a pension plan “is not precluded from meeting the applicable requirements for qualification merely because it provides benefits **prior to normal retirement**, such as for disability or death benefits, which are only **incidental** to the main purpose of the plan.” Rev. Ruling 56-693, 1956-2 C.B. 282 (emphasis supplied), *modified by*, Rev. Ruling 60-323, 1960-2 C.B. 148. Therefore, it is doubtful that the term “incidental death benefit” includes a **post-retirement** death benefit under a pension plan. *See I.R.S. G.C.M. 33663*, 1967 WL 15842 (Oct. 20, 1967) (noting that applicability of an

incidental benefit test to post-retirement death benefits was “vulnerable to attack” due to lack of statutory authorization for this treatment).

Alternatively, Pensioner Death Benefits are protected as a retirement-type subsidy. This Court has adopted the following definition for a retirement-type subsidy: “[w]e have defined a retirement-type subsidy to be the excess in value of a benefit over the actuarial equivalent of the normal retirement benefit.” *Bellas*, 221 F.3d at 525 (citations omitted). Pensioner Death Benefits meet this definition by providing for a contingent benefit over and above the normal retirement benefit. (JA00105; Cons. Am. Compl. ¶ 128; JA00438; Schultz Decl. ¶ 4).

The fact that the payment is contingent on the survival of a Mandatory Beneficiary should not make a difference; in *Bellas*, this Court held that contingent job separation benefits that continued past normal retirement age constituted a retirement-type subsidy, reasoning as follows:

After careful analysis of the arguments presented and the cited authority, we hold that unpredictable contingent event benefits that provide a benefit greater than the actuarially reduced normal retirement benefit are retirement-type subsidies, and therefore are accrued benefits under Section 204(g), if the benefit continues beyond the normal retirement age. Such benefits are accrued upon their creation rather than upon the occurrence of the unpredictable contingent event.

221 F.3d at 532. In *Bellas*, this Court concluded that this result was consistent “with Congress’s intended general rule that subsidies continuing past normal retirement age are to be considered retirement-type subsidies.” *Id.*

In rejecting plaintiffs' claim below, the district court relied upon the legislative history of Section 204(g) (JA00021; slip op. at 13), noting the following portion of the Senate Report:

The committee intends that under these regulations, a subsidy that continues after retirement is generally to be considered a retirement-type subsidy. The committee expects, however, that a qualified disability benefit, a medical benefit, a social security supplement, a death benefit (including life insurance), or a plant shut down benefit (that does not continue after retirement age), will not be considered a retirement-type subsidy.

S. Rep. No. 98-575 at 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576.

This excerpt from the Senate Report states a general rule that subsidies which continue past normal retirement age are protected. Its general reference to "a death benefit" is ambiguous, however, because it is not clear whether the reference is to incidental, preretirement death benefits, rather than the substantial, service-pension-related post-retirement death benefits involved here.

The surrounding legislative history suggests that the Senate Report was referring to preretirement death benefits. After all, Congress had required defined benefit plans to offer a form of death benefit, the joint and survivor annuity, when it passed ERISA, and the amendments to Section 204(g) came in legislation which was designed to "provide for greater equity under private pension plans for workers and their spouses and dependents." S. Rep. 98-575, 98th Cong., 2d Sess. at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2548.

Against this background, it is unlikely that the language in the Senate Report quoted by the district court was designed to weaken protections for the spouses of retirees. Since Pensioner Death Benefits provide a benefit in excess of the normal retirement benefit after retirement (JA00438; Schultz Decl. ¶ 4), they are a protected retirement-type subsidy under Section 204(g) of ERISA.

### **III. PENSIONER DEATH BENEFITS WERE PROTECTED UNDER THE BENEFITS AGREEMENT AND FEDERAL COMMON LAW.**

The Foss Plaintiffs asserted that Pensioner Death Benefits were protected under the Benefits Agreement, which they could enforce under federal common law. The district court rejected their contention, questioning whether the Benefits Agreement was a plan document and indicating that it lacked clear vesting language. (JA00026; slip op. at 18).

The plan document that Lucent adopted, effective October 1, 1996, provided in relevant part as follows: “The Plan assumes and is solely responsible for all liabilities as of September 30, 1996 relating to Transferred Individuals.” (JA01215; Pls.’ Ex. 11 at D001436).<sup>31</sup> This portion of the plan includes two critical terms: “Transferred Individuals,” which is defined as “[a] ‘Transferred Individual’ within the meaning of the [Benefits Agreement] . . . .”;<sup>32</sup> and “liabilities,” which is not defined at all. The

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<sup>31</sup> The subsequent documents promulgated by Lucent are to the same effect. (See JA00265; Foss Decl. Ex. 4 at EF000218; JA01321; Pls.’ Ex. 12 at D001660).

<sup>32</sup> (JA01222; Pls.’ Ex. 11 at D001443; see also JA00274; Foss Decl. Ex. 4 at EF000227).

Benefits Agreement, however, explicitly spells out what “liabilities” Lucent assumed. (JA01200, 1204; Pls.’ Ex. 10 at D008901, 8905).

Plainly, the Benefits Agreement is a plan document. First, the Benefits Agreement was the mechanism through which the plaintiffs were transferred from AT&T’s pension plan to Lucent’s pension plan. Second, Lucent’s plan documents expressly incorporated terms from the Benefits Agreement by reference. Third, Lucent’s plan documents left the critical term “liabilities” undefined, presumably because the Benefits Agreement was intended to spell out what liabilities Lucent was assuming, just as it would define who was a Transferred Individual. Finally, defendants characterized the Benefits Agreement as a plan document in their initial disclosures, where they listed the Benefits Agreement under the heading “Plan Documents.” (See JA02044; Pls.’ Ex. 37 at 5).

Courts have concluded that a variety of different types of documents are enforceable under ERISA as “plan documents.” See *Delgrosso v. Spang and Co.*, 769 F.2d 928, 929, 933-34 (3d Cir. 1985) (collectively bargained agreements were plan documents enforceable under ERISA); see also *Dardaganis v. Grace Capital, Inc.*, 889 F.2d 1237, 1240-42 (2d Cir. 1989) (investment advisory agreement and guidelines were plan documents enforceable under ERISA).

Since the Benefits Agreement is plainly one of the documents pursuant to which the Lucent Plan was established, the plaintiffs are entitled under ERISA to enforce its terms. See *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d at

1161 n.6 (where plan's terms restrict the ability of the sponsor to amend, equitable relief is available to invalidate an amendment inconsistent with the terms of the unamended plan) (discussing *Delgrosso*). Thus, plaintiffs submit that Lucent is responsible for all of the "liabilities" transferred to it, including Pensioner Death Benefits, and accordingly Lucent was not free to eliminate this benefit while keeping the funds that were provided to pay it.

The Fifth Circuit recently addressed a similar claim in *Halliburton Company Benefits Committee v. Graves*, 463 F.3d 360 (5th Cir. 2006). As part of a merger agreement, a corporation agreed to maintain retiree medical benefit plans and to make modifications to those plans only to the extent it made similar modifications to its plan for active workers. 463 F.3d at 365. After the merger, plan amendments were proposed that were inconsistent with the provisions of the merger agreement, giving rise to litigation by retirees. 463 F.3d at 368-69. The Fifth Circuit concluded that the merger agreement restricted Halliburton's power to amend the retiree health plan obligations it had assumed and that participants in those plans could sue to enforce the restriction. 463 F.3d at 375-78.

The Fifth Circuit's reasoning in *Halliburton* is persuasive and fully supports plaintiffs' contention that they may enforce the Benefits Agreement to require that Lucent pay all liabilities, including Pensioner Death Benefits.

## CONCLUSION

Based upon the arguments and authorities set forth above, the Foss Plaintiffs respectfully request that the district court's order dismissing these actions be reversed and that these actions be remanded for further proceedings.

Dated: April 20, 2007

Respectfully submitted,

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**CERTIFICATE OF BAR MEMBERSHIP**

We hereby certify that we 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 13,928 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 Book Antiqua.

Dated: April 20, 2007

/s/ James R. Malone, Jr.  
James R. Malone, Jr.

**CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK**

1. I hereby certify that the text of the electronic PDF version of the foregoing Brief of Plaintiffs-Appellants 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.

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

/s/ James R. Malone, Jr.  
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**CERTIFICATE OF SERVICE**

I, James R. Malone, Jr., hereby certify that on this 20th day of April, 2007, ten copies of the foregoing Brief of Plaintiffs-Appellants Edward Foss, Sarah Conder, Arthur J. Berendt, and Robert Howard and four copies of the Appendix were sent by UPS overnight delivery to the Clerk of the Third Circuit Court of Appeals and two copies of the foregoing Brief of Plaintiffs-Appellants Edward Foss, Sarah Conder, Arthur J. Berendt, and Robert Howard and one copy of the Appendix were served by UPS overnight delivery on:

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Case Nos. 06-5008 & 06-5009

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

In Re: Lucent Death Benefits ERISA Litigation

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

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

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*Appeal from the United States District Court for the District of New Jersey,  
Case Nos. 03-cv-5017, 04-cv-640, 04-cv-1099 (Cavanaugh, J.)*

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**JOINT APPENDIX  
VOLUME I OF VIII**  
*(Pages JA00001 through JA00050)*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of December, 2006, the foregoing was served electronically through the Court's ECF system and served via UPS overnight courier, addressed as follows:

The Honorable Dennis Cavanaugh  
United States District Judge  
United States District Court  
for the District of New Jersey  
Martin Luther King Courthouse  
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/s/ Kimberly L. Kimmel  
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- and -

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I hereby certify that a copy of the foregoing NOTICE OF APPEAL was served this 6th day of November, 2006, by ECF Filing and by first class mail upon the following counsel:

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**CLOSED**

NOT FOR PUBLICATION

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

EDWARD FOSS, on behalf of himself :  
and all others similarly situated, SARAH :  
CONDER, VINCENT R. LUCAS, :  
Individually and on behalf of all others :  
similarly situated, ARTHUR BERENDT, :  
and ROBERT B. HOWARD :

Plaintiffs, :

v. :

LUCENT TECHNOLOGIES INC.; :  
LUCENT RETIREMENT INCOME :  
PLAN; and LUCENT TECHNOLOGIES, :  
INC. EMPLOYEE BENEFITS :  
COMMITTEE, :

Defendants. :

**Hon. Dennis M. Cavanaugh**

**ORDER**

Civil Action No.03-CV-5017 (DMC)

\_\_\_\_\_ This matter coming before the Court upon motion by Defendants Lucent Technologies, Inc.,  
Lucent Retirement Income Plan, Lucent Technologies Inc. Employee Benefits Committee, and  
AT&T Corporation pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or for  
Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure; and also upon  
Plaintiffs' motion to substitute a party; and oral argument having been heard on this matter on  
November 9, 2006; and the Court having further reviewed all submissions;

IT IS on this 27<sup>th</sup> day of November, 2006;

**ORDERED** that Defendant's motion to dismiss is **granted**; and it is further

**ORDERED** that Plaintiffs' motion to substitute a party is **denied** as moot.

S/ Dennis M. Cavanaugh  
Dennis M. Cavanaugh, U.S.D.J.

