UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-5008 & 06-5009

IN RE: LUCENT DEATH BENEFITS ERISA LITIGATION

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

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

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

REPLY BRIEF FOR APPELLANT HELEN P. LUCAS

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SUMMARY OF ARGUMENT

A "death benefit" can be either a pension benefit or a welfare benefit depending on how it is designed, funded and administered.[1] A "defined benefit" pension death benefit, such as the Death Benefit here, is permitted by the Internal Revenue Code and offers employers the opportunity to maximize the tax benefits of their pension contributions in exchange for assuming the obligations that attach to all defined pension benefits. As the allegations and record showed, both AT&T and Lucent for years made a voluntary choice to design, fund and administer the Death Benefit as a defined pension benefit. Having reaped the advantages of their decision, they cannot evade their corresponding benefit obligations to beneficiaries like Appellant Lucas.

As stated in the opening Brief, the district court's dismissal ruling hinged upon its erroneous conclusion that all death benefits must be welfare benefits. When the law and the record are considered, it is apparent that this Death Benefit was a pension benefit, not a welfare benefit. At a minimum, it is possible for

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[1] ERISA § 3(1), 29 U.S.C. § 1002(1), defines "welfare benefit plan" to expressly exclude "pensions on retirement *or death*." *See* Brief for Appellant Helen P. Lucas ("Br.") 30 (filed April 20, 2007). ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A), defines "pension plan" as one which defers income for periods extending to or beyond termination of employment, "regardless of . . . the method of calculating the benefits under the plan or the method of distributing benefits from the plan." (Br. 28).

Appellant Lucas to prove facts establishing that the Death Benefit is a pension benefit as alleged.

Review of the district court's opinion shows that it failed to credit and recognize the significance of the allegations in the Amended Complaint, which established that AT&T and Lucent acknowledged the Death Benefit to be a "defined benefit" in all their operative ERISA plan instruments (*i.e.*, summary plan descriptions, Form 5500 Annual Returns, and plan documents, per ERISA §§ 104(b)(2), 402(a)(1), 29 U.S.C. §§ 1024(b)(2), 1102(a)(1)). *See* C. ¶ 4 (A 0061-62); *see also* C. ¶¶ 9-10, 43-45, 50-65, 78-80, 84-97 (A 0063-64, 74-75, 77-84, 88-89, 92-93).

Dismissal was improper. Appellees Lucent Technologies Inc., et al. (hereinafter "Lucent") cannot avert this conclusion. Lucent is unable to controvert the allegations, and the preliminary showing from documents, that AT&T, and later Lucent, characterized the Death Benefit as a defined pension benefit at every conceivable opportunity. For example, their SPDs told participants that the Death Benefit was a "defined benefit,"[2] their Form 5500 Annual Returns informed the Department of Labor and the IRS that it was a "defined pension benefit" subject to Code § 401(a) and minimum funding standards,[3] their SPDs told participants that

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[2] *See* Br. 16-17, 36-37, 42-45.

[3] *See* Br. 17-18, 37-41.

the Plan contained two welfare plans and one pension plan and that the Death Benefit was part of the defined benefit pension plan,[4] AT&T's Tax Guidelines and Procedures allowed lump-sum and rollover treatment for it, a treatment permitted only for plans qualified under Code §§ 401(a) or 403(b) (which exclude welfare plans),[5] and the Plan expressly required its protection and full funding upon Plan termination as a "pension" benefit, with priority over deferred vested pensions, under the "Pension Plan Termination Arrangements."[6]

It is not surprising that Lucent's brief gives no indication that these facts are disputed. Conversely, and despite its comprehensive arguments, Lucent does not identify any corroboration for its bald conclusion that this particular Death Benefit is a welfare benefit. When Lucent's arguments are considered as a whole, it becomes clear that they rest upon the mere fact that the name of the benefit is "death benefit."

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4 *See* Br. 16-17, 36-37.

5 *See* Br. 45-46.

6 *See* Br. 18, 48-56.

ARGUMENT

I. THE PENSION PLAN'S DISCRETIONARY DEATH BENEFITS ARE NOT AT ISSUE IN THIS LAWSUIT.

Lucent contends there is language in the Pension Plan documents that provides "discretion" on *certain* death benefits under the Plan. *See* Consolidated Brief for Appellees Lucent Technologies Inc., et al. ("Opp Br.") 10 (filed June 22, 2007). As stated in Appellants' Local Rule 56.1 Statement, from 1976 onward the Plan divided and distinguished death benefits payable to Mandatory Beneficiaries from those payable to Discretionary Beneficiaries. Certain death benefits were payable to Mandatory Beneficiaries out of the pension trust funds and were part of the defined benefit pension plan (AT&T Plan #006 and Lucent Plan #001). Other death benefits were payable to Discretionary Beneficiaries out of company operating income and were part of separate and distinct welfare plans. Although Lucent obscures the point, those discretionary death benefits, which are *not defined pension benefits*, are not the subject of these cases. (PS ¶¶ 21-22, A 0179; C. ¶¶ 1, 4, A 0060-62; PS ¶ 46, A 0187-88).

