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<tr><td>PHILLIP C. ENGERS, WARREN J. MCFALL
DONALD G. NOERR, and GERALD SMIT,
individually and on behalf of all others
similarly situated,
Plaintiffs,

vs.

AT&T and AT&T MANAGEMENT
PENSION PLAN,
Defendants.</td><td>UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

C.A. No. 98-CV-3660 (JLL)</td></tr>
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PLAINTIFFS' MEMORANDUM OF LAW

IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Introduction and standard of review

A party seeking summary judgment must show there is no genuine issue as to material facts by setting out facts that would be admissible in evidence supported by depositions, interrogatory answers, and admissions, together with affidavits. FRCP 56(c) and (e). The Court must resolve "all inferences, doubts and issues of credibility ... against the moving party." *LaResca v. AT&T*, 161 F.S.2d 323 (D.N.J. 2001) (citing *Meyer v. Riegel Prods.,* 720 F.2d 303, 307 (3d Cir. 1983).

AT&T's motion does not come close to establishing a right to summary judgment. AT&T offers a number of unsupported conclusory statements many of which it already advanced, unsuccessfully, in a challenge to the named Plaintiffs' "standing" to raise the Section 204(h) claim (denied by Judge Politan on November 19, 2001) and in a motion to dismiss the SPD claim (denied in pertinent part by Judge Politan on June 29, 2000). AT&T's motion also relies heavily on a fictitious "interpretation" and invented terminology. For example, the "interpretation" by the Plan administrator discussed on pages 18-23 of AT&T's brief never actually occurred (there is not even a record of it in AT&T's Statement of Facts). Likewise, AT&T regally pronounces that the Board's April 1997 resolutions shall be redefined as a unitary "Plan amendment" to support its legal arguments about the validity of the cash balance amendments and the absence of Section 204(h) notice. The redefined term is then repeated a remarkable 43 times, even though all the underlying documents refer to "amendments" (plural), with different effective dates for the "Special Update" amendments and the "Cash Balance" amendments.

I. AT&T's untimely October 2000 amendments to the Plan

As described in the Plaintiffs' summary judgment motion, two amendments were contained in an October 16, 2000 Plan document. AT&T's Board did not adopt these changes in its April 16, 1997 resolutions, and they were also not adopted by any authorized delegate of the Board at any date in between. The Board's April 16, 1997 resolutions do not provide for a "wear-away" or that new annuity options can be based on the "lower" of a participant's annuities. Under *Confer v. Custom Eng'g*, 952 F.2d 41, 43 (3d Cir. 1991), plan amendments can "operate only prospectively."

AT&T's motion requests a judgment for the defense on the validity of the "wear-away" provision. It does not address the validity of the amendments that base the residual annuity and joint & 100% survivors' benefit on lower annuity amounts (although AT&T's Statement of Facts discussed the latter rules at some length, see AT&T's ¶¶55-56, 59[1]).

A. The exhaustion defense

As an affirmative defense, AT&T asks that the Fourth and Fifth Claims about the validity of the wear-away provision, which are both statutory claims, be sent back to AT&T to exhaust an internal claims procedure. Def.Br. 14-18. This argument is faulty for three reasons. First, Plaintiffs have already exhausted, as set forth in ¶ 60 of the Complaint. See also Pltf. Counter-Stmnt ¶150. "ERISA does not require either issue or theory exhaustion, it requires only claim exhaustion." *Wolf v. Nat'l Shopmen Pension Fund*, 728 F.2d 182, 186 (3d Cir. 1984); *McCoy v. Laborers Local 222 Pension Plan*, 188 F.Supp.2d 461, 467 (D.N.J. 2002), *aff'd*, 2003 WL 1512167 (3d Cir. 2003).[2]

Second, AT&T waived any exhaustion defense to the Fourth and Fifth Claims by failing to include it in its earlier motions to dismiss. AT&T's third motion to dismiss asked the Court to dismiss the Fourth and Fifth Claims but did not raise any issue of exhaustion (although exhaustion was raised with respect to other claims). On June 29, 2000, Judge Politan denied AT&T's motion to dismiss the Fourth and Fifth Claims. Under Rule 12(g), a party who makes a motion under Rule

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[1] References to AT&T's Statement of Facts, such as here, are designated "AT&T's¶." Otherwise, references to ¶'s are to those in Plaintiffs' Statement of Facts.