Orig.: Clerk  
cc: Counsel of Record  
The Honorable Mark Falk, U.S.M.J.  
File

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

EDWARD FOSS, on behalf of himself :  
and all others similarly situated, SARAH :  
CONDER, VINCENT R. LUCAS, :  
Individually and on behalf of all others :  
similarly situated, ARTHUR BERENDT, :  
and ROBERT B. HOWARD :

Plaintiffs, :

v. :

LUCENT TECHNOLOGIES INC.; :  
LUCENT RETIREMENT INCOME :  
PLAN; and LUCENT TECHNOLOGIES, :  
INC. EMPLOYEE BENEFITS :  
COMMITTEE, :

Defendants. :

Hon. Dennis M. Cavanaugh

OPINION

Civil Action No. 03-CV-5017(DMC)

DENNIS M. CAVANAUGH, U.S.D.J.:

This matter comes before the Court upon motion by Defendants Lucent Technologies, Inc., Lucent Retirement Income Plan, Lucent Technologies Inc. Employee Benefits Committee, and AT&T Corporation pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, directed to the Consolidated Amended Complaint (“Complaint”), filed on or about November 10, 2005. Oral argument was heard on this matter on November 9, 2006. After carefully considering the submissions of the parties, and based upon the following, it is the finding of this Court that Defendants’ motion to dismiss or for summary judgment is granted.

**I. BACKGROUND**

In 1996, AT&T created a spin-off, Lucent Technologies. As part of the creation of the spin-

off, several AT&T retirees were transferred to the Lucent retirement plan. This class action consists of a class of AT&T retirees and their beneficiaries who, prior to February 2003, were eligible to receive a death benefit under the Lucent Retirement Income Plan if certain subsequent conditions were met. Plaintiffs were AT&T retirees who commenced retirement before the Lucent spin-off. Specifically, they are members of a class of former AT&T plan participants who were transferred to the Lucent plan with the spin-off. Plaintiffs seek relief pursuant to the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001-1465, claiming “a right to have a death benefit paid to their spouse or other dependents in an amount equal to one year’s salary.” Complaint ¶1. The disputed Pensioner Death Benefit (“death benefit”) was one of many benefits included in the Lucent Retirement Income Plan, successor in interest to the AT&T Management Pension Plan. Lucent’s elimination of the death benefit from the defined benefit plan and subsequent refusal to pay Plaintiffs the death benefit gave rise to this litigation.

**A. The AT&T Plan**

AT&T maintained a defined pension plan, known as the AT&T Management Pension Plan (the “AT&T Plan”). Complaint ¶15. The AT&T Plan, like the subsequently created Lucent Plan is a defined benefit plan. Stated generally, a defined benefit plan typically “consists of a general pool of assets rather than individual dedicated accounts. Such a plan, ‘as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment.’” Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439 (1999) (citing Comm’r v. Keystone Consol. Indus., Inc., 508 U.S. 152, 154 (1993)). Among other benefits, the AT&T Plan provided for a death benefit to be paid to a retired plan participant’s spouse or other dependent relatives upon the plan participant’s death.

**B. The Lucent Plan**

When Lucent was created it assumed AT&T's responsibilities under the AT&T Plan. To memorialize this transfer of obligations and liabilities, AT&T and Lucent entered into an Employee Benefits Agreement ("EBA"). Under the EBA, Lucent assumed and agreed to pay AT&T's benefit obligations to certain former employees. Assets were transferred from the AT&T Management Pension Plan on the condition that Lucent would assume the responsibility of such payments to certain AT&T retirees. Complaint ¶38. Thereafter Lucent established a defined benefit pension plan, the Lucent Technologies Inc. Management Plan (the "Lucent Plan"), that mirrored the provisions of the AT&T Plan. Like the AT&T Plan, the Lucent Plan also included a death benefit. The death benefit was payable to a retiree's qualified mandatory beneficiary or beneficiaries in an amount equal to twelve months pay at retirement. Complaint ¶41. Beneficiaries eligible to receive the benefit at the plan participant's death included the participant's spouse at the time of death, dependent children up to age 23 (and older children in specified circumstances) or dependent parents living with or near the retiree. AT&T Plan, Art. 5; Lucent Plan, Art 5.

**C. Administration of the Plan**

Lucent Technologies Inc. Employee Benefits Committee ("the Committee") is among the named Defendants in this case. The Committee acts as the plan administrator and is thereby vested with discretionary authority to administer the plan and make changes to it. AT&T Plan Sec. 3.1, 3.2(e)(ii), and 3.3; Lucent Plan, Sec 3.1, 3.2(e)(ii), and 3.3. Both the AT&T Plan and the successor Lucent Plan contained "reservation of rights" clauses. AT&T Plan, Sec. 10.1; Lucent Plan, Sec. 10.1. These provisions authorized the Committee to make changes in the benefit offerings or to terminate the plan entirely, provided the action did not affect an Employee's right to vested benefits.

**D. Elimination of the Death Benefit**

As of January 1, 2000, the death benefit under the Lucent Plan was maintained only for plan participants who retired prior to January 1, 1998. Later, on or about January 2, 2003, Lucent sent letters to all retirees informing them that it was eliminating the death benefit for management employees who retired on or after January 1, 1998. Complaint ¶ 53.

**E. Plaintiffs' Claim to the Death Benefit**

As stated above, the plaintiffs in this case were all AT&T retirees whose benefits were transferred under the Lucent Plan, with the exception of Plaintiff Conder. Unlike the other Plaintiffs, Plaintiff Conder's late husband, Joseph Conder, was also alive as of February 1, 2003, but has since died. All other plaintiffs were also alive on February 1, 2003 when the death benefit was eliminated. Under the amended Lucent Plan neither Plaintiff Conder's heirs nor the other Plaintiffs' future heirs are eligible to receive the death benefit.

**II. DISCUSSION**

**A. Plaintiffs' Claims**

Plaintiffs claim a right to receive the death benefit and/or damages and equitable relief under the following three theories: (1) breach of fiduciary duty; (2) violation of ERISA's anti-cutback rule; and (3) breach of unilateral contract pursuant to federal common law. In Count I of the Complaint, Plaintiffs seek money damages on the grounds that the Committee's elimination of the death benefit was in violation of the fiduciary duties it owes under ERISA. In Count II, Plaintiffs contend that the death benefit was protected by ERISA's anti-cutback rule as either a pension benefit or, alternatively, a welfare benefit. In Count III, Plaintiffs claim that pursuant to federal common law, elimination of

the death benefit constituted a breach of unilateral contract. Specifically, in Count III, Plaintiffs argue that the pension plan constituted a contract, accepted by Plaintiffs through performance and that the death benefits vested upon Plaintiffs' performance. Lastly, in Count IV, Plaintiffs seek equitable relief based on Defendants' alleged breach of fiduciary duty.

**B. 12(b)(6) Dismissal**

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), all allegations in the complaint must be taken as true and must be viewed in the light most favorable to the plaintiff. See Warth v. Seldin, 422 U.S. 490, 501 (1975); Trump Hotels & Casino Resorts, Inc., v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir.1998). In evaluating a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court may consider only the complaint, exhibits attached to the complaint, matters of public record, and undisputedly authentic documents if the plaintiff's claims are based upon those documents. See Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir.1993). If, after viewing the allegations in the complaint in the light most favorable to the plaintiff, it appears beyond doubt that no relief could be granted "under any set of facts which could prove consistent with the allegations," a court shall dismiss a complaint for failure to state a claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

**C. Rule 56 Summary Judgment**

Summary judgment is granted only if all probative materials of record, viewed with all inferences in favor of the non-moving party, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 330 (1986). The moving party bears the burden of showing that there

is no genuine issue of fact and it must prevail as a matter of law, or that the non-moving party has not shown facts relating to an essential element of the issue for which he bears the burden. Celotex, 477 U.S. at 331. If either showing is made then the burden shifts to the non-moving party, who must demonstrate facts which support each element for which he bears the burden and must establish the existence of genuine issues of material fact. Id. The non-moving party “may not rest upon the mere allegations or denials of his pleading” to satisfy this burden, Fed. R. Civ. P. 56(e), but must produce sufficient evidence to support a jury verdict in his favor. Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

### **III. ANALYSIS**

\_\_\_\_\_ Defendants’ motion to dismiss or for summary judgment raises the following five issues. First, the Court must determine whether the Plan terms are ambiguous. If the terms are ambiguous then the Court may look to extrinsic evidence to ascertain the meaning of the Plan’s terms. Second, the Court must determine whether the challenged actions are subject to ERISA’s fiduciary provisions. Third, whether the benefit is properly classified as a pension benefit, or alternatively, as an employee welfare benefit. Fourth, whether the death benefit was vested and thereby could not be eliminated pursuant to ERISA’s anti-cutback provision. Finally, whether this Court may grant relief based on federal common law in light of the Supreme Court’s holding in Hughes Aircraft, 525 U.S. 432.

#### **A. Ambiguity of Plan Terms**

The extent to which this Court may consider extrinsic evidence hinges on whether or not this Court determines that the Lucent Plan’s terms are ambiguous. The question of whether an ERISA

plan's terms are ambiguous is one of law. Bill Gray Ent., Inc. Employee Health & Welfare Plan v. Gourley, 248 F.3d 206, 218 (3d Cir. 2001). Furthermore, a plan term is "ambiguous if it is subject to reasonable alternative interpretations. Taylor v. Cont'l Group Change in Control Severance Pay Plan, 933 F.2d 1227, 1232 (3d Cir. 1991). Only if the plan terms are ambiguous is it appropriate for the court to "consider such [extrinsic] evidence when no ambiguity exists." Bill Gray, 248 F.3d at 218, (quoting Epright v. Envtl. Res. Mgmt. Inc. Health & Welfare Plan, 81 F.3d 335, 339 (3d Cir. 1996)).

Defendants argue that the relevant Plan terms are not ambiguous. On this basis, Defendants contend that the Court should not consider any extrinsic evidence in interpreting the Plan terms. Plaintiffs counter that provisions in the Plan documents are ambiguous and cite to various extrinsic evidence, including non-Plan documents as well as the subjective expectations and actions of individual Plaintiffs. Specifically, Plaintiffs refer to the fact that "[p]articipants perceived Pension Death Benefits as pension benefits, and their availability influenced the decisions participants made about the form in which they should receive their service pension."

From a review of the Plan's terms, this Court finds that the Plan Documents are not ambiguous. The same definition of the death benefit is included in the AT&T and Lucent Plans. The Plan language defining the death benefit and employees' eligibility clearly states who is eligible and when the death benefit was to be paid.<sup>1</sup> Here, the language is not ambiguous because it is not "subject to reasonable alternative interpretations." Taylor, 933 F.2d at 1232. Thus, this Court must

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<sup>1</sup> See Pl. Ex. 13 at D-001907; Pl Ex.14 at D-010406; Pl. Ex.16 at D-010487; Pl. Ex.19 at D-002258.

“enforce the Plan as written unless [it] can find a provision of ERISA that contains a contrary directive.” *Dade v. N. Am. Philips Corp.*, 68 F.3d 1558, 1561 (3d Cir. 1995).