Lucent's reference to "discretionary" language comes from the 1996 Lucent Plan. (Opp. Br. 10, referring to A 1282). Although § 5.4(a) states that the Committee has discretion, it is "subject to the following provisions of this Section 5.4," which state that if the beneficiary is described in § 5.5(a), the benefit "shall

be paid." Section 5.5(a), in turn, is entitled "Mandatory Beneficiaries" and reiterates that "Mandatory Beneficiaries" "shall be paid" the benefit. In contrast, § 5.5(b) is entitled "Discretionary Beneficiaries" and states that the benefit "may be paid" to those different beneficiaries. (A 1282-83; *see also* PS ¶¶ 21-22, A 0179).

Although Lucent avoids acknowledging it, the SPD precisely draws the same crucial distinction between the two types of death benefits:

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

1984 AT&T SPD (A 1398) (emphasis added). The same SPD advised the participants that:

> **Plan Identification Numbers**
>
> #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

1984 AT&T SPD (A 1398) (emphasis added).

This careful design and differentiation of two distinct types of death benefits was not accidental. It demonstrates skillful and accurate tax planning by AT&T. As explained in the opening Brief, Treasury Regulation § 1.401-1(b)(1)(i) provides

that the principal feature of a pension plan is that its benefits are "definitely determinable." (Br. 28). Death benefits payable at the discretion of the company could not satisfy this requirement and thus cannot be part of a pension plan qualified under Code § 401(a). In addition, defined benefit pension plans must be held in trust. (Br. 27 n. 17).

AT&T was able to design, fund and administer the Death Benefit as a pension benefit because it could satisfy these and other tax requirements, including requirements that the benefit was (1) "definitely determinable" and "incidental" to the principal purpose of paying retirement benefits (Treas. Reg. § 1.401-1(b)(1)(i)); (2) directly related to the service pension (Treas. Reg. § 1.411(a)(7)(a)(1)); and (3) payable from pension trust funds (Treas. Reg. § 1.411(a)(7)(a)(1)). AT&T and successor Lucent therefore were permitted to treat and pre-fund the Death Benefit as a defined benefit pension benefit. (Br. 28-29, 53 n. 28). The "*certain* death benefits" which AT&T's SPD described as being part of the defined benefit pension plan are those that "shall be paid," in definite amounts, to Mandatory Beneficiaries out of the pension trust fund. *See* PS ¶ 47, A 0188-89.

The Consolidated Amended Complaint only seeks to restore these "defined pension benefit" Death Benefits that Lucent improperly eliminated in 2003. C. ¶ 4 (A 0061-62).

II. THE TAX TREATMENT OF THE DEATH BENEFIT IS HIGHLY RELEVANT. APPELLANTS URGED THE DISTRICT COURT TO CONSIDER THESE FACTS.

Lucent argues, only in passing in a footnote (Opp. Br. 47 n. 16), that Appellant Lucas' argument relative to the "tax treatment" of the Death Benefit was "not presented to the court below." Beyond that mere assertion, Lucent provides no specifics. Lucent is incorrect.

The record below shows that Appellants raised the issue of the various aspects of Lucent's tax treatment of the Death Benefit as disputed questions of fact precluding dismissal, and repeatedly argued that the tax treatment was consistent with AT&T's and Lucent's funding and reporting of the Death Benefit as a pension benefit.

For example, in their Local Rule 56.1 Statement, Appellants stated:

> Plaintiffs dispute the defendants' contention that the Pensioner Death Benefit was a welfare benefit payable under an "employee welfare benefit plan" within the meaning of Section 3(1) of ERISA, 29 U.S.C. § 1002(1). Instead, *the defendants funded and reported Pensioner Death Benefits as a pension benefit, and plaintiffs assume that the defendants' tax returns are consistent with this treatment by tying the applicable tax deduction to the date a contribution was made, rather than the date that a benefit was paid.*

(A 0224) (emphasis added).

The underpinning of the tax treatment issue was also provided in the Consolidated Amended Complaint:

> After the enactment of ERISA, AT&T designed and treated the Retiree Death Benefits as a "defined benefit" in Plan documents, Summary Plan Descriptions and Annual Returns; AT&T continued to fund Retiree Death Benefits on an actuarial basis (using mortality and interest assumptions) just as it did all other defined benefits payable under the Plan.

C. ¶ 4 (A 0061-62); *see also* C. ¶¶ 9-10, 43-45, 50-65, 78-80, 84-97 (A 0063-64, 74-75, 77-84, 88-89, 92-93).

Moreover, Appellants repeatedly pointed out and urged the district court to consider the historic facts bearing on the treatment of the Death Benefit by AT&T and Lucent. C. ¶¶ 4-5, 9-10, 36-65, 71-96 (A 0061-62, 72-84, 87-96); PS ¶¶ 11-114 (A 0175-0214); *see also* Pl. Br. in Opp. to Def. Motion to Dismiss or for Summ. Judgment at 3-6, 9-16 (Dkt. Item # 54, filed March 8, 2006).

