

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.

*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.)*

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

CHIMICLES & TIKELLIS LLP
James R. Malone, Jr.
(PA ID. No. 41885)
Kimberly L. Kimmel
(PA ID. No. 91557)
361 West Lancaster Avenue
Haverford, PA 19041
Telephone: (610) 642-8500

*Attorneys for Plaintiffs-Appellants Foss,
Conder, Berendt, and 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).¹ 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

¹ 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.² *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

² 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,³ 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.⁴

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

³ 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.

⁴ 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 Lucent⁵ 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

⁵ 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,⁶ 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

⁶ 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”⁷ (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).

⁷ 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.⁸ (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).

⁸ 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.⁹ (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

⁹ 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.¹⁰

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.

¹⁰ 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.¹¹

¹¹ (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.¹²
- These benefits were payable either in installments or in a lump sum.¹³
- Employees were entitled to file a directive indicating that they wanted the Pensioner Death Benefit paid out in installments.¹⁴
- The amount of the benefit was set at one year's compensation.¹⁵
- Eligibility for the benefit was tied to the age and service requirements for a service pension.¹⁶
- Finally, Pensioner Death Benefits were paid from a tax-exempt pension trust, not from life insurance.¹⁷

¹² (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).

¹³ (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).

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

¹⁵ (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).

¹⁶ (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.¹⁸ (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).

¹⁷ (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).

¹⁸ 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.¹⁹ (JA00839-40; Pls.' Ex. 6 at

¹⁹ 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. ¶¶

(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.²⁰ 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;

²⁰ 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.²¹ 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.

²¹ (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, 2003.²²

(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.²³ 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

²² 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.

²³ 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,²⁴ 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.”²⁵ *Id.* at 152.

²⁴ 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.”

²⁵ 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).²⁶

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

²⁶ “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.²⁷ 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.*

²⁷ 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.²⁸ 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

²⁸ (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).²⁹

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

²⁹ *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 Code³⁰ 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

³⁰ 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).³¹ 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]”;³² and “liabilities,” which is not defined at all. The

³¹ 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).

³² (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,

CHIMICLES & TIKELLIS LLP

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

James R. Malone, Jr.

(PA ID. No. 41885)

Kimberly L. Kimmel

(PA ID. No. 91557)

361 West Lancaster Avenue

Haverford, PA 19041

Telephone: (610) 642-8500

*Attorneys for Plaintiffs-Appellants
Foss, Conder, Berendt, and Howard*

CERTIFICATE OF BAR MEMBERSHIP

We hereby certify that we are members of the bar of this Court.

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

/s/ Kimberly Kimmel
Kimberly Litman Kimmel

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.
James R. Malone, Jr.

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:

Victoria Quesada, Esquire
Quesada & Moore, LLP
128 Avon Place
West Hempstead, NY 11552

Alan M. Sandals, Esquire
Sandals & Associates, PC
One South Broad Street
Suite 1850
Philadelphia, PA 19107

Counsel for Movant-Appellant Helen Lucas

John Houston Pope, Esquire
Epstein Becker & Green, P.C.
250 Park Avenue
New York, NY 10177-1211

Frank C. Morris, Jr., Esquire
Epstein Becker & Green, P.C.
1227 25th Street, NW, Suite 700
Washington, DC 20037

Joseph D. Guarino, Esquire
Epstein Becker & Green, P.C.
Two Gateway Center, 12th Floor
Newark, NJ 07102

Counsel for Defendants

Dated: April 20, 2007

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