**B. Nonfiduciary Nature of Plan Administrator’s Actions**

Plaintiffs challenge two of Defendants’ decisions: (1) AT&T’s decision to spin-off Lucent and transfer AT&T’s pension obligations to Lucent; and (2) Lucent’s decision to amend the Lucent Plan to eliminate the death benefit. The classification of these decisions as fiduciary or nonfiduciary under ERISA is important because if they are nonfiduciary decisions then Defendants were within their proper discretion to make these decisions and Plaintiffs are not entitled to the equitable relief they seek for Defendants’ alleged breach of fiduciary duties owed. Defendants assert that these decisions are nonfiduciary decisions and as such cannot be challenged under ERISA. Plaintiffs argue that Lucent and the Committee are and were fiduciaries of the Lucent Plan and that elimination of the death benefit constituted a breach of the fiduciary obligations owed by Defendants. However, Plaintiffs’ reasoning is flawed. The fact that Defendants are fiduciaries does not compel the conclusion that they were acting in their fiduciary capacity when they amended the Plan. While plan sponsors owe certain fiduciary duties under ERISA, they are also vested with the authority to take actions in a nonfiduciary capacity.

AT&T’s decision to spin-off Lucent and transfer pension assets to Lucent was a nonfiduciary decision. ERISA’s fiduciary requirements do not apply to strictly business decisions that do not violate a specific ERISA provision or otherwise strip an individual of an already vested benefit. The Supreme Court noted that “ ‘only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration,’ does a person

become a fiduciary under § 3(21)(A).” *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (citing *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (1995)). See also *Blaw Knox Ret. Income Plan v. White Consol. Ind, Inc.*, 998 F.2d 1185, 1189 (3d Cir. 1993) (holding that employer’s transfer of pension plans to a subsidiary was a “corporate business decision outside the scope of ERISA’s protective rules,” to which “no fiduciary duties apply.”) Therefore, AT&T’s decision to spin-off Lucent and transfer its pension funds and obligations under the plan to Lucent was not a plan management or administrative decision. Rather, this decision was strictly a business decision and not a decision made by AT&T in its fiduciary capacity. So long as AT&T complied with ERISA Section 208<sup>2</sup>, AT&T did not breach any of its fiduciary obligations by spinning-off Lucent and transferring pension assets to Lucent. See 29 U.S.C.A. § 1058.

Lucent’s decision to amend the plan is also a nonfiduciary decision. The Supreme Court has repeatedly held that “employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans.” *Hughes Aircraft*, 525 U.S. at 443, (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995)). Furthermore, when employers undertake such action “they do not act as fiduciaries, but are analogous to the settlors of a trust.” *Hughes Aircraft*, 525 U.S. at 443. Thus, an employer may amend either a pension or welfare benefit plan without being bound to a fiduciary standard of care. See *id.*; see also *Spink*, 517 U.S. at 980. Based on these holdings, the Third Circuit has concluded that “[w]hen an employer

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<sup>2</sup> Section 208 of ERISA requires that any merger or consolidation of a pension plan provides each plan participant with a benefit equal or greater than the benefit he would have received prior to the merger

makes decisions about the *design* of a welfare plan . . . it functions as an employer and not as an administrator and thus it is not acting as a fiduciary. Accordingly, an employer can create a plan that furthers its business interests, and it can act according to these interests in amending or terminating the plan.” *Noorily v. Thomas & Betts Corp.*, 188 F.3d 153, 168 (3d Cir. 1999) (emphasis in original) (internal citations omitted); see also *Lettrich v. J.C. Penney Co., Inc.*, 90 Fed. Appx. 604, 614 (3d Cir. 2004). Here, Lucent’s decision to eliminate the death benefit was a decision about the design of the plan, not plan administration. The mere fact that Lucent amended its plan does not breach any fiduciary duties under ERISA; rather, only an amendment that violates a specific provision of ERISA triggers ERISA’s fiduciary provisions. See *Bennett v. Conrail Matched Savings Plan Admin. Comm’ee*, 168 F.3d 671, 679 (3d Cir. 1999).

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. In their brief Plaintiffs cite to *Delgrosso v. Spang and Co.*, to support their argument that actions taken that contradict an express provision of the plan constitute a breach of fiduciary duties. 769 F.2d 928 (3d Cir. 1985). This argument is unpersuasive because *Delgrosso* can be distinguished from this case in at least two major ways: (1) all contributions in that case were made under a defined contribution plan; and (2) unlike the reservation of rights clause contained in the plan in this case, the plan in *Delgrosso* contained a clause prohibiting reversion of contributions. *Id.* at 930. Because Defendants’ decisions to spin-off Lucent and amend the Lucent Plan were nonfiduciary decisions, Plaintiffs’ claims for money damages and equitable relief based on breach of fiduciary duty is denied.

Taking the facts in the light most favorable to Plaintiffs, it is evident that dismissal as to Plaintiffs' Count I is appropriate because the facts alleged do not constitute a breach of any fiduciary duties owed by Defendants.

**C. Classification of Death Benefit as a Pension Benefit or Welfare Benefit**

This Court must decide whether the death benefit is properly classified as a pension benefit or an employee welfare benefit. While ERISA offers protection to both pension benefits and employee welfare benefits, there are different provisions for modifying these benefits as well as different rules as to when such benefits vest. Classification of the death benefit is critical to the disposition of Defendants' motions because the death benefit is protected by ERISA's anti-cutback rule only if (1) it is an accrued pension benefit; or (2) it is a vested employee welfare benefit.

ERISA's anti-cutback rule prohibits elimination or reduction of accrued benefits. Notably, the rule, codified in ERISA Section 204(g), protects only *accrued* benefits. 29 U.S.C.A. § 1054. Thus, if the AT&T/Lucent Plan death benefit was an accrued benefit then Lucent violated ERISA by eliminating it.

ERISA Section 3(23)(A) defines "accrued benefit" in the case of a defined benefit plan as an annual benefit, commencing at normal retirement age. 29 U.S.C.A. § 1002(23). Pursuant to this definition, pension benefits and not employee welfare benefits may qualify as accrued benefits. The respective statutory definitions of pension benefits and employee welfare benefits make clear that only pension benefits could potentially qualify as accrued benefits for purposes of the anti-cutback rule.

By definition, only pension benefits, not employee welfare benefits can be paid at normal retirement age in the form of an annual benefit; therefore, only pension benefits can be accrued. Stated generally, pension benefits are designed to provide retirement income to employees. See Unisys Corp. Ret. Med. Benefit “ERISA” Litig., 58 F.3d 896, 901 (3d Cir. 1995) (citing 29 U.S.C. § 1002(1)). 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.A. § 1002(1); see Unisys, 58 F.3d at 901 (explaining elements of an employee welfare plan). By definition alone, it is evident that employee welfare benefits do not satisfy the requirements of an accrued benefit because welfare benefits are not paid at normal retirement age but rather when a specified event, such as death, occurs.

In this case, the death benefit, as defined by plan documents, satisfies the definition of an employee welfare benefit and is thus not an “accrued benefit” for purposes of the anti-cutback rule. The death benefit provided for payment to a plan participant’s beneficiaries upon the plan participant’s death and clearly is not paid at “normal retirement age.” Employee welfare benefits, are “maintained for the purpose of providing for [plan participants] or their beneficiaries . . . benefits in the event of death.” ERISA § 3(1), 29 U.S.C. § 1002(1). Similarly, the death benefit provides for a plan participant’s beneficiaries at the plan participant’s death. Finally, according to the Plan documents, the death benefit is paid in a lump sum or installment payments equal to twelve months salary. 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.

Plaintiff argues unpersuasively that the death benefit is a pension benefit because it was funded from surplus pension assets. This assertion is incorrect and not supported by any case law or statutory text. ERISA does not require that welfare benefits be funded by non-pension assets. Rather, some courts have held that employee welfare benefits are often part of a comprehensive pension plan. See Rombach v. Nestle USA, Inc., 211 F.3d 190, 193-93 (2d Cir. 2000) (citing McBarron v. S&T Indus., 771 F.2d 94, 97 (6th Cir. 1985)). The Court's role in classifying the death benefit is to look at the nature of the benefit as defined by the Plan terms. See Oatway v. Am. Int'l Group, 325 F.3d 184, 188-89 (3d Cir. 2003) (classifying benefits by what purpose they are designed to serve). This classification should not be made by evaluating how the plan is funded or how Plaintiffs subjectively perceived the benefit. 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.

Plaintiff also argues that the death benefit is protected by the anti-cutback rule because it is a retirement-type subsidy. In 1984 Congress enacted the Retirement Equity Act ("REA"), modifying ERISA Section 204(g) to include retirement-type subsidies within the definition of "accrued benefits." The legislative history of this change reveals that Congress was concerned with protecting the pension and retirement benefits of individuals who retired early. See Bellas v. CBS, Inc., 221 F.3d 517, 523, 525 (3d Cir. 2000). Additionally, the Senate Report addressing the reason for the change to ERISA Section 204(g) stated that certain benefits, including a death benefit, were not intended to be considered retirement-type subsidies. See S. Rep. No. 98-575, 98th Cong., 2d Sess., at 30 (1983) reprinted in 1984 U.S.C.C.A.N. 2547, 2574; see also Bellas, 221 F.3d at 526.

Furthermore, the death benefit does not satisfy the definition of retirement-type subsidy as provided by the Third Circuit. Congress intended for retirement-type subsidy to be defined in Treasury Department regulations; however, no such regulations have been set forth. See id. at 524; 29 U.S.C. § 1054(g)(2)(A). Nevertheless, the Third Circuit has defined retirement-type subsidy as “the excess in value of a benefit over the actuarial equivalent of the normal retirement.” Bellas, 221 F.2d at 525; see also Ashenbaugh v. Crucible Inc., 1975 Salaried Ret. Plan, 854 F.2d 1516, 1521 n. 6 (3d Cir. 1998); Dade, 68 F.3d at 1562 n.1. In Bellas, the Third Circuit explained how the retirement-type subsidy is calculated:

[t]he value of the early retirement benefit is calculated by first determining the amount that would be payable to the participant at normal retirement age, given the participant’s service and compensation as of the date of *early* retirement. This value then is reduced by a factor reflecting that benefit payments will begin earlier than was contemplated and, therefore, are likely to continue for a longer period of time.

221 F.2d at 525 (emphasis in the original) (internal citations omitted). Adhering to the Third Circuit’s definition of retirement-type subsidy, the death benefit is protected by the anti-cutback rule as a retirement-type subsidy only if it is calculated in this way. In looking to the plain language of the Lucent Plan, it is evident that the death benefit is not a retirement-type subsidy because it is not calculated in the manner stated above; but rather, was a payment equivalent to the plan participant’s final twelve months of compensation. Pl. Ex. 2 at D000304. In no way was the death benefit intended to provide a benefit to employees who retired early. Instead, the death benefit primarily assisted a plan participant’s beneficiary upon the retiree’s death.