The district court considered these issues, but mistakenly ruled that "how a plan is funded" is not properly considered in determining the proper legal classification of the Death Benefit (Opinion at 13, A 0021). and that it must confine its examination to the plan itself (Opinion at 7-8, 12, A 0015-16, 20). As shown by numerous cases discussed at pages 9-11 and 23-25 below, this narrow approach was improper, and it led the court to a simplistic and erroneous conclusion.

Appellants' claims are made under ERISA. (C. ¶ 13, A 0064-65). In *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1144 (3d Cir. 1993), this Court held that many ERISA sections have a "mirror-like counterpart in the Internal Revenue

Code." Consequently, when interpreting ERISA, this Court looks "for guidance to sources which interpret its IRC counterpart . . .." *Id.* This precept was amplified and extended in *In re IT Group, Inc.*, 448 F.3d 661, 668 (3d Cir. 2006), where the Court considered the plan's "intended and actual tax treatment" to determine whether the plan was an unfunded "top hat" plan under ERISA. Moreover, ERISA expressly provides that Treasury Regulations "shall apply" to the minimum vesting, funding and participation standards of ERISA, and that the Secretary of Labor shall not prescribe or apply regulations "in a manner inconsistent with" Treasury Regulations. ERISA § 3002(c), 29 U.S.C. § 1202(c).

Among the sources that interpret the "mirror-like" IRC counterparts are decisions of the Tax Court, discussed in the opening Brief (Br. 31-34), on the question whether a particular benefit is a welfare or pension benefit. These decisions stand for a clear rule – a plan sponsor cannot obtain a current deduction for contributions to fund future benefits which it retains the ability to eliminate. (Br. 31-34). It can be assumed that AT&T and its advisers were aware of these tax restrictions when they designed and administered the Death Benefit.

Appellants' allegations and documents concerning tax treatment of the Death Benefit by AT&T and Lucent present questions of fact – important questions that the district court and Lucent may not ignore. That tax treatment provides valuable evidence that must inform the proper analysis of the character of

the benefit and the validity of the various positions taken by Lucent. For example, in *In re IT Group, Inc.*, *supra*, the Court looked to the plan's "intended and actual tax treatment," noting that if plan beneficiaries do not incur tax liability during the year plan contributions were made, it is "more likely than not" an "unfunded" plan. *Id*. at 668-69. Similarly, for example, if AT&T and/or Lucent deducted its contributions to fund the Death Benefit using minimum funding standards under IRC § 404 (Br. 33), this "strongly supports the conclusion" that the benefit is a pension benefit. *Id*. at 669.

Another historic indicator of pension benefit status stems from the fact that a plan sponsor may request an IRS determination letter confirming qualified status under Code § 401(a), either before or after establishing or amending a pension plan. *See* Sacher, Steven J., et al. (eds.), *Employee Benefits Law* (2d ed. 2000) at 94. The Form 5500 Annual Reports filed by AT&T and Lucent for the pertinent defined benefit pension plan disclosed, in response to question 22b, the date of the most current determination. In the 1989 and 1994 reports, the most current letter was issued in December 1986. (1989 Form 5500, A 1466; 1994 Form 5500, A 1553). In the 1998 report, the most current letter was issued in 1998. (1998 Form 5500, A 1742).

In *Altimaro v. Bohn*, 372 Pa. Super. 265, 539 A.2d 431 (Pa. Super. 1988), the court considered whether the plan was an ERISA pension plan that was

immune from garnishment proceedings. In holding that it was, the court reviewed all the evidence by which the plan was established and operated. Significant among its findings was an IRS determination letter that the plan was "qualified" and the fact that the plan document contained anti-alienation provisions to comply with that status. The court also noted that under ERISA § 4021, 29 U.S.C. § 1321, a plan is "covered" by PBGC termination insurance under ERISA Title IV, and is a pension plan, if it received a "favorable determination letter" that it is qualified under IRC § 401(a). *Altimaro,* 372 Pa. Super. at 432-33, 539 A.2d at 268-69.

In this case, Lucent concedes that "from the start" in 1913, the pension plan provided some form of death benefit. (Opp. Br. 14). Yet Lucent's document productions in this case are conspicuous in their lack of *any* communication between AT&T or Lucent and the IRS regarding the Death Benefit, including, but not limited to, determination letters. In any event, the Court at this juncture can infer that it is highly unlikely that any ruling from the IRS would corroborate the claim of Lucent's litigation counsel that the Death Benefit is a welfare benefit. The allegations and the record below both show that the companies consistently and continuously reported the Death Benefit on their Annual Returns to the IRS and DOL as a defined benefit *pension benefit* in a *pension plan* qualified under IRC § 401(a). (Br. 35-42).

At the least, as Appellants asserted in their Local Rule 56.1 Statement (A

00224), and as Lucent has now conceded in its opposition brief (Opp. Br. 47 n. 16), the tax treatment of the Death Benefit requires "further factual development" and thus raises questions of fact that preclude dismissal.