[2] Further "exhaustion" would be futile because Defendants already taken a "fixed" position as stated in pp. 18-23 of their Brief. *Berger v. Edgewater Steel*, 911 F.2d 911, 916-7 (3d Cir. 1990).

12 who omits any defense or objection then available to it shall not thereafter make a motion based on the defense or objection so omitted. See *McCurdy v. American Bd. of Plastic Surgery*, 157 F.3d 191, 194 (3d Cir. 1998).

Third, this Circuit's precedents, including two cases where AT&T was the defendant, establish that "questions of law" do <u>not</u> require exhaustion. Indeed, the leading case is *Zipf v. AT&T*, 799 F.2d 889, 891 (3d Cir. 1986), where the Third Circuit held that exhaustion is not required for claims that assert rights established by the ERISA statute. In *Harrow v. Prudential Ins. Co.*, 279 F.3d 244, 252-54 (3d Cir. 2002), the Third Circuit followed *Zipf* in holding that exhaustion is <u>not</u> applied to claims arising from violations of statutory rights unless the claim "merely recasts [a] benefits claim in statutory terms" rather than requiring an application of ERISA itself. And in *Eastman v. AT&T*, 43 Fed.Appx. 483 (3d Cir. Aug. 16, 2002), another case where AT&T was the defendant, the Third Circuit reiterated that exhaustion is not required for a statutory claim unless it is "synonymous" with a claim for benefits under the plan terms. See also *D'Amico v. CBS Corp.*, 297 F.3d 287 (3d Cir. 2002); *Wilkerson v. Bowen*, 828 F.2d 117, 122 (3d Cir. 1987) (exhaustion is not required for "system-wide policy of ignoring binding court precedents and a legislative mandate").

The Class' claims of statutory violations are not "camouflaged," a "mere recasting" or "artful pleading" of benefit claims, as Defendants variously but conclusorily assert. Def.Br. 15-16. The Fourth and Fifth Claims about the wear-away provision are not about the terms of Section 4.06(a) of the Restated Plan document, but about <u>when</u> that provision was validly adopted under ERISA Section 402, 29 U.S.C. 1102. The Third Circuit has addressed these issues in at least <u>eight</u> different decisions, including two opinions in the *Curtiss-Wright v. Schoonejongen* litigation that originated in this district and went to the Supreme Court. See *Hozier v. Midwest Fasteners*, 908 F.2d 1155 (1990); *Huber v. Casablanca*, 916 F.2d 85 (1990); *Confer v. Custom Eng'g*, supra (1991); *Ackerman* *v. Warnaco*, 55 F.3d 117 (1995); *Epright v. Envir. Resources Mgmt.*, 81 F.3d 335 (1996); *Schoonejongen*, 18 F.3d 1034 (1994), and 143 F.3d 120 (1998); and *Smathers v. Multi-Tool, Inc.*, 298 F.3d 191 (2002). Those cases establish that Plans cannot be amended informally, but only by following the procedures specified in the Plan document. As the Supreme Court has ruled, a company is "bound" to "whatever level of specificity [the] company ultimately chooses in an amendment procedure." *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 83 (1995). Consistent with *Zipf* and the other decisions discussed above, exhaustion of administrative remedies has not been required in the cases challenging the validity of plan amendments under ERISA Section 402.

B. The "interpretation" defense

Alternatively AT&T asks this Court defer to an "interpretation" by it of when the Plan amendments were adopted. Def.Br. 18-22. AT&T thereby tries to convert the "question of law" about when the "wear-away" provision was validly adopted into an issue of plan "interpretation" subject to an "arbitrary and capricious" standard of review. Id. at 22. The first problem with this argument is that the validity and timing of a plan amendment is a "question of law" as established by the *Schoonejongen* and *Confer* line of precedents, not a matter of plan interpretation. The second problem, which AT&T never gets around to saying, is that its "interpretation" is a fiction, i.e., there is no record of it having been made. The third problem is that in the course of its extended discussion of this issue AT&T never actually takes a position on when the amendment was adopted.