**D. Vesting of Death Benefit**

Having classified the death benefit as an employee welfare benefit, the next inquiry is whether this benefit had vested when Lucent eliminated it. Once an employee welfare benefit vests it may not be eliminated without violating ERISA's anti-cutback rule. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 512 (1981); DiGiacomo v. Teamsters Pension Trust Fund of Philadelphia and Vicinity, 420 F.3d 220, 223 (3d Cir. 2005). Plaintiff contends that the benefit was vested when Lucent eliminated it. Specifically, Plaintiff argues that this vesting occurred: (1) when plan participants became eligible for retirement with a service pension according to the language in the summary plan document (SPD); or, alternatively (2) when Lucent transferred excess pension assets to pay for post-retirement medical benefits. As explained below, Plaintiffs' assertions about the time for vesting are incorrect because the vesting of employee welfare benefits must be clear on the face of the plan documents and here, the plan documents do not indicate that vesting occurred upon either of these events.

The Third Circuit has repeatedly noted that "ERISA does not require automatic vesting of welfare benefit plans." Unisys, 58 F.3d at 901. See also Alexander v. Primerica Holdings, Inc., 967 F.2d 90, 95 (3d Cir. 1992); Smith v. Hartford Ins. Group, 6 F.3d 131, 136 (3d Cir. 1994). These cases have summarized the congressional reasoning for no automatic vesting: "[t]o require the vesting of those ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1160 (3d Cir. 1990). Courts, including the Third Circuit, have followed Congress' lead and respected the "need for flexibility with respect to an employer's right to change

medical” and other welfare benefit plans. Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Skinner Engine Co., 188 F.3d 130, 138 (3d Cir. 1999). Thus, a plan participant’s right to an employee welfare benefit vests only according to the terms of the plan. See Unisys, 58 F.3d at 902.

In order for an employee welfare benefit to vest, the conditions for vesting must be clear on the face of the plan. Thus, to determine when an employee welfare benefit vests, the Court must “examine the plan documents.” Unisys, 58 F.3d at 902. The Third Circuit has reasoned that since employee welfare benefits are “[e]xtra-ERISA commitments” the vesting language “must be found in the plan documents and stated in clear and express language.” Id. Furthermore, the “plan participant bears the burden of proving, by a preponderance of the evidence, that the employer intended the welfare benefits to be vested.” Id. Thus, in this case, Plaintiffs bear the burden of proving that the death benefit vested according to clear and express language contained in the Lucent Plan.

1. Vesting of Benefit According to Plan Documents

Plaintiffs direct the Court’s attention to several documents published by AT&T and Lucent that allegedly set forth the vesting guidelines for the death benefit. First, Plaintiffs claim that AT&T prioritized benefits under the plan and in doing so established the death benefit as vesting upon an employee’s eligibility for retirement. According to Plaintiffs’ argument, ERISA Section 4044 required AT&T to prioritize the benefits. 29 U.S.C. § 1344(a). Such prioritization of benefits pursuant to Section 4044 does not create vesting rights; but rather “insurance” upon termination of a plan. See Mead Corp. v. Tilley, 490 U.S. 714, 723 (1989) (holding that ERISA Section 4044 does

not create new entitlements but only “insurance for benefits created” in Title I); see also Ashenbaugh, 854 F.2d at 1528. Therefore, Defendants’ act of categorizing the death benefit as a Category Two benefit has no bearing on when a plan participant’s entitlement to the death benefit vested. Furthermore, because the Plan itself was not terminated, Section 4044 offers Plaintiffs no protection.

Next, Plaintiffs’ argue that language in the Summary Plan Description (“SPD”) demonstrates that the death benefit vested upon a plan participant’s eligibility for retirement. Plaintiffs are correct that if there is a conflict in the language contained in a SPD and the plan documents then the SPD controls. Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found., 334 F.3d 365, 378 (3d Cir. 2003). However, the language in the AT&T and Lucent SPDs does not “clear[ly] and express[ly]” indicate that the death benefit vested upon eligibility for retirement. Unisys, 58 F.3d at 902. Rather, the language Plaintiffs cite merely defines the death benefit and states who is eligible.<sup>3</sup> Furthermore, other provisions in the SPD make clear that plan participants did not have a vested right to the death benefit upon retirement because the occurrence of subsequent events could serve as grounds for Lucent to deny payment of the benefit. For example, the SPD contained in Exhibit 14 states that “[n]o Death Benefits, however, may be payable in the event a suit for damages or other legal action is brought against the Company outside the provisions of this Plan on account of the death of an employee.” Pl. Ex. 14 at D010406. While this

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<sup>3</sup> The SPD published by AT&T, contained in Exhibit 13, states that “[a] benefit equal to one year’s pay at retirement will be paid to the qualified beneficiary of an employee who retires with a Service or Disability Pension.” Pl. Ex. 13 at D001907. Contrary to Plaintiff’s contentions, this language does not define when vesting occurs. See also Pl. Ex. 16 at D010487; Pl. Ex. 19 at D002258-259.

exclusion is not applicable in this case, it shows that Plaintiffs' right to the death benefit was not vested upon retirement, but it could be stripped away if Plaintiffs engaged in particular conduct, namely, filing suit against Lucent. Additionally, the SPD language makes clear that the benefit will be paid only if a qualified beneficiary survives the plan participant.<sup>4</sup> The presence of these conditions on plan participants' eligibility for the death benefit underscore the fact that there was no automatic vesting language and, further, that employees' entitlement to the death benefit did not vest upon retirement. The benefit only vested when the plan participant died and was survived by qualified beneficiaries.

Finally, Plaintiffs' argue that their right to the death benefit vested pursuant to clear language contained in the Employee Benefits Agreement ("EBA"). First, it is not clear that the EBA is even a Plan document. Plaintiffs ask this Court to follow the Fifth Circuit's example, citing Halliburton Company Benefits Committee v. Graves, 463 F.3d 360 (5th Cir. 2006) for the proposition that a merger agreement may amend the terms of an employee benefits plan. Regardless of whether the EBA amended the terms of the employee benefits plan, the clause in the EBA stating that Lucent assumed AT&T's liabilities with regards to transferred retirees does not contain clear and express vesting language. Pl. Ex. 11 at D001436. Neither this language nor any other language cited by Plaintiffs clearly and expressly states the vesting requirements for the death benefit. Therefore, the death benefit did not become vested pursuant to any of these documents.

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<sup>4</sup> "If there is no beneficiary who qualifies for a mandatory payment, payment of a Death Benefit to other dependent relatives may be authorized by the Employee Benefits Committee." Pl. Ex. 14 at D010406.

2. Vesting of Benefit by Transfer of Funds

Plaintiffs also argue that the death benefit vested when Lucent transferred excess pension assets pursuant to I.R.C. Section 420. Specifically, Plaintiff cites language in the Lucent Plan: “[a]ccrued pension benefits for Participants and beneficiaries become nonforfeitable.” Pl. Ex. 12 at D001692. This language is not grounds for concluding that the death benefit vested. First, this is not clear and express language of vesting as is required by controlling precedent. Unisys, 58 F.3d at 902. Second, as discussed above, the death benefit is not accrued under the statutory definition because it is not an annual benefit paid at normal retirement age. Therefore, Lucent’s transfer of excess pension assets did not cause the death benefit to vest.

Based on Plaintiffs’ complaint and the plan documents, it is apparent that dismissal is appropriate as to Plaintiffs’ Count II. This Court may consider the plan documents in dismissing Count II pursuant to Federal Rule of Civil Procedure 12(b)(6) because Plaintiffs’ claims are based on those documents. Pension Benefit Guar. Corp., 998 F.2d at 1196. It is clear on the face of these documents that the death benefit was not vested and its elimination did not violate ERISA’s anti-cutback rule.

**E. Contract Claims Based on Federal Common Law**

Arguing that the pension plan is a unilateral contract, Plaintiffs seek relief pursuant to federal common law. Plaintiffs claim that the pension plan is an offer which the employee accepts by performance, binding the employer to the contract’s terms. Under this theory, the death benefits would vest upon an employee’s performance.

Plaintiffs' unilateral contract theory is unavailing for several reasons. First, the Supreme Court recently ruled that it is inappropriate for the courts to employ federal common law to supplement ERISA. Most recently, in Hughes Aircraft, the Supreme Court held that because ERISA "is a comprehensive and reticulated statute and is enormously complex and detailed" it should not be supplemented by extratextual remedies, such as the common-law doctrines advocated by respondents." 525 U.S. at 447 (citing Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361 (1980) and Mertens v. Hewitt Assoc., 508 U.S. 248, 262 (1993) (internal citations omitted)). Just this year, the Third Circuit reiterated this point in Hooven v. Exxon Mobil Corporation, Nos. 04-3773, 05-1610, 2006 WL 2988116,\*5 (3d Cir. Oct. 20, 2006), noting that "[a]lthough we occasionally employ unilateral contract concepts in ERISA cases, we do so only where 'the asserted unilateral contract is based on the explicit promises in the ERISA plan documents themselves.' Unilateral contract principles may not operate to create extra-ERISA causes of action for plan benefits." Thus, as stated above, no relief pursuant to unilateral contract principles is available in this case because there are no explicit, non-revocable promises to the death benefit contained in the ERISA plan documents.

Secondly, the majority of cases cited by Plaintiffs are from other circuits and involved top hat plans, not welfare benefits like the case here.<sup>5</sup> Unlike typical pension and employee welfare

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<sup>5</sup> Plaintiffs' reliance on Burch v. Firestone Tire and Rubber Co., 838 F.2d 134, 145-47 (3d Cir. 1987) and Amatuzio v. Gandalf Sys. Corp., 994 F.Supp. 253, 266 (D.N.J. 1998) to show that the Third Circuit and the District of New Jersey have applied unilateral contract principles to employee welfare plans is unpersuasive. Both of these plans involve severance plans, relating to length of service and a form of wages. Such a benefit is distinct from the death benefit at issue here.

benefit plans, top-hat plans are designed to compensate highly paid employees. Thus, some courts have carved out an exception for top-hat plans, reasoning that because they are more akin to unilateral contracts, federal common law contract principles are applicable. See Goldstein v. Johnson & Johnson, 251 F.3d 433, 442 (3d Cir. 2001). Therefore, the cases cited by Plaintiffs to support the unilateral contract theory of relief are distinguishable from the facts here and thereby unpersuasive.

Finally, even if the Court applies federal common law contract principles and construes the plan as a unilateral contract, it is still subject to the Plan's reservation of rights clause. Plaintiffs may have accepted the Plan's terms by performance; however, they accepted all the Plan's terms, including the clause reserving Defendants' right to alter plan benefits in the future. Therefore, Defendants were merely exercising their rights under the contract that Plaintiffs accepted and agreed to.

Dismissal is appropriate as to Plaintiffs' Count IV because no relief can be granted upon the face of Plaintiffs' complaint due to the fact that federal common law unilateral contract principles may not be grounds for relief on pension and retirement plans that fall within the ambit of ERISA.

#### IV. CONCLUSION

For the reasons stated above, it is the decision of the this Court that Defendants' motion to dismiss is granted. Additionally, Plaintiffs' motion to substitute a party is rendered moot and is thereby denied. An appropriate Order accompanies this Opinion.

S/ Dennis M. Cavanaugh

Dennis M. Cavanaugh, U.S.D.J.