III. DEFENDANTS DESIGNED THE DEATH BENEFIT AS A DEFINED PENSION BENEFIT IN OPERATIVE PLAN INSTRUMENTS.

In its flight to escape the legal consequences of the allegations and the record, Lucent resorts to bluster, calling the extensive showing of the Death Benefit's defined pension benefit status "much ado about nothing," and taking the position that whether "SPDs or tax forms accurately or inaccurately described the [death] benefit is immaterial to the task at hand." (Opp. Br. 45). Lucent's position thus ignores the controlling documents under ERISA, which specifically recognizes that there are three "instruments under which the plan [is] established or operated." These are summary plan descriptions (SPDs), Form 5500 Annual Returns, and plan documents. ERISA §§ 104(b)(2), 402(a)(1), 29 U.S.C. §§ 1024(b)(2), 1102(a)(1). Moreover, in the event there is a conflict between the plan document and the SPDs, the SPDs must control. *See Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Foundation*, 334 F.3d 365, 378, 380 (3d Cir. 2003).

All three types of controlling ERISA documents consistently state that the Death Benefit is a defined pension benefit. When fairly considered, each of these reflects an interwoven design and a consistent course of conduct by plan sponsors AT&T and Lucent that properly treat the Death Benefit as a defined pension benefit.

A. Summary Plan Descriptions

The summary plan descriptions ("SPDs") prepared and distributed by AT&T and Lucent specifically informed participants that the service pensions, deferred vested pensions, and Death Benefits are benefits of a "pension plan" that is a "defined benefit plan." (A 1398).[7] These disclosures advised participants that the Death Benefit was a protected pension benefit subject to the same vesting and accrual rules as their other pension benefits in the Plan. Since the Death Benefits, service pensions, and deferred vested pensions are all part of the same defined benefit pension plan, they share the *same status as protected pension benefits*. The participants have a right to enforce the SPDs' statement that the Death Benefit was a protected pension benefit. *See Burstein, supra*.

As a protected pension benefit, the Death Benefit could not be taken away any more than a service pension could have been. Lucent argues that participants and beneficiaries were not "entitled" to the Death Benefit until the death of the participant.[8] But, if that were so, then by the same logic a participant is not entitled to a service pension until he/she actually retires, and Lucent could also take these benefits away before the commencing event occurred. Yet even Lucent does not

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[7] A 0065, C. ¶52; *see also* Br. 16-17, 36-37, 42-45.

[8] Opp. Br. 42. It should be noted that defined pension benefits, by their nature, abound with requirements and conditions, such as age and service, which a participant must meet in order to obtain actual payment of the benefit *as defined*. *Employee Benefits Law* at 30.

contend this, because it recognizes that service pensions are defined pension benefits subject to the protections of ERISA Title I and Code § 401(a). Lucent's position that it could eliminate the Death Benefit, but not the service pension, is based solely on its refusal to acknowledge the indelible and inescapable historic fact that this Death Benefit is a defined pension benefit like the service pension.

Lucent also attempts to efface the distinction between the future event which determines the time to pay out the benefit and the protected status of the benefit itself. For example, compare the Death Benefit to a service pension joint and survivor annuity payable to the surviving spouse of a retired participant. Both types of benefits become payable on the participant's death, but only if there is a surviving beneficiary. Again, even Lucent would not contend that it could revoke the right to a joint and survivor annuity before the death occurs. Yet, because both are defined pension benefits, Lucent has no more right to revoke one than it would have to revoke the other.

The Death Benefit's status as a defined pension benefit also governs the proper construction of the "Reservation of Rights" clause. First, it bears noting that the earliest AT&T SPDs did not contain *any* Reservation of Rights clauses. (C. ¶ 50, A 0077).[9] Moreover, unlike the "plan document" language quoted by

[9] *See Devlin v. Empire Blue Cross Blue Shield,* 274 F.3d 76, 84-85 (2d Cir. 2001), holding that when participants began performance with no Reservation of Rights clause in the SPD, plan sponsors were not free to revoke the benefit.

Lucent (Opp. Br. 39), the parallel text in the SPDs historically used the word "individual" rather than "employee," so the reservation clause preserved the rights of every participant and beneficiary, not just "Employees," who became "entitled" to a benefit. For example, the 1984 AT&T SPD provides:

> future changes will not affect the rights of any *individual* to any benefit or pension which he or she may have previously become entitled to receive.

(A 1414) (emphasis added).[10]

The only benefits to which a participant can become "entitled" under the Pension Plan are the protected benefits; *i.e.*, those subject to the minimum vesting standards of ERISA Title I and IRC § 401(a).[11] The SPDs prepared by AT&T and Lucent disclosed that there are only three benefits under the Plan that have those entitlement rights, *i.e.*, the defined pension benefits – the service pension, the deferred vested pension, and the Death Benefit. (Br. 43).