Because the Fourth and Fifth Claims present statutory issues about the validity and adoption dates of plan amendments, the standard of review is de novo. In *Samaroo v. Samaroo*, 193 F.3d 185, 189 (3d Cir. 1999), *cert. denied*, 529 U.S. 1062 (2000), the real defendant was the AT&T Management Pension Plan (represented by the same law firm as here). The Third Circuit held, "We must review legal conclusions and questions of statutory construction de novo." [3]

As to the validity and timing of the wear-away provision, the issues should be simple: Is the wear-away provision a clear and manifest term of the Board's April 16, 1997 resolutions? If not, was there any amendment between April 16, 1997 and October 16, 2000 that adopted it? Amendments related to cash balance and special update were adopted on November 5, 1997 and December 19, 1997. ¶¶17, 27 and 30. However, AT&T does not contend that the wear-away provision was contained in those sets of amendments and AT&T has identified no other relevant amendments in this time period. Accordingly, the wear-away must be contained in the Board's April 1997 resolutions or else it was not adopted until October 16, 2000. But AT&T does not even pretend that the wear-away rule in Section 4.06(a) of the Restated Plan is described in the Board resolutions.

In *Henkin v. AT&T,* 80 F.S.2d 1357 (N.D. Ga. 1999), a group of over 100 management employees sought to rely on AT&T Board resolutions about a retirement incentive plan that were adopted at a January 1998 meeting because those resolutions outlined the principal terms of the offer but did not refer to "caps" on participation which AT&T adopted later. The District Court ruled that it was "meritless" for the Plaintiffs to argue that the Board resolutions "constitute the VRIP Plan by themselves." 80 F.S.2d at 1360 (emph. added). Instead, the Court ruled, the resolutions "set forth some of the eligibility and benefits information, and expressly left other matters to be resolved after further discussion." Id.

In this case, the shoe is firmly on the other foot. AT&T contends that the April 1997 Board resolutions on cash balance contained "all the necessary amendments." ¶30. However, the language

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[3] AT&T's reliance on the "arbitrary and capricious" standard to obtain deferential review of its actions is also misplaced. Even the decisions on the "arbitrary and capricious" standard make clear that deference is not given on "questions of law." *Abnathya v. Hoffman-LaRoche, Inc.*, 2 F.3d 40, 45 (3d Cir. 1993), which Defendants cite, acknowledges that a legal position is reviewed for whether it is "erroneous as a matter of law."

of the resolutions and the record of the Board's meeting shows that the Board "left other matters to be resolved" by the Senior Vice-President after further consideration. With respect to the amendments that the Plaintiffs identified, that resolution did not occur until October 16, 2000.

The points that AT&T discusses on pages 19 to 22 of its Brief relate to whether a wear-away provision would be a "plausible" reading of the "intent of the design presented to the Board." AT&T suggests that the team of employees and consultants who developed the cash balance design intended this all along. But there is no suggestion that the Board manifested an intention on this issue. In responding to the Plaintiffs' discovery requests, AT&T admitted there are "no documents which relate to the AT&T Board's intention with respect to the issue of crossover." ¶ 49. At his deposition, AT&T's 30(b)(6) witness testified that the Board "did not say you could" or "you could not" with respect to wear-away. ¶43. The Senior Vice-President who made the cash balance presentation to the Board also conceded that the Board's resolutions do not provide for wear-away and that this was one of the matters he was to address as the Board's delegate. ¶45. Many of the details described in AT&T's Statement of Facts concerning the Senior Vice-President's unrecorded, oral presentation to AT&T's Compensation and Employee Benefits Committee (CEBC) are simply made up. See Pltfs. Counter-Statement of Facts ¶¶21-35. But even if they were presumed true, the Third Circuit has consistently and repeatedly rejected "informal" amendments. See, e.g., *Confer*, 952 F.2d at 43. Treating an oral "presentation to" a committee of the Board as if it were the equivalent of a formal written action by the Board would extend informality to a new level.