Date: November 27, 2006  
Orig.: Clerk  
cc: Counsel of Record  
The Honorable Mark Falk, U.S.M.J.  
File

12BM, APPEAL, CLOSED, LEAD, RULE16, SCHEDO

**U.S. District Court**  
**District of New Jersey [LIVE] (Newark)**  
**CIVIL DOCKET FOR CASE #: 2:03-cv-05017-DMC-MF**

FOSS v. LUCENT TECHNOLOGIES, et al  
Assigned to: Judge Dennis M. Cavanaugh  
Referred to: Magistrate Judge Mark Falk  
Demand: \$0  
Member case: ([View Member Case](#))  
Case in other court: USCA, 06-05008  
USCA, 06-05009  
Cause: 29:1132 E.R.I.S.A.-Employee Benefits

Date Filed: 10/23/2003  
Date Terminated: 11/28/2006  
Jury Demand: None  
Nature of Suit: 791 Labor: E.R.I.S.A.  
Jurisdiction: Federal Question

**Plaintiff**

**EDWARD FOSS**

*on behalf of himself and all others  
similarly situated*

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*ATTORNEY TO BE NOTICED*

**Plaintiff**

**SARAH CONDER**

represented by **KIMBERLY LITMAN KIMMEL**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JOSEPH G. SAUDER**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Consol Plaintiff**

**VINCENT R., LUCAS**

*Individually and on behalf of all other  
similarly situated.*

represented by **SCOTT M. LEMPERT**  
SANDALS & ASSOCIATES, P.C.  
ONE SOUTH BROAD STREET  
SUITE 1850  
PHILADELPHIA, PA 19107  
(215) 825-4000  
Email: slempert@sandalslaw.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Consol Plaintiff**

**ARTHUR J. BERENDT**

represented by **CHRISTINE F. LEWIS**  
PELLETTIERI, RABSTEIN &  
ALTMAN, ESQS.  
TARNSFIELD PLAZA  
790 WOODLANE ROAD  
SUITE 6  
MT. HOLLY, NJ 08060  
(609) 267-3390  
Email:  
christine.lewis@dol.lps.state.nj.us  
*TERMINATED: 08/02/2005*  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**KIMBERLY LITMAN KIMMEL**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JOSEPH G. SAUDER**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

**Consol Plaintiff**

**ROBERT B. HOWARD**

represented by **CHRISTINE F. LEWIS**  
(See above for address)  
*TERMINATED: 08/02/2005*  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**KIMBERLY LITMAN KIMMEL**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**JOSEPH G. SAUDER**  
(See above for address)  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**LUCENT TECHNOLOGIES INC.**

represented by **THEODORE D. ADEN**  
EPSTEIN BECKER & GREEN, P.C.  
TWO GATEWAY CENTER  
12TH FLOOR  
NEWARK, NJ 07102  
(973) 642-1900  
Email: taden@ebglaw.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Defendant**

**LUCENT RETIREMENT INCOME  
PLAN**

represented by **THEODORE D. ADEN**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Defendant**

**LUCENT TECHNOLOGIES, INC.  
EMPLOYEE BENEFITS  
COMMITTEE**

represented by **THEODORE D. ADEN**  
(See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Defendant**

**COLLETTE CHILTON**  
*TERMINATED: 12/01/2003*

**Defendant**

**JOHN HICKEY**

TERMINATED: 12/01/2003

**Defendant****PAMELA O. KIMMET**

TERMINATED: 12/01/2003

**Defendant****RALPH P. CRAVISO**

TERMINATED: 12/01/2003

**Consol Defendant****AT&T CORP**

represented by **JOSEPH D. GUARINO**  
 EPSTEIN BECKER & GREEN, PC  
 TWO GATEWAY CENTER  
 12TH FLOOR  
 NEWARK, NJ 07102-5003  
 (973) 642-1900  
 Email: jguarino@ebglaw.com  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
10/23/2003	<u>1</u>	COMPLAINT filed FILING FEE \$ 150.00 RECEIPT # 319265 (dr) Additional attachment(s) added on 6/7/2006 (tll, ). (Entered: 10/24/2003)
10/23/2003		CASE REFERRED to arbitration (dr) (Entered: 10/24/2003)
10/24/2003	<u>2</u>	NOTICE of Allocation and Assignment filed. ( NEWARK - Judge BISSELL - Magistrate Judge HANEKE) (NM) (dr) Additional attachment(s) added on 6/7/2006 (tll, ). (Entered: 10/24/2003)
11/07/2003	<u>3</u>	NOTICE/Certificate of Compliance with section 502(h) of ERISA by EDWARD FOSS (jd) Additional attachment(s) added on 6/7/2006 (tll, ). (Entered: 11/12/2003)
11/25/2003	<u>4</u>	STIPULATION and ORDER, extending time , setting answer due for 2/9/04 for LUCENT TECHNOLOGIES, for LUCENT RETIREMENT, for LUCENT TECHNOLOGIES , voluntarily dismissing action as to defts Chilton, Craviso, Hickey and Kimmet w/out prejudice ( signed by Chief Judge John W. Bissell ) (NM) (jd) Additional attachment(s) added on 6/7/2006 (tll, ). (Entered: 12/01/2003)
01/16/2004	<u>5</u>	MOTION for Leave for James R. Malone, Jr. to Appear pro hac vice by EDWARD FOSS. (Attachments: # <u>1</u> certification of Christine F. Lewis in support of motion# <u>2</u> declaration of James R. Malone, Jr# <u>3</u> proposed order)(jd, ) (Entered: 01/26/2004)
01/16/2004		Set Deadlines as to <u>5</u> MOTION for Leave to Appear pro hac vice. Motion Hearing set for 2/9/2004 10:00 AM before Judge John W. Bissell. (jd, )



		on 6/8/2006 (tll, ). Additional attachment(s) added on 6/8/2006 (tll, ). (Entered: 03/08/2004)
03/09/2004	<u>11</u>	Consent ORDER granting pro hac vice admission to Andrea R. Calem on behalf of defts . Signed by Judge G. Donald Haneke on 3/9/04. (jd, ) Modified on 3/10/2004 (jd, ). (Entered: 03/10/2004)
03/09/2004	<u>12</u>	Consent ORDER granting pro hac vice admission to Frank C. Morris, Jr. on behalf of defts. Signed by Judge G. Donald Haneke on 3/9/04. (jd, ) (Entered: 03/10/2004)
03/10/2004	<u>13</u>	SCHEDULING ORDER: the motion for class certification shall be fully briefed and submitted to Judge Bissell by 7/15/04; Discovery is to remain open until further order of the court.. Signed by Judge G. Donald Haneke on 3/10/04. (jd, ) (Entered: 03/11/2004)
03/10/2004		Minute Entry for proceedings held before Judge G. Donald Haneke : Scheduling Conference held on 3/10/2004. (nc, ) (Entered: 03/15/2004)
04/01/2004	<u>14</u>	NOTICE of Appearance by RAMONA M MARIANI on behalf of EDWARD FOSS (MARIANI, RAMONA) (Entered: 04/01/2004)
04/01/2004	<u>15</u>	NOTICE by EDWARD FOSS of <i>Withdrawal of Counsel</i> (MARIANI, RAMONA) (Entered: 04/01/2004)
04/14/2004	<u>16</u>	ORDER REASSIGNING CASE. Case reassigned to Judge William G. Bassler for all further proceedings. Judge John W. Bissell no longer assigned to case. Signed by Judge John W. Bissell on 4/14/04. (jd, ) (Entered: 04/16/2004)
06/03/2004	<u>17</u>	ORDER OF RECUSAL. Judge Madeline C. Arleo recused. . Signed by Judge Madeline C. Arleo on 6/1/04. (jd, ) (Entered: 06/03/2004)
06/25/2004	<u>18</u>	Stipulation and PROTECTIVE ORDER. Signed by Judge William G. Bassler on 6/23/04. (jd, ) (Entered: 06/28/2004)
06/30/2004		Minute Entry for proceedings held before Judge Mark Falk: Telephone Conference held on 6/30/2004. (mm, ) (Entered: 07/12/2004)
07/07/2004	<u>19</u>	ORDER Settlement Conference set for 7/20/2004 04:00 PM before Magistrate Judge Mark Falk. Status Conference set for 7/20/2004 04:00 PM before Magistrate Judge Mark Falk.. Signed by Judge Mark Falk on 7/7/04. (jd, ) (Entered: 07/08/2004)
07/20/2004	<u>20</u>	Letter from Counsel for Lucent. (FLYNN, JAMES) (Entered: 07/20/2004)
07/20/2004		Minute Entry for proceedings held before Judge Mark Falk: Settlement Conference held on 7/20/2004. (mm, ) (Entered: 08/01/2004)
08/09/2004	<u>21</u>	Letter from Lucent's counsel to Magistrate Judge Falk re case management. (FLYNN, JAMES) (Entered: 08/09/2004)
08/24/2004	<u>22</u>	Letter from Counsel for Lucent to Magistrate Falk. (FLYNN, JAMES) (Entered: 08/24/2004)

09/02/2004	<u>23</u>	NOTICE by EDWARD FOSS of <i>Lodging of Letter</i> (LITMAN, KIMBERLY) (Entered: 09/02/2004)
10/20/2004	<u>24</u>	Letter from defendants re new hearing date. (GUARINO, JOSEPH) (Entered: 10/20/2004)
12/10/2004	<u>25</u>	ORDER Settlement/Status Conference and oral argument is set for 1/11/2005 02:30 PM before Magistrate Judge Mark Falk.. Signed by Judge Mark Falk on 12/9/04. (jd, ) (Entered: 12/10/2004)
01/05/2005	<u>26</u>	Letter from Arthur Penn, Esq.. (PENN, ARTHUR) (Entered: 01/05/2005)
01/05/2005	<u>27</u>	Letter from Arthur Penn, Esq. to Judge Falk. (PENN, ARTHUR) (Entered: 01/05/2005)
01/10/2005	<u>28</u>	Letter from Lucent defendants to Magistrate Judge Mark Falk in response to plaintiff's letter to the Court dated January 5, 2005 seeking reconsideration of the Court's decision to approve defendants' request to proceed to file a summary judgment motion. (Attachments: # <u>1</u> Certificate of Service)(FLYNN, JAMES) (Entered: 01/10/2005)
01/11/2005	<u>29</u>	Minute Entry for proceedings held before Judge Mark Falk: Oral Argument held on 1/11/2005. Ordered discovery in each case to continue. When discovery is provided defendant may file motions. (Tape #F05 CD#1.) (mm-sl, ) (Entered: 01/13/2005)
01/27/2005	<u>30</u>	STIPULATION AND ORDER for consolidation of cases; civil action no. 04-640 and 04-1099 are consolidated with 03-5017 for all discovery, and other pretrial and trial purposes, etc.. Signed by Judge William G. Bassler on 1/27/05. (jd, ) (Entered: 01/28/2005)
07/29/2005	<u>31</u>	MOTION for Summary Judgment by LUCENT TECHNOLOGIES INC., AT&T CORP, LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE. Responses due by 8/29/2005 (Attachments: # <u>1</u> Statement Local Rule 56.1 Statement# <u>2</u> Brief # <u>3</u> Certification of Susan E. Goodwin# <u>4</u> Exhibit A to J of Goodwin Certification# <u>5</u> Text of Proposed Order # <u>6</u> Certificate of Service)(GUARINO, JOSEPH) (Entered: 07/29/2005)
07/29/2005		Set Deadlines as to <u>31</u> MOTION for Summary Judgment. Motion Hearing set for 9/12/2005 before Judge William G. Bassler. (Please be advised that this motion will be decided on the papers unless otherwise notified by the court) (jd, ) (Entered: 08/01/2005)
08/02/2005	<u>32</u>	Letter from Arthur Penn re <u>31</u> MOTION for Summary Judgment. (Attachments: # <u>1</u> Exhibit Exhibit 1# <u>2</u> Exhibit Exhibit 2# <u>3</u> Exhibit Exhibit 3# <u>4</u> Exhibit Exhibit 4)(PENN, ARTHUR) (Entered: 08/02/2005)
08/19/2005	<u>33</u>	Letter from Defendants' Counsel to Hon. Mark Falk re response to August 2d letter re <u>32</u> Letter. (FLYNN, JAMES) (Entered: 08/19/2005)
08/24/2005	<u>34</u>	Letter from Kimberly M. Litman in response to letter from defendants' counsel re <u>33</u> Letter. (LITMAN, KIMBERLY) (Entered: 08/24/2005)