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[10] The 1984 AT&T SPD was in effect during the spin off of the regional Bell companies, including the predecessor to Qwest. Thus, the same formative documents and the same death benefits are before the Court in this appeal as in *Kerber v. Qwest Pension Plan,* 05 CV 00478 (MSK-PAC) (D. Colo.) (Br. 1). Lucent admitted that the 1996 Lucent SPDs it quotes (Opp. Br. 13-14) have never been seen by any of the Appellants or the proposed class members. (Def. Resp. to Request to Admit, at 25, 26, 30, 36-37, A 2025-26, 2030, 2036-37).

[11] Lucent's reliance on *Jones v. AT&T Co.,* 798 F. Supp. 1137, 1142-43 (E.D.Pa. 1992), *aff'd,* 981 F.2d 1247 (3d Cir. 1992), thus is misplaced. In *Jones*, it was conceded that the severance benefit in issue was a welfare benefit. The court acknowledged the entitlement that attaches to pension benefits.

In the district court, Lucent's counsel speculated that the statement in the SPDs that the subject Death Benefit was a defined pension benefit was a "mistake." (Br. 43-44). In its opposing brief, Lucent finds a new argument – that the SPD statements that the "Type of Plan" which provided the Death Benefit was part of a "pension plan" that was "a defined benefit plan" is "an accurate statement" because the "source of payment for it is the defined benefit pension fund." (Opp. Br. 45-46). Lucent neglects to mention that the *same* page of the *same* SPD separately describes the *source* of the payment for the Death Benefit:

> **Plan Identification Numbers**
>
> #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

1984 AT&T SPD (A 01398) (emphasis added). The separate disclosure that the Death Benefit is part of the defined benefit pension plan thus serves a different purpose – it tells participants that the Death Benefit is a protected pension benefit.

SPDs must be written in a manner calculated to be understood by the average participant. (Br. 42, *citing* 29 U.S.C. § 1022(a)). "Congress' purpose in enacting the ERISA disclosure provisions [was to] ensur[e] that 'the individual participant knows exactly where he stands with respect to the plan.'" *Gillis*, 4 F.3d at 1148, *quoting Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 118 (1989)

(quoting H.R. Rep. No. 93-533, 93rd Cong., 1st Sess. 11 (1973). Lucent's construction of the SPD – in effect that, "even though we told you in the SPD that the Death Benefit has the status of a defined pension benefit, it really isn't; that is just the source of payment" – asks the Court to ignore words it published to employees and retirees for years and to add other, much different ones in their place. This violates ERISA's requirement to honor "the plain language of the document" and the resulting understanding of participants. *See, e.g., DeWitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 520-22 (3d Cir. 1997) (administrator's interpretation was "unreasonable" because it was "inconsistent with the plain language").

B. Plan Documents

As noted in Section I, the 1996 Lucent plan document distinguishes "mandatory" death benefits which "shall be paid" from "discretionary" ones that "may be paid." (A 1282-83). This language is consistent with Lucent's reporting of the Death Benefit as a defined pension benefit in Annual Returns and SPDs. (Br. at 37-41, 43; C. ¶ 4, A 0061-62). The SPDs likewise inform participants that "a benefit equal to one year's pay at retirement *will be paid* to the mandatory beneficiary . . .." AT&T 1984 SPD (A 1415). This language in plan documents and SPDs that the Death Benefit "shall [or will] be paid" is consistent with vesting. *In re New Valley Corp.,* 89 F.3d 143, 151-152 (3d Cir. 1996). (Br. 57-58).

Since the law permitted AT&T and Lucent to establish, fund and report the Death Benefit as a defined pension benefit, the Plan also had to determine when a participant gained a vested entitlement to it. Given that the Death Benefit obtained its accrued benefit status by virtue of being *directly related* to the retirement benefit (Treas. Reg. § 1.411(a)(7)(a)(1)), it is consistent to have the related Death Benefit also vest upon attaining eligibility for the retirement benefit.[12] This is precisely what the Plan document states in the "Pension Plan Termination Provisions."

The Pension Plan Termination Provisions provide further corroboration of which benefits are the "protected" pension benefits under the Plan. As noted previously, the SPDs state that the service pension, deferred vested pension, and "certain Death Benefits" are defined pension benefits under the Plan. *See* page 14 *supra*. Thus, it is not surprising that the three benefits that are specifically enumerated as protected in the Plan Termination Provisions likewise are the service pension, the deferred vested pension, and the Death Benefit. *See* LMPP § 4.11 (A 1277-80). The Plan document also uses parallel language to describe the treatment of the service pension and the Death Benefit. In both instances, the protections apply to benefits payable after the date of plan termination. For the

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[12] The Death Benefit was provided to retirees and their beneficiaries. By definition, each retiree had either attained normal retirement age or accumulated the service needed to receive a service pension benefit at a younger age.

service pension, benefits payable to employees *eligible for retirement* are protected. For the Death Benefit, benefits payable on the *future deaths* of both retired participants and employees *eligible for retirement* are protected. (Br. 51-52).