AT&T's plea for deference to its "interpretation" as "Plan administrator" fails for other reasons, too. First, the Board's resolutions authorize a delegate of the Board, the Senior Vice-President for Compensation & Benefits, to adopt "amendments ... consistent with the intent of the cash balance design presented to the Board." ¶15. The resolutions did not authorize the adoption of additional rules through "interpretations" by other persons. Second, the section of the Plan document that discusses "interpretations" of Plan provisions actually charges this function to the Employee Benefits Committee (EBC), not to the "Plan administrator" as AT&T contends. See Ex. 5, Sec. 3.04. Third, the "interpretation" which AT&T puts forward is fictitional: neither EBC nor the Plan administrator actually interpreted the Board resolutions in the manner that AT&T's Brief suggests. AT&T's Brief is devoid of any citation to an interpretation by the EBC or the Plan administrator with "reasons" along the lines offered in the Brief. See Def.Br. 19-20.

The Third Circuit and other courts have consistently rejected deference to after-the-fact interpretations devised by counsel for purposes of litigation. See *Gritzer v. CBS, Inc.*, 275 F.3d 291, 296 (3d Cir. 2003) (deferential standard of review is only appropriate when the trustee "has in fact interpreted the instrument"); *Moench v. Robertson*, 62 F.3d 553, 556-7 (3d Cir. 1995) ("nothing in the record" indicated that the defendant "actually deliberated, discussed or interpreted the plan in any formal manner"). See also *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 620 (8th Cir. 1998) ("We will not permit ERISA claimants ... to be sandbagged by after-the-fact interpretations devised for purposes of litigation").

AT&T further contends that the Plan administrator has consistently applied a "greatest of" rule. Def.Br. 22. But the Third Circuit recognizes that being "consistently wrong" cannot elevate an unauthorized practice. *Epright v. Envir. Resources Mgmt.*, 81 F.3d 335, 339 (3d Cir. 1996). Moreover, discovery showed that AT&T has not consistently applied a greatest of rule. Instead, AT&T applies a software program that pays benefits "irrespective of [the] greatest" benefit. ¶52.[4]

The other rationales that AT&T proposes as support for its fictitious interpretation are

[4] AT&T's motion refers to a "greatest of" rule twenty-nine times. However, the superlative term "greatest" is not actually found in the Plan documents. See Ex. 5 at 30 and Ex. 6 at 18.

irrelevant to the issue of when the Board, or its delegate, validly adopted the wear-away amendment. But we discuss them briefly to point out that they are not true. AT&T first contends that even if the adoption of the wear-away amendment was untimely, the employees never had an expectation that future cash balance accruals would be "added to" their previously-earned benefits. Def.Br. 20. This is untrue because the Plan historically provided that new accruals were always added to, or "plus," previously-earned benefits after pay-base updates. ¶¶2-3, 40 and 136. After six previous updates in the pay-base formula, AT&T always grandfathered the prior pay base formula with continued 1.6% of pay accruals in case that was better for participants than the new formula with continued 1.6% of pay accruals. See id. and AT&T's¶7.

AT&T further argues that any provision other than one with wear-away would result in a "windfall" with "pay and service for the same period of time ... counted twice, even three times" resulting in "duplicative or even triplicative benefits." Def.Br. 19-20. These are simply false assertions, supported by no documents or testimony (even AT&T's Statement of Facts does not support them). Everyone agrees that wear-aways can be avoided with an A "plus" B formula, as AT&T had done historically, without creating "windfalls." ¶184. A survey of cash balance conversions that AT&T's actuarial expert conducted shows that many companies avoid the legal issues and inequities associated with wear-aways by (a) continuing the previous formula on an "on-going" basis, (b) offering employees the previously-earned benefits "plus" the cash balance accruals, or (c) offering the greater of (1) an opening account balance "plus" the cash balance accruals or (2) the previously-earned benefits "plus" the cash balance accruals. Ex. 19, Tab B at 5 and 8-11.

Because the Board's delegate did not adopt the wear-away amendment until October 16, 2000, AT&T has evidently finally become concerned about the chronological gap. But *Schoonejongen* holds that a plan sponsor is bound to follow its own procedures for "amendments."