08/25/2005	<u>35</u>	Letter from Kimberly M. Litman re <u>31</u> MOTION for Summary Judgment. (LITMAN, KIMBERLY) (Entered: 08/25/2005)
09/07/2005	<u>36</u>	Letter from Joseph D. Guarino re case status. (GUARINO, JOSEPH) (Entered: 09/07/2005)
09/08/2005		Minute Entry for proceedings held before Judge Mark Falk: Telephone Conference held on 9/8/2005. (mm, ) (Entered: 09/11/2005)
09/27/2005	<u>37</u>	Letter from Kimberly M. Litman and Scott Lempert. (Attachments: # <u>1</u> Exhibit [Proposed] Consolidated Amended Complaint# <u>2</u> Exhibit Letter - Opinion & Order)(LITMAN, KIMBERLY) (Entered: 09/27/2005)
10/06/2005	<u>38</u>	STIPULATION and [Proposed] Order by EDWARD FOSS, VINCENT R., LUCAS, ARTHUR J. BERENDT, ROBERT B. HOWARD. (LITMAN, KIMBERLY) (Entered: 10/06/2005)
10/13/2005	<u>39</u>	STIPULATION AND ORDER that the deadline for defts' response to pltfs' First Set of Requests for Admissions shall be extended through and including 11/15/05, etc.. Signed by Judge Mark Falk on 10/12/05. (jd, ) (Entered: 10/13/2005)
10/20/2005	<u>40</u>	Letter from Arthur Penn. (Attachments: # <u>1</u> Text of Proposed Order Granting Leave to File Consolidated Amended Complaint)(PENN, ARTHUR) (Entered: 10/20/2005)
10/21/2005	<u>41</u>	Letter from Defense Counsel re Objection to amended pleading re <u>37</u> Letter, <u>40</u> Letter. (FLYNN, JAMES) (Entered: 10/21/2005)
11/07/2005	<u>42</u>	Letter from Kimberly Litman and Scott Lempert re <u>41</u> Letter. (Attachments: # <u>1</u> Exhibit Exhibit 1)(LITMAN, KIMBERLY) (Entered: 11/07/2005)
11/09/2005	<u>43</u>	ORDER granting leave to file consolidated amended complaint w/in 10 days of this Order. Signed by Judge Mark Falk on 11/3/05. (jd, ) (Entered: 11/09/2005)
11/10/2005	<u>44</u>	AMENDED COMPLAINT against all defendants all defendants., filed by SARAH CONDER, EDWARD FOSS, VINCENT R., LUCAS, ARTHUR J. BERENDT, ROBERT B. HOWARD.(LITMAN, KIMBERLY) (Entered: 11/10/2005)
12/27/2005	<u>45</u>	STIPULATION AND ORDER that the deadline for defta' response to pltfs' first set of requests for admissions shall be extended through and including 11/3/05, etc.. Signed by Judge Mark Falk on 12/20/05. (jd, ) (Entered: 12/27/2005)
12/30/2005	<u>46</u>	MOTION for Summary Judgment by LUCENT TECHNOLOGIES INC., LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE. Responses due by 2/28/2005 (Attachments: # <u>1</u> Statement Local Rule 56.1# <u>2</u> Brief In Support of Summary Judgment# <u>3</u> Certification Declaration of Susan E. Goodman# <u>4</u> Exhibit A to J of Goodwin# <u>5</u> Text of Proposed Order # <u>6</u> Certificate of Service)(GUARINO, JOSEPH)

		(Entered: 12/30/2005)
12/30/2005		Set Deadlines as to <u>46</u> MOTION for Summary Judgment. Motion Hearing set for 5/22/2006 before Judge William G. Bassler. (Please be advised that this motion shall be decided on the papers unless otherwise notified by the court) (jd, ) Modified on 1/5/2006 (spc, ). (Entered: 01/03/2006)
01/18/2006	<u>47</u>	Letter from Kimberly M. Litman and Scott Lempert. (Attachments: # <u>1</u> Exhibit [Proposed] Amended Stipulation and Order Relating to Confidentiality of Discovery Materials)(LITMAN, KIMBERLY) (Entered: 01/18/2006)
01/18/2006	<u>48</u>	NOTICE by EDWARD FOSS, SARAH CONDER re <u>47</u> Letter Attachment #2, Exhibit B, inadvertently left off Document 47 (LITMAN, KIMBERLY) (Entered: 01/18/2006)
01/18/2006		Minute Entry for proceedings held before Judge Mark Falk : Telephone Conference re: motion to amend held on 1/18/2006. (jr) (Entered: 01/19/2006)
01/30/2006	<u>49</u>	Certification of Joseph D. Guarino on behalf of LUCENT TECHNOLOGIES INC., LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE. (jd, ) (Entered: 01/30/2006)
01/30/2006	<u>50</u>	Certification of John Houston Pope on behalf of LUCENT TECHNOLOGIES INC., LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE re: admission pro hac vice. (jd, ) (Entered: 01/30/2006)
01/30/2006	<u>51</u>	Consent ORDER for admission pro hac vice of John Houston Pope. Signed by Judge Mark Falk on 1/26/06. (jd, ) (Entered: 01/30/2006)
02/27/2006	<u>52</u>	Letter from Kimberly M. Litman and Scott Lempert re <u>46</u> MOTION for Summary Judgment. (Attachments: # <u>1</u> Exhibit Stipulation and Proposed Order)(LITMAN, KIMBERLY) (Entered: 02/27/2006)
03/01/2006	<u>53</u>	Rule 7.1 Letter for extension of return date re <u>46</u> MOTION for Summary Judgment filed by SARAH CONDER, etal. (Attachments: # <u>1</u> stipulation and proposed order)(jd, ) (Entered: 03/01/2006)
03/08/2006	<u>54</u>	RESPONSE in Opposition re <u>46</u> MOTION for Summary Judgment filed by EDWARD FOSS, VINCENT R., LUCAS, ARTHUR J. BERENDT, ROBERT B. HOWARD, SARAH CONDER. (Attachments: # <u>1</u> Statement Under L.R. 56.1# <u>2</u> Appendix (placed in Clerk's office)# <u>3</u> Text of Proposed Order)(LITMAN, KIMBERLY) (Entered: 03/08/2006)
03/08/2006	<u>55</u>	MOTION to Seal <i>Materials Pursuant to L.R. 5.3(c)</i> by EDWARD FOSS, VINCENT R., LUCAS, ARTHUR J. BERENDT, ROBERT B. HOWARD, SARAH CONDER. (Attachments: # <u>1</u> Exhibit Declaration of James R. Malone, Jr.# <u>2</u> Text of Proposed Order)(LITMAN, KIMBERLY) (Entered: 03/08/2006)

03/08/2006		Set Deadlines as to <u>55</u> MOTION to Seal <i>Materials Pursuant to L.R. 5.3 (c)</i> . Motion Hearing set for 4/10/2006 before Judge William G. Bassler. (Please be advised that this motion shall be decided on the papers unless otherwise notified by the court) (jd, ) (Entered: 03/08/2006)
03/09/2006	<u>56</u>	Letter from Kimberly M. Litman re <u>54</u> Response in Opposition to Motion, (Appendix received in Clerk's Office 3/9/06 and placed in Clerk's file). (jd, ) (Entered: 03/09/2006)
03/10/2006	<u>57</u>	Amended Stipulation and ORDER relating to Confidentiality of Discovery Materials. Signed by Judge Mark Falk on 3/8/06. (jd, ) (Entered: 03/10/2006)
03/10/2006	<u>58</u>	Notice of Request by Pro Hac Vice to receive Notices of Electronic Filings. (GUARINO, JOSEPH) (Entered: 03/10/2006)
03/16/2006	<u>59</u>	Supplemental to pltfs' STATEMENT under L.R. 56.1 by EDWARD FOSS. (Attachments: # <u>1</u> appendix to pltfs' opposition brief (entire document placed in Clerk's vault))(jd, ) Additional attachment(s) added on 6/7/2006 (tll, ). Additional attachment(s) added on 6/7/2006 (tll, ). Additional attachment(s) added on 6/7/2006 (tll, ). Additional attachment(s) added on 6/7/2006 (tll, ). Additional attachment(s) added on 6/7/2006 (tll, ). Additional attachment(s) added on 6/7/2006 (tll, ). (Entered: 03/16/2006)
03/23/2006	<u>60</u>	NOTICE by EDWARD FOSS, VINCENT R., LUCAS, ARTHUR J. BERENDT, ROBERT B. HOWARD, SARAH CONDER re <u>55</u> MOTION to Seal <i>Materials Pursuant to L.R. 5.3(c)</i> is <i>Withdrawn</i> (LITMAN, KIMBERLY) (Entered: 03/23/2006)
03/24/2006		Clerk's Note: document #59 Unsealed as per Notice (doc #60) submitted by Kimberly Litman. (document placed in Clerk's file) (jd, ) (Entered: 03/24/2006)
04/17/2006	<u>61</u>	REPLY to Response to Motion re <u>46</u> MOTION for Summary Judgment filed by LUCENT TECHNOLOGIES INC., AT&T CORP, LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE. (Attachments: # <u>1</u> Certificate of Service)(GUARINO, JOSEPH) (Entered: 04/17/2006)
04/26/2006	<u>62</u>	MOTION to Substitute Party by EDWARD FOSS, VINCENT R., LUCAS, ARTHUR J. BERENDT, ROBERT B. HOWARD, SARAH CONDER. (Attachments: # <u>1</u> Statement Notice of Motion# <u>2</u> Statement Suggestion of Death# <u>3</u> Text of Proposed Order # <u>4</u> Brief # <u>5</u> Certificate of Service)(LEMPERT, SCOTT) (Entered: 04/26/2006)
04/26/2006		Set Deadlines as to <u>62</u> MOTION to Substitute Party. Motion Hearing set for 5/22/2006 before Judge William G. Bassler. (Please be advised that this motion shall be decided on the papers unless otherwise notified by the court) (jd, ) (Entered: 04/27/2006)
05/08/2006	<u>63</u>	RESPONSE in Opposition re <u>62</u> MOTION to Substitute Party <i>and Cross-Motion to Dismiss Lucas Action as Moot</i> filed by LUCENT