As noted in the opening Brief, under ERISA § 4044 accrued benefits take priority over benefits that are not accrued, and "nonforfeitable" (vested) benefits must be satisfied before forfeitable ones. 29 U.S.C. § 1344(a)(1)-(5). Consequently, protections accorded in a plan document to specifically enumerated benefits are highly indicative of the legal character of those benefits as recognized by the plan sponsor. (Br. 48-54).

Lucent now construes the Plan Termination Provisions to mean that (1) the ERISA § 4044 categories are different than the categories enumerated in the Termination Provisions, and (2) one must first satisfy *all* § 4044 categories before addressing any remaining Plan benefit categories. (Opp. Br. 36 n. 13). Lucent's construction is incorrect.

The boilerplate language that the Plan must "first" apply the monies in the "order and extent required by ERISA § 4044" simply means that the provision is intended to comply with ERISA, and that the ERISA priorities prevail in the case of any conflict with the Termination Provisions. But Lucent does not contend that the Termination Provisions are contrary to § 4044, a tacit concession that is

understandable given that AT&T and Lucent retained these provisions in the Plan for decades following the enactment of ERISA. Moreover, both the Termination Provisions and § 4044 ensure that accrued benefits take priority over benefits that are not accrued, and "nonforfeitable" (vested) benefits take priority over forfeitable ones. 29 U.S.C. § 1344(a)(1)-(5); LMPP § 4.11 (A 1277-80). The fact that AT&T's and Lucent's plan documents expressly recognize, and give priority to, the Death Benefit ahead of other *vested pension benefits* establishes that the Death Benefit also is a protected, vested pension benefit and this defines its appropriate corresponding rank under § 4044. Nothing in ERISA § 4044 interferes with the protected status long recognized by AT&T and then by Lucent.

C. Annual Returns

Lucent repeatedly refers to the Annual Returns filed by AT&T and Lucent as "tax returns" and argues that they are merely "source materials" and "minutia[e]" that should be ignored by the Court. (Opp. Br. 24, 45). Both assertions are inaccurate.

Annual Returns are not "tax returns," because qualified pension plans are tax-exempt. Rather, Annual Returns must be filed with both with the IRS and the Department of Labor, and must be furnished to participants on request, because they stand as important disclosure documents in the ERISA regulatory scheme. *See* ERISA §§ 103, 104(b), 29 U.S.C. §§ 1023, 1024(b), and IRC § 6058(a);

Employee Benefit Law at 127-128.

The Annual Returns constitute representations to the government, under penalty of perjury, that the stated facts about the plan are true. We note that positions taken by ordinary taxpayers on tax returns are admissible as admissions against interest. *See, e.g., Commonwealth ex rel. Chidsey v. Keystone Mut. Casualty Co.*, 373 Pa. 105, 126, 95 A.2d 664, 674 (Pa. 1953). In this case, plan sponsors and fiduciaries at both AT&T and Lucent made repeated admissions, in filings submitted to two federal agencies, that the Death Benefit was a pension benefit in a defined benefit pension plan. (Br. 36). The filings are the principal means of government oversight of the pension system.

Lucent cites two cases to support its view that Annual Returns are "source material" and "minutia[e]" that can be ignored by the Court. (Opp. Br. 24, 45, 47). But neither ERISA nor the cited cases permit disregard of this essential component of the statutory disclosure scheme. In one case, *Neuma, Inc. v. Amp, Inc.*, 259 F.3d 864, 876-77 (7th Cir. 2001), the court did not disregard the Form 5500; it simply found the report to be contradicted by the SPD and unsupportive of the plaintiff's claim. The other case, *RLJCS Enterprises, Inc. v. Professional Benefit Trust, Inc.*, 438 F. Supp. 2d 903, 912-13 (N.D. Ill. 2006), *aff'd*, 487 F.3d 494 (7th Cir. 2007), presents a unique set of facts – a multi-employer benefits trust through which unrelated employers purchased welfare benefits. The court sensibly concluded that

tax code compliance issues could not overcome the fact that the trust documents defining the employers' rights clearly vested ownership of certain insurance policies and their proceeds in the trust.

A review of the law of *this* Circuit reveals that both this Court and district courts have, of course, considered disclosures in Form 5500s as evidence to make determinations in ERISA cases. *See, e.g., Chait v. Bernstein,* 835 F.2d 1017, 1019 (3d Cir. 1987) ("the record contains actuarial information filed with the Internal Revenue Service that corroborates Bernstein's assertions;" citing Schedule B of the Form 5500); *Gorini v. AMP Inc.*, 94 Fed. Appx. 913, 2004 WL 834633 (3d Cir. 2004) (unpublished) (Form 5500 statement that all employees were active participants in severance plan was evidentiary support for finding); *Post v. Hartford Insurance Co.*, Civ. No. 04-3230, 2005 WL 424945 at *3 (E.D. Pa. Feb. 23, 2005) (characterization as an ERISA plan in a Form 5500 is evidence of being an ERISA plan); *Gluck v. Unisys Corporation,* Civ. No. 90-1510, 1995 WL 498730 at *11 (E.D. Pa. Aug. 21, 1995) (Form 5500 establishes evidentiary facts, including effective date and substance of amendment, overfunding, and reduction in early retirement benefits); *Faulman v. Security Mut. Financial Life Insurance Co.*, Civ. No. 04-5083, 2006 WL 1541059 at *2 (D.N.J. June 2, 2006) (Form 5500 established number of plan participants). Indeed, in *RCN Litigation*, Civ. No. 04-5068, 2006 WL 753149 at *6 (D.N.J. March 21, 2006), the court held that the

fiduciary duty associated with filing the Form 5500 "is to ensure that the report is filed properly and that the information contained in the report is accurate."