Likewise, the *Restatement of Trusts,* §331 comment d, provides that when a procedure for making changes is specified, changes can be made "only in that manner." In this instance, the Senior Vice-President or his delegate was required to adopt "amendments" to effect any rules "consistent with the intent of the design presented to the Board" that were not in the resolutions. Even if wear-away was a plausible outgrowth of that design, the Board's resolutions did not provide for it and the Senior Vice-President did not adopt such an amendment until October 16, 2000. Accordingly, AT&T is not entitled to summary judgment on the Fourth and Fifth Claims about when the plan was validly amended to adopt wear-away.[5]

II. The Section 204(h) notice of reductions in future accruals

With the cash balance conversion, AT&T reduced the rates of future benefit accrual from 1.6% of pay to approximately 1.35-1.4% of pay effective January 1, 1998. AT&T contemporaneously recognized that notice under ERISA Section 204(h), 29 U.S.C. 1054(h), was required, but it departed from the statute on the contents of that notice by distributing notices that did not tell participants about the reductions in future accruals. ¶¶83-91.

Having become aware from this litigation of the inadequacy of its notice, AT&T would like to present a first-line defense. Accordingly, it has developed a different approach to determining whether reductions occurred. On that new basis, AT&T asserts that "none" of the named Plaintiffs "suffered a significant reduction" and therefore none of them can pursue the 204(h) claim. Def.Br. 25 and 28. Essentially, this argument is contingent on the Court permitting AT&T to offer a second set of accounts which regroup and restructure the plan's accruals in a different light. AT&T would like to compare the participants' cash balance benefits with their benefits under the formula as it

[5] As mentioned, AT&T has not argued that it is entitled to summary judgment on the second amendment adopted October 16, 2000, which provided that the new cash balance options could be based on the lower of a participant's annuity entitlements.

existed two amendments earlier, i.e., before the 1997 special update. AT&T admits that it never contemporaneously performed any computations along this line. ¶125.

A. AT&T's effort to reargue Judge Politan's ruling that the named Plaintiffs have "standing" to raise the Section 204(h) claim

AT&T's argument that "none of the named plaintiffs ... suffered a significant reduction in the rate of future benefit accrual" is founded on a November 13, 2000 "Certification" prepared by Kevin Armant. Id. at 25. AT&T fails to mention that Judge Politan reviewed the same Certification and rejected it three years ago.

Mr. Armant's Certification was prepared to support an argument in opposition to class certification that the four named Plaintiffs lacked "standing" to raise the Section 204(h) claim. The declarant, Mr. Armant, is an actuary but not a fact witness. Judge Politan considered his Certification and asked Plaintiffs to prepare a proffer about how they intended to show the 204(h) violation. Slip Op dated June 6, 2001 at 5-6. Plaintiffs prepared a proffer dated July 9, 2001, which included an Affidavit from Claude Poulin, the actuarial expert who continues to serve as the Plaintiffs' expert. After reviewing both the Armant certification and the Plaintiffs' proffer, Judge Politan ruled:

> "[T]he Plaintiffs filed supplemental submissions in response to the Court's instructions expressed in its June 6, 2001 Letter Opinion and Order, regarding the Plaintiffs' Third Claim for Relief. The Court is satisfied that the named Plaintiffs proffered sufficient evidence which tended to counter the Defendants' contention that none of the named Plaintiffs will suffer a reduction in annual benefits commencing at age sixty-five by virtue of the Plan amendment. As such, Plaintiffs satisfactorily established standing with regard to the Third Claim for Relief. Accordingly, the Court will neither dismiss nor decertify the Plaintiffs' Third Claim for Relief on the basis of lack of standing."

Slip Op dated Nov. 19, 2001 at 12-13.

When Magistrate Judge Hedges issued an Order on December 1, 2003, requiring AT&T to serve expert actuarial and communications reports, AT&T did <u>not</u> designate Mr. Armant as its actuarial expert. Instead, it designated Lawrence Sher, a well-known consultant on cash balance conversions. After Mr. Sher's report was prepared and his deposition was taken, AT&T evidently decided against presenting it as support for its motion. Instead, it returned to the Armant Certification and offers it with no other evidence. AT&T has thus offered this Court only the "evidence" that Judge Politan already considered. In addition to objecting that AT&T cannot substitute Mr. Armant as its actuarial expert when AT&T did not have him prepare an expert report pursuant to Rule 26(a)(2)(B) or make him available for a deposition, Plaintiffs submit that AT&T's position has already been rejected by this Court. The "law of the case" doctrine means that standing should not be "re-decided" absent extraordinary circumstances, such as the availability of new evidence. *PIRG of N.J. v. Magnesium Elektron*, 123 F.3d 111, 116-17 (3d Cir. 1997).[6]