		TECHNOLOGIES INC., AT&T CORP, LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE. (Attachments: # <u>1</u> Brief in Opposition to Motion for Substitution of Surviving Spouse Helen P. Lucas and in Support of Cross-Motion to Dismiss Lucas Action as Moot# <u>2</u> Text of Proposed Order # <u>3</u> Certificate of Service)(GUARINO, JOSEPH) (Entered: 05/08/2006)
05/09/2006		CLERK'S OFFICE QUALITY CONTROL MESSAGE: The Cross-Motion doc #63 filed by J. Guarino on 5/8/06 was submitted incorrectly as a Response. PLEASE RESUBMIT THE Cross-Motion within three business days from the date of the annotation USING Motion as the event code. This submission will remain on the docket unless otherwise ordered by the court. This message is for informational purposes only. (jd, ) (Entered: 05/09/2006)
05/09/2006	<u>64</u>	Cross MOTION to Dismiss <i>Lucas Action and Opposition to Motion for Substitution of Surviving Spouse Helen P. Lucas as Plaintiff Pursuant to Rule 25(a)(1)</i> by LUCENT TECHNOLOGIES INC., AT&T CORP, LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE. Responses due by 5/15/2006 (Attachments: # <u>1</u> Brief # <u>2</u> Text of Proposed Order # <u>3</u> Certificate of Service)(GUARINO, JOSEPH) (Entered: 05/09/2006)
05/09/2006		Set Deadlines as to <u>64</u> Cross MOTION to Dismiss <i>Lucas Action and Opposition to Motion for Substitution of Surviving Spouse Helen P. Lucas as Plaintiff Pursuant to Rule 25(a)(1)</i> . Motion Hearing set for 5/22/2006 before Judge William G. Bassler. (jd, ) (Entered: 05/09/2006)
05/18/2006	<u>65</u>	RESPONSE in Opposition re <u>64</u> Cross MOTION to Dismiss <i>Lucas Action and Opposition to Motion for Substitution of Surviving Spouse Helen P. Lucas as Plaintiff Pursuant to Rule 25(a)(1) and Reply in Further Support of Motion for Substitution</i> filed by VINCENT R., LUCAS. (LEMPERT, SCOTT) (Entered: 05/18/2006)
06/08/2006		Minute Entry for proceedings held before Judge Mark Falk : Telephone Conference held on 6/8/2006. (jr) (Entered: 06/13/2006)
06/20/2006		Motions No Longer Referred: <u>62</u> MOTION to Substitute Party (LM, ) (Entered: 06/20/2006)
07/24/2006	<u>66</u>	NOTICE of Appearance by JOSEPH G. SAUDER on behalf of EDWARD FOSS, ARTHUR J. BERENDT, ROBERT B. HOWARD, SARAH CONDER (SAUDER, JOSEPH) (Entered: 07/24/2006)
08/22/2006	<u>67</u>	ORDER REASSIGNING CASE. Case reassigned to Judge Dennis M. Cavanaugh for all further proceedings. Judge William G. Bassler no longer assigned to case. Signed by Judge Garrett E. Brown, Jr. on 8/18/06. (sr, ) (Entered: 08/22/2006)
10/11/2006		CHAMBER'S NOTE: There shall be a status conference via telephone on Monday, October 23, 2006 at 3:45 p.m. It shall be plaintiff's counsel's

		responsibility to contact all counsel to set up the conference as well as initiate the conference call. (LM, ) (Entered: 10/11/2006)
10/23/2006		Minute Entry for proceedings held before Judge Mark Falk : Status Conference via telephone held on 10/23/2006. (LM, ) (Entered: 10/30/2006)
11/08/2006	<u>68</u>	NOTICE of Supplemental Authority on behalf of pltf's in connenction with defts' motion to dismiss or for summary judgment, etc. (jd, ) (Entered: 11/09/2006)
11/09/2006	<u>69</u>	Minute Entry for proceedings held before Judge Dennis M. Cavanaugh : Motion Hearing held on 11/9/2006 re <u>64</u> Cross MOTION to Dismiss <i>Lucas Action and Opposition to Motion for Substitution of Surviving Spouse Helen P. Lucas as Plaintiff Pursuant to Rule 25(a)(1)</i> filed by LUCENT TECHNOLOGIES INC., AT&T CORP., LUCENT RETIREMENT INCOME PLAN., LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE., <u>46</u> MOTION for Summary Judgment filed by LUCENT TECHNOLOGIES INC., LUCENT RETIREMENT INCOME PLAN., LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE,. (Court Reporter Chuck McGuire.) (spc, ) (Entered: 11/14/2006)
11/17/2006	<u>70</u>	Notice of Request by Pro Hac Vice Victoria Quesada to receive Notices of Electronic Filings. (LEMPERT, SCOTT) (Entered: 11/17/2006)
11/27/2006	<u>71</u>	OPINION . Signed by Judge Dennis M. Cavanaugh on 11/27/06. (jd, ) (Entered: 11/28/2006)
11/27/2006	<u>72</u>	ORDER denying as moot <u>62</u> Motion to Substitute Party., granting <u>64</u> Motion to Dismiss . Signed by Judge Dennis M. Cavanaugh on 11/27/06. (jd, ) (Entered: 11/28/2006)
11/28/2006		***Civil Case Terminated. (jd, ) (Entered: 11/28/2006)
12/06/2006	<u>73</u>	NOTICE OF APPEAL as to <u>72</u> Order on Motion for Summary Judgment, Order on Motion to Substitute Party, Order on Motion to Dismiss by EDWARD FOSS, ARTHUR J. BERENDT, ROBERT B. HOWARD, SARAH CONDER. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (LITMAN, KIMBERLY) (Entered: 12/06/2006)
12/06/2006	<u>74</u>	NOTICE OF APPEAL as to <u>71</u> Opinion, <u>72</u> Order on Motion for Summary Judgment, Order on Motion to Substitute Party, Order on Motion to Dismiss by VINCENT R., LUCAS. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (LEMPERT, SCOTT) (Entered: 12/06/2006)
12/07/2006	<u>77</u>	USCA Appeal Fees received \$ 455 receipt number 342572 re <u>73</u> Notice of Appeal (USCA) (ji, ) Modified on 12/11/2006 (ji, ). (Entered: 12/11/2006)

12/08/2006	<u>75</u>	USCA Case Number 06-5008 for <u>73</u> Notice of Appeal (USCA), Notice of Appeal (USCA) filed by EDWARD FOSS,, ARTHUR J. BERENDT,, ROBERT B. HOWARD,, SARAH CONDER,. USCA Case Manager Tonya Wyche (Document Restricted - Court Only) (Wyche, Tonya) (Entered: 12/08/2006)
12/08/2006	<u>76</u>	USCA Case Number 06-5009 for <u>74</u> Notice of Appeal (USCA), Notice of Appeal (USCA) filed by VINCENT R., LUCAS,. USCA Case Manager Tonya Wyche (Document Restricted - Court Only) (Wyche, Tonya) (Entered: 12/08/2006)
12/08/2006	<u>78</u>	USCA Appeal Fees received \$ 455 receipt number 342595 re <u>74</u> Notice of Appeal (USCA), filed by VINCENT R., LUCAS. (ji, ) (Entered: 12/11/2006)
12/12/2006	<u>79</u>	TRANSCRIPT filed for dates of November 9, 2006 before Judge Cavanaugh, re <u>74</u> Notice of Appeal (USCA), Notice of Appeal (USCA) Court Reporter: Charles P. McGuire. (ji, ) (Entered: 12/15/2006)
12/21/2006	<u>82</u>	TRANSCRIPT filed for dates of January 11, 2005 before Judge Falk, re <u>74</u> Notice of Appeal (USCA). Copy of transcript of Jan 11, 2005 - submitted by Kimberly Litman, Esg. - waiting for Audio Edge Transcription Service to file original. (ji, ) (Entered: 12/29/2006)
12/22/2006	<u>80</u>	TRANSCRIPT REQUEST by SARAH CONDER re [76] USCA Case Number, "Already on file in the D.C. Clerk's office selected in Section 1A. (ji, ) (Entered: 12/26/2006)
12/22/2006	<u>81</u>	TRANSCRIPT REQUEST by VINCENT R., LUCAS re <u>74</u> Notice of Appeal (USCA), "Already on file in the D.C. Clerk's office" selected in Section 1A. (ji, ) (Entered: 12/28/2006)
12/28/2006	<u>83</u>	TRANSCRIPT filed for dates of January 11, 2005 before Judge Falk, re <u>74</u> Notice of Appeal (USCA), <u>73</u> Notice of Appeal (USCA). (ji, ) (Entered: 12/29/2006)

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<b>Billable Pages:</b>	8	<b>Cost:</b>	0.64

12BB, CLOSED, SCHEDO

**U.S. District Court**  
**District of New Jersey [LIVE] (Newark)**  
**CIVIL DOCKET FOR CASE #: 2:04-cv-00640-WGB-MCA**

LUCAS v. LUCENT TECHNOLOGIES, INC. et al  
Assigned to: Judge William G. Bassler  
Referred to: Magistrate Judge Madeline C. Arleo  
Lead case: [2:03-cv-05017-DMC-MF](#)  
Member case: ([View Member Case](#))  
Cause: 09:0010 Petition to Vacate Arbitration Award

Date Filed: 02/13/2004  
Date Terminated: 01/27/2005  
Jury Demand: None  
Nature of Suit: 790 Labor: Other  
Jurisdiction: Federal Question

**Plaintiff**

**VINCENT R., LUCAS**  
*INDIVIDUALLY AND ON BEHALF OF  
ALL OTHERS SIMILARLY SITUATED*

represented by **SCOTT M. LEMPERT**  
SANDALS & ASSOCIATES, P.C.  
ONE SOUTH BROAD STREET  
SUITE 1850  
PHILADELPHIA, PA 19107  
(215) 825-4000  
Email: [slempert@sandalslaw.com](mailto:slempert@sandalslaw.com)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

V.