Lucent also relies on inapposite cases which decided that *disability* benefits are welfare and not pension benefits, an issue not presented by this appeal. *Rombach v. Nestle USA*, 211 F.3d 190, 193-94 (2d Cir. 2000), held that disability benefit provisions of a pension plan actually constituted a distinct welfare plan. The only contrary fact presented by the participant was that this benefit was called a "disability retirement pension" and was part of a "master" pension plan. Similarly, *Robinson v. Sheet Metal Workers National Pension Fund,* 441 F. Supp.2d 405 (D. Conn. 2006), followed *Rombach* and found that an "IRD [Industry Related Disability] plan is a welfare benefit plan." It also noted that the Form 5500 Annual Return "did not differentiate" between these disability benefits and pension benefits, unlike the various employer-prepared documents in this case.

Lucent's cases thereofore provide no guidance for this much different case. In the first instance, there was no allegation that SPDs informed participants that the benefit was a defined pension benefit, which established an enforceable right to the benefit as so represented. *See Burstein*, *supra*, 334 F.3d at 381. Moreover, ERISA treats benefits payable on disability differently than benefits payable on "retirement" and "death," which are triggering events for a pension. *See* note 1, *supra*. Finally, disability benefits are generally treated as welfare benefits for

purposes of the employer's tax treatment. Canan and Mitchell, *Employee Fringe Benefit Plans* (2002) § 9.1.

Lucent also cites, with approval, the district court's statement that "how a plan is funded" does not aid in the classification of the benefit. (Opp. Br. 44). But that is not the law of this Circuit. How a plan is funded has always been a critical factor in determining, for example, (1) whether a benefit is a welfare benefit plan or an exempt payroll practice, *see, e.g., Schwartz v. Liberty Life Assurance Co.*, 470 F.Supp. 2d 511, 517 (E.D. Pa. 2007); (2) whether an ERISA plan exists, *see, e.g., Henglein v. Informal Plan for Shutdown Benefits*, 974 F.2d 391, 399-400 (3d Cir. 1992); or (3) whether a plan was an unfunded "top hat" plan under ERISA, *see In re IT Group, Inc.*, *supra* (considering the plan's "intended and actual tax treatment" in making the determination).

Finally, we address Lucent's conclusory statement that the Death Benefit "does not share any of the characteristics of an accrued pension benefit." (Opp. Br. 32).[13] In point of fact, the Annual Returns and the actuarial and other schedules

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[13] Lucent's reliance on *Huber v. Casablanca Indus.*, 916 F.2d 85 (3d Cir. 1990), and *Bencivenga v. Western Pa. Teamsters and Employers Pension Fund*, 763 F.2d 574 (3d Cir. 1985), is misplaced. The rationale of *Bencivenga* has been substantially modified by the Retirement Equity Act of 1984 (codified at 29 U.S.C. § 1054(g)) and *Bellas v. CBS, Inc.,* 221 F.3d 517 (3d Cir. 2000). *Huber* involved the question whether "a $2,500 lump-sum post-retirement death benefit" had to be included in calculating the pension liabilities for which a withdrawing employer had funding responsibility, an issue governed by PBGC determinations rather than general ERISA and IRC rules. The PBGC position followed by the decision

included in these filings demonstrate that the Death Benefit and the service pension share the exact same actuarial *accrual* tables and "Accrual Rate[s]." The two benefits *accrue* in tandem, e.g., the "Annual Rates of Retirement on Service Pension" are used to determine the "Accrual Rate for Service Pensions and Death Benefits." *See, e.g.,* 1994 Form 5500, Schedule B (A 1581); (Br. 38-40).

ERISA provides that Treasury Regulations "shall apply" to its minimum funding standards (*see* 29 U.S.C. § 1202(c)) and the minimum funding standards require a determination of the accrued liability under the Plan, *see 29* U.S.C. §1082(c)(7)(A). Consequently, the definition of an "accrued benefit" under ERISA is tied to the Treasury Regulations. These regulations specifically permit a death benefit to be a pension benefit (Treas. Reg. § 1.401(1)(b)(1)(i))) when it is directly related to a retirement benefit (Treas. Reg. § 1.411(a)(7)(a)(1)).

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reflects the limits defined by Congress on PBGC's duty to guarantee reduced benefits when underfunded plans terminate; it is not determinative of the treatment of benefits in on-going plans.