B. AT&T's efforts to avoid Actuary Poulin's findings of future reductions

ERISA Section 204(h) requires any significant reductions in the future rate of accruals to be disclosed in advance of their effectiveness. As indicated above, the class' actuarial expert, Mr. Poulin, found significant reductions in the rate of future benefit accrual after the January 1, 1998 effective date of the cash balance amendments. The reductions were 15% to 35% lower than the prior formula's rate of 1.6% of pay. ¶¶70-72. Discovery revealed that AT&T had computed the same reductions as Mr. Poulin. Numerous spreadsheets, graphs and charts were prepared internally showing the same reductions. ¶¶73-78. For example, Ex. F to the Poulin report attaches AT&T-prepared spreadsheets showing "accrual rates" virtually identical to those Mr. Poulin computed.

AT&T argues that this Court should not consider Mr. Poulin's report because he applied an "incorrect legal standard" and therefore his findings have "absolutely no relevance." Def.Br. 27. For

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[6] If the named Plaintiffs lacked standing to bring the Section 204(h) claim, the proper course would be to invite additional class members to intervene, not to dismiss classwide claims. *Manual for Complex Litig., Fourth*, §21.26; *Birmingham Steel Corp. v. TVA*, 353 F.3d 1331, 1339-40 (11th Cir. 2003).

support, AT&T relies on FRE 401 and 402 on relevance and irrelevance. This is a circular, conclusory analysis which is founded on the wrong Federal Rules: FRE 702-704 apply to expert testimony. Even if the Court were ultimately to agree with AT&T's legal theory, it would be circular to exclude expert testimony in limine based on the Court's ultimate legal conclusion.

AT&T's brief goes on to claim that Mr. Poulin's method of comparison is "not found in any law, including the Temporary [Treasury] regulations." Def.Br. 26-7. However, the Treasury Department's temporary 1995 regulations and its final 1998 regulations both provide that the statutory determination of whether a plan has been "amended so as to provide for a significant reduction in the rate of future benefit accrual" is based on comparing "the amount of the future annual benefit commencing at normal retirement age" under the amended plan with the amount of the future annual benefit that would have been earned under the terms of the plan prior to the amendment. 26 C.F.R. 1.411(d)-6, Q&A 5 and 7. Following those regulations, Mr. Poulin prepared spreadsheets comparing the "future annual benefit" under the cash balance amendments which became effective on January 1, 1998 with the "future annual benefit" if the prior 1.6% of pay rate had continued.

AT&T's actuarial expert, Mr. Sher, agreed with Mr. Poulin that the Plan's prior rate of accrual was 1.6% of pay. ¶126. He further agreed that Mr. Poulin calculated the past and present "accrual rates" appropriately for a Plan which complies with ERISA's "133 1/3%" accrual rule. See Sher Rpt.10-11. Both before and after the conversion, AT&T's Applications for Determination to the Internal Revenue Service swear that AT&T intends to satisfy this "133 1/3% rule." ¶135 and Pltf. Ex. 41. As further evidence, the spreadsheets produced in discovery show that AT&T computed its cash balance "accrual rates" using exactly the same method as Mr. Poulin. ¶73.

The Treasury regulations on Section 204(h) issued in 2003 confirm that the "rate of future benefit accrual" is determined "annually." 68 F.R. 17277, 17279 (Apr. 9, 2003). Whether a reduction in the rate will occur is based on "whether the amendment is reasonably expected to reduce "the benefits accruing for a year."" Id. and 26 C.F.R. 54.4980F-1, Q&A 6(b)(1) and 8. [7]

While AT&T now acknowledges that Mr. Poulin's comparisons of future annual benefits have "mathematical logic," Def.Br. 27, AT&T asserts that the regulations can be read to support the "projected" approach that it has developed post hoc and that, furthermore, the regulations are "required" to be read in that manner. Id. Although AT&T contends that the regulations require that any comparison be performed on the basis of "projected" benefits, and repeats the word "projected" four times, this word cannot be found anywhere in the 1995, 1998 or 2003 regulations. AT&T's approach would also read the regulations inconsistently with the statutory direction to determine whether there is a "significant reduction in the rate of future benefit accrual." AT&T's "projected" benefit approach would not look at the "rate" of benefit accruals at all. As the Supreme Court recently said in another ERISA case, interpreting a regulation inconsistently with the statutory purpose and terms is an "incorrect reading." *Yates v. Hendon*, 124 S.Ct. 1330, 1342 (2004).