**Defendant**

**LUCENT TECHNOLOGIES, INC.**

represented by **JOSEPH D. GUARINO**  
EPSTEIN BECKER & GREEN, PC  
TWO GATEWAY CENTER  
12TH FLOOR  
NEWARK, NJ 07102-5003  
(973) 642-1900  
Email: [jguarino@ebglaw.com](mailto:jguarino@ebglaw.com)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Defendant**

**LUCENT RETIREMENT INCOME  
PLAN**

represented by **JOSEPH D. GUARINO**  
(See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Defendant**

**LUCENT TECHNOLOGIES, INC.  
EMPLOYEE BENEFITS  
COMMITTEE**

represented by **JOSEPH D. GUARINO**  
(See above for address)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Defendant****AT&T CORP.**

represented by **JOSEPH D. GUARINO**  
 (See above for address)  
**ATTORNEY TO BE NOTICED**

<b>Date Filed</b>	<b>#</b>	<b>Docket Text</b>
02/13/2004	<u>1</u>	COMPLAINT against AT&T CORP., LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES, INC., LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE ( Filing fee \$ 150 receipt number 321548. ) , filed by VINCENT R., LUCAS.(dr, ) (Entered: 02/26/2004)
02/26/2004		Summons Issued as to AT&T CORP., LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES, INC., LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE.Days Due - 20. (Mailed to Counsel) (dr, ) (Entered: 02/26/2004)
03/12/2004	<u>2</u>	ORDER REASSIGNING CASE. Case reassigned to Judge William G. Bassler for all further proceedings. Judge John W. Bissell no longer assigned to case. Signed by Judge John W. Bissell on 03/12/04. (JB, ) (Entered: 03/17/2004)
03/25/2004	<u>3</u>	ANSWER to Complaint by LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES, INC., LUCENT TECHNOLOGIES, INC. EMPLOYEE BENEFITS COMMITTEE. w/certif of service.(JB, ) (Entered: 03/29/2004)
04/19/2004	<u>4</u>	ANSWER to Complaint w/cert of service by AT&T CORP..(sr, ) (Entered: 04/23/2004)
06/04/2004	<u>5</u>	MOTION for Limited Admission of Victoria Quesada and Alan M. Sandals to appear Pro Hac Vice. by VINCENT R., LUCAS. (Attachments: # <u>1</u> Proposed Order# <u>2</u> Certf of service# <u>3</u> Declaration of Alan M. Sandals# <u>4</u> Declaration of Victoria Quesada)(JB, ) (Entered: 06/08/2004)
06/04/2004		Seting Deadlines as to <u>5</u> MOTION for Limited Admission. Motion Hearing set for 6/28/2004 10:00 AM before Judge William G. Bassler. (PLEASE BE ADVISE THAT THIS MOTION WILL BE DECIDED ON PAPERS, UNLESS OTHERWISE NOTIFY BY COURT. (JB, ) (Entered: 06/08/2004)
06/30/2004	<u>6</u>	ORDER granting <u>5</u> Motion for Limited Admission pro hac vice. Signed by Judge Mark Falk on 6/30/04. (Attachments: # <u>1</u> Declaration of Victoria Quesada# <u>2</u> Declaration of Alan M. Sandals) (MD, ) (Entered: 07/02/2004)
06/30/2004		Minute Entry for proceedings held before Judge Mark Falk: Telephone Conference held on 6/30/2004. (mm, ) (Entered: 07/12/2004)
07/07/2004	<u>7</u>	ORDER Settlement Conference set for 7/20/2004 04:00 PM before

		Magistrate Judge Mark Falk. Status Conference set for 7/20/2004 04:00 PM before Magistrate Judge Mark Falk.. Signed by Judge Mark Falk on 7/7/04. (jd, ) (Entered: 07/08/2004)
12/10/2004	<u>8</u>	SCHEDULING ORDER: Settlement Conference set for 1/11/2005 02:30 PM before Magistrate Judge Mark Falk. Status Conference set for 1/11/2005 02:30 PM before Magistrate Judge Mark Falk.. Signed by Judge Mark Falk on 12/10/04. (JB, ) (Entered: 12/14/2004)
01/05/2005	<u>9</u>	Letter from Arthur Penn, Esq. to Judge Falk. (PENN, ARTHUR) (Entered: 01/05/2005)
01/11/2005	<u>10</u>	Minute Entry for proceedings held before Judge Mark Falk: Oral Argument held on 1/11/2005. Ordered discovery in each case to continue. When discovery is provided defendant may file motions. (Tape #F05 CD#1.) (mm-sl, ) (Entered: 01/13/2005)
01/27/2005	<u>11</u>	STIPULATION AND ORDER consolidating cases 04-640 and 04-1099 into 03-5017 for all discovery and pretrial purposes under the caption "In re Lucent Death Benefits ERISA Litigation" using the Master file number 03-cv-5017 (WGB) this case is closed.. Signed by Judge William G. Bassler on 1/27/05. (JB, ) (Entered: 01/28/2005)
01/28/2005		Cases associated. (JB, ) (Entered: 01/28/2005)

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<b>Billable Pages:</b>	2	<b>Cost:</b>	0.16

12BM, CLOSED, MEMBERCASE, SCHEDO

**U.S. District Court**  
**District of New Jersey [LIVE] (Newark)**  
**CIVIL DOCKET FOR CASE #: 2:04-cv-01099-WGB-MCA**

BERENDT et al v. LUCENT TECHNOLOGIES INC et al  
Assigned to: Judge William G. Bassler  
Referred to: Magistrate Judge Madeline C. Arleo  
Lead case: [2:03-cv-05017-DMC-MF](#)  
Member case: ([View Member Case](#))  
Cause: 29:1132 E.R.I.S.A.-Employee Benefits

Date Filed: 03/08/2004  
Date Terminated: 01/28/2005  
Jury Demand: None  
Nature of Suit: 791 Labor: E.R.I.S.A.  
Jurisdiction: Federal Question

**Plaintiff**

**ARTHUR J. BERENDT**

represented by **CHRISTINE F. LEWIS**  
PELLETTIERI, RABSTEIN &  
ALTMAN, ESQS.  
TARNSFIELD PLAZA  
790 WOODLANE ROAD  
SUITE 6  
MT. HOLLY, NJ 08060  
(609) 267-3390  
Email:  
[christine.lewis@dol.lps.state.nj.us](mailto:christine.lewis@dol.lps.state.nj.us)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**KIMBERLY LITMAN KIMMEL**  
CHIMICLES & TIKELLIS, LLP  
361 WEST LANCASTER AVENUE  
HAVERFORD, PA 19041  
(610) 642-8500  
Email: [kimberlylitman@chimicles.com](mailto:kimberlylitman@chimicles.com)  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**RAMONA M MARIANI**  
THE DISCIPLINARY BOARD OF  
THE SUPREME  
COURT OF PENNSYLVANIA  
1635 MARKET STREET  
SEVEN PENN CENTER, 16TH  
FLOOR  
PENNSYLVANIA, PA 19103  
(215) 560-6296  
**TERMINATED: 05/07/2004**  
**LEAD ATTORNEY**  
**ATTORNEY TO BE NOTICED**

**Plaintiff**

**ROBERT B. HOWARD**  
*on behalf of themselves and all others  
 similarly situated*

represented by **CHRISTINE F. LEWIS**  
 (See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**KIMBERLY LITMAN KIMMEL**  
 (See above for address)  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**RAMONA M MARIANI**  
 (See above for address)  
*TERMINATED: 05/07/2004*  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

V.

**Defendant**

**LUCENT TECHNOLOGIES INC**

represented by **JOSEPH D. GUARINO**  
 EPSTEIN BECKER & GREEN, PC  
 TWO GATEWAY CENTER  
 12TH FLOOR  
 NEWARK, NJ 07102-5003  
 (973) 642-1900  
 Email: jguarino@ebglaw.com  
*LEAD ATTORNEY*  
*ATTORNEY TO BE NOTICED*

**Defendant**

**LUCENT RETIREMENT INCOME  
 PLAN**

represented by **JOSEPH D. GUARINO**  
 (See above for address)  
*ATTORNEY TO BE NOTICED*

**Defendant**

**LUCENT TECHNOLOGIES INC  
 EMPLOYEE BENEFITS  
 COMMITTEE**

represented by **JOSEPH D. GUARINO**  
 (See above for address)  
*ATTORNEY TO BE NOTICED*

Date Filed	#	Docket Text
03/08/2004	<u>1</u>	COMPLAINT against LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES INC, LUCENT TECHNOLOGIES INC EMPLOYEE BENEFITS COMMITTEE ( Filing fee \$ 150 receipt number 321991. ) , filed by ARTHUR J. BERENDT, ROBERT B. HOWARD. (Attachments: # <u>1</u> Exhibits A-F)(MD, ) (Entered: 03/16/2004)

04/05/2004	<u>2</u>	Motion for special appointment to serve process as to LUCENT TECHNOLOGIES, INC., LUCENT RETIREMENT INCOME PLAN AND LUCENT TECHNOLOGIES INC. EMPLOYEE BENEFITS COMMITTEE. Signed by Judge John W. Bissell on 4/5/04. (bl, ) (Entered: 04/07/2004)
04/08/2004	<u>3</u>	Certification of James R. Malone, Jr. of Compliance with Section 502(h) of ERISA w/cert of service attached (jd, ) (Entered: 04/12/2004)
04/15/2004	<u>4</u>	ORDER REASSIGNING CASE. Case reassigned to Judge William G. Bassler for all further proceedings. Judge John W. Bissell no longer assigned to case. Signed by Judge John W. Bissell on 4/15/04. (jd, ) (Entered: 04/22/2004)
04/23/2004	<u>5</u>	NOTICE of Appearance by JOSEPH GUARINO on behalf of LUCENT TECHNOLOGIES INC (JB, ) (Entered: 04/26/2004)
04/30/2004	<u>6</u>	ANSWER to Complaint w/cert of service attached by LUCENT RETIREMENT INCOME PLAN, LUCENT TECHNOLOGIES INC, LUCENT TECHNOLOGIES INC EMPLOYEE BENEFITS COMMITTEE.(jd, ) (Entered: 05/03/2004)
05/07/2004	<u>7</u>	Substitution of Attorney - Attorney KIMBERLY M. LITMAN for ARTHUR J. BERENDT and ROBERT B. HOWARD added. Attorney RAMONA M MARIANI terminated.. (DD, ) (Entered: 05/11/2004)
06/30/2004		Minute Entry for proceedings held before Judge Mark Falk: Telephone Conference held on 6/30/2004. (mm, ) (Entered: 07/12/2004)
07/07/2004	<u>8</u>	ORDER Status/Settlement Conference set for 7/20/2004 04:00 AM before Magistrate Judge Mark Falk.. Signed by Judge Mark Falk on 7/7/04. (MD, ) (Entered: 07/07/2004)
12/03/2004		Minute Entry for proceedings held before Judge Mark Falk : Telephone Conference held on 12/3/2004. (mm-sl, ) (Entered: 12/15/2004)
12/10/2004	<u>9</u>	SCHEDULING ORDER: Settlement Conference set for 1/11/2005 02:30 PM before Magistrate Judge Mark Falk. Status Conference set for 1/11/2005 02:30 PM before Magistrate Judge Mark Falk.. Signed by Judge Mark Falk on 12/09/04. (nr, ) (Entered: 12/13/2004)
01/05/2005	<u>10</u>	Letter from Arthur Penn, Esq. to Judge Falk. (PENN, ARTHUR) (Entered: 01/05/2005)
01/11/2005	<u>11</u>	Minute Entry for proceedings held before Judge Mark Falk: Oral Argument held on 1/11/2005. Ordered discovery in each case to continue. When discovery is provided defendant may file motions. (Tape #F05 CD#1.) (mm-sl, ) (Entered: 01/13/2005)
01/27/2005	<u>12</u>	STIPULATION AND ORDER for consolidation of cases. Case nos. 04-640 and 04-1099 are consolidated with 03-5017 for all discovery, pretrial and trial purposes, etal.. Signed by Judge William G. Bassler on 1/27/05. (jd, ) (Entered: 01/28/2005)

01/28/2005		***Civil Case Terminated. (jd, ) (Entered: 01/28/2005)
01/28/2005		Cases associated. (jd, ) (Entered: 01/28/2005)
12/28/2006	13	Transcript of 1/11/05 is filed in CV03-5017 (rd, ) (Entered: 12/28/2006)

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