IV. THE DEATH BENEFIT IS NOT AN "ANCILLARY" BENEFIT.

Benefits provided by defined benefit pension plans are protected benefits subject to the minimum standards of ERISA and the Code. (Br. 29). Lucent contends, however, that the Death Benefit is an "ancillary" benefit. Since ancillary benefits are neither protected nor subject to minimum vesting standards, these two concepts are mutually exclusive. In other words, defined benefit pension benefits like the Death Benefit cannot also be "ancillary" benefits. Consequently, because Appellants have permissibly alleged (and established from Lucent's documents and historic conduct) that the Death Benefit is a defined benefit pension benefit, Lucent's contention that it is an ancillary benefit must fail.

It is true that there are some other types of death benefits which are properly treated as "ancillary." However, Treasury Regulations recognize a key exception for death benefits which are *directly related* to retirement benefits. These are treated as accrued benefits in tandem with the retirement benefits to which they are related. A regulation relating to accrued benefits provides:

> In general, the term "accrued benefit" 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 (or insurance premiums for such expenses), disability benefits not in excess of the qualified disability benefit (see section 411(a)(9) and paragraph (c)(3) of this section), 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)(1) (emphasis added). The Death Benefit is equal to the *greater of* either "the annual pension allowance" (which sets a floor) or twelve months of salary at retirement (Br. 15 n.16), and thus is directly related to the retirement benefit in terms of qualification, accrual, and amount.

There is no support in this regulation for Lucent's assumption that benefits that are "directly related" to retirement benefits must take any particular form (such as a "lump sum") or must be a "vehicle for awarding a pre-retirement death benefit." (Opp. Br. 33). Nor is there any such authority in caselaw. To the contrary, the limited caselaw that addresses such death benefits confirms Appellants' point that death benefits related to retirement benefits are not ancillary benefits. In *United Foods, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 816 F. Supp 602, 609 (N.D. Cal. 1993), *aff'd*, 41 F.3d 1338 (9th Cir. 1994), the court distinguished lump sum death benefits which are directly related to pension benefits from fixed-amount death benefits, which are essentially allowances for funeral costs unrelated to the participant's service, compensation or age. This decision recognizes, and rightly so, the multitude of forms that death benefits can take depending on the plan sponsor's objectives. When the death benefit is "directly related to" retirement benefits and accrued and funded in tandem with service pension benefits, as this Death Benefit is, the benefit is not ancillary.

A second regulation (relating to funding) confirms that post-retirement death benefits, at least, are not ancillary. It states that ancillary benefits are benefits generally paid *before* separation from service:

> . . . 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.

Treas. Reg. § 1.412(c)(3)-1(f)(2). In this case, all Death Benefits by definition are paid as a result of deaths occurring *after* a participant's separation from service, so the ancillary benefit rule does not apply for this reason as well.

ERISA legislative history likewise explains that "ancillary" benefits refer to more transient benefits, and do not include benefits based upon "service":

> Also, where the employee moves from one employer to another, the ancillary benefits (which are on a contingency basis) would often be provided by the new employer, whereas the new employer would not provide pension benefits based on service with the old employer . . . .

H.R. Rep. No. 807, 93rd Cong., 2d Sess. 60, *reprinted in* 1974 U.S.C.C.A.N. 4639, 4670, 4726. In this case, the Death Benefit is "based upon service with the old employer" sufficient to establish entitlement to a service pension. The benefit is payable to Mandatory Beneficiaries (*see* Section I) from pension trust funds (*see* Section II). The funding assumption was "retirement" as determined under the Plan (Br. 38), and the benefit was accrued, funded, and reported to the government

and participants as a defined pension benefit using the same "salary," "mortality," "retirement" and "accrual" factors as the related service pension. (Br. 38-40).

At the end of the analysis, the question in these appeals is this – "Does it matter how a plan sponsor designed, funded, operated and reported plan benefits in ERISA-mandated Annual Returns, SPDs and plan documents?" Under the statute and the caselaw, the answer must be that these facts *do* matter. Appellants' allegations must be taken as true, and they must have an opportunity to fully develop the record pertaining to the historic treatment of the Death Benefit, through depositions of knowledgeable company witnesses, company actuaries and accountants, and experts.

In this case, AT&T and Lucent carefully and deliberately chose to structure the Death Benefit as a defined benefit pension benefit and gained significant financial advantages as a result. Ensuring that Appellant Lucas and all other affected participants and beneficiaries receive these protected benefits does no more than enforce the bargain that AT&T and Lucent made through their longstanding conduct.

CONCLUSION

For the reasons stated here and in her opening Brief, Appellant Lucas respectfully requests that this Court reverse the judgment and remand this case for further proceedings.

Dated: July 9, 2007

Respectfully submitted,

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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 6,978 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

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

Dated: July 9, 2007

s/ Scott M. Lempert
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CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

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

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 2007, I caused copies of the foregoing Reply Brief for Appellant Helen P. Lucas to be served in the manner indicated upon the following counsel:

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