Examples given in the Treasury regulations are also inconsistent with AT&T's approach. The 1995 and 1998 regulations contain an example in which the projected normal retirement benefit of 50% of pay is not changed at all, but an amendment is adopted changing the numerator or denominator used to compute the future annual rate at which those benefits accrue. 26 C.F.R. 1.411(d)-6, Q&A 6 (Example). If AT&T's projected approach was correct, the example would not necessarily result in a reduction, even though the Treasury Department concluded that it did.

[7] Although the 2003 regulations are not retroactive, no change was made between 1986 and 2003 in the relevant statutory language about a "a significant reduction in the rate of future benefit accrual." Agency guidance on the interpretation of existing statutes and regulations can be considered regardless of its date based on persuasive power. *Esden v. Bank of Boston*, 229 F.3d 154, 171 (2d Cir. 2000); *United States v. Mead*, 533 U.S. 218, 228 and 235 (2001).

Likewise, the preamble to the Treasury Department's 2003 regulations discusses how notice is required "for an amendment that increases benefits in one year and then reduces them in the next, even though the aggregate benefit over the two years might not be reduced or might even be increased in the aggregate." 68 F.R. at 17279. If AT&T's projected benefit approach was correct, this example would be wrong, too.

AT&T post hoc approach does not conform with the Treasury regulations in another critical respect. It would not compare "future" accruals after the January 1, 1998 "effective date" of the cash balance amendment. The statue and the regulations compare "future" annual benefits after the "effective date" of an amendment. AT&T's brief would substitute a different approach: At the company's discretion, plan "amendments" with different "effective dates" could be regrouped into one with the "projected" total benefits under the redefined Plan amendment compared with those in effect before it. The purpose of this formulation would be to facilitate AT&T's main accounting gimmick, which is to put the 1997 Special Update on the post-1998 side of the comparison.

To reorder the Plan's amendments in that manner, AT&T's motion simply declares that the Special Update amendments and the Cash Balance amendments will be considered as one. Starting on page one of its Brief, AT&T announces that all of the Board's Resolutions will be "hereinafter referred to interchangeably as either the "Resolutions" or the "Plan amendment"" Def.Br. 1. AT&T then refers to the "Plan Amendment" in the singular form a remarkable forty-three (43) times. But like AT&T's substitution of words in the regulations, no reference to the "Plan amendment" appears in any of the Board resolutions or governing Plan documents. All of the documents and even answers to interrogatories refer to "amendments" (plural) with a 1997 effective date for the Special Update amendments and a 1998 effective date for the Cash Balance amendments. ¶¶15, 27, 30, 85 and Pltf. Exs. 5, 9, and 13.

To illustrate the differences, the calculations by the actuarial experts show that named Plaintiff Donald Noerr had retirement benefits of $1,523 per month on January 1, 1997. Had the prior formula continued, his rate of future accruals would have been 1.6% of pay, or $94.10 per month in benefits, for each year of service until he retired in February 2002. However, for the year 2001, AT&T only "booked" $80.67 per month in "hypothetical" cash balance accruals for him (down 14% from the benefit produced with the prior formula). See Poulin Rpt. Ex. G and Sher Rpt. Ex. B-3. Moreover, AT&T did not actually pay even this reduced rate of accrual to Mr. Noerr because of the "wear-away" contingency that it imposed. ¶139.

To understand the "creative accounting" which AT&T wishes to substitute, let's look at the example further. The Special Update that became effective January 1, 1997 resulted in Mr. Noerr's benefits increasing by 16%. AT&T's¶44. The mathematical reason was that his salary had increased at a rate of approximately 3% per year between 1987-92 and 1994-96. The official U.S. cost-of-living and wage indexes had both gone up by 18% over this time period, Plf. Counter-Stmnt ¶31, but AT&T's benefits had lagged. Without the update, AT&T's formula would have ranked 42nd out of 50 major companies at some pay levels. ¶19. Under AT&T's proposed approach, this update would not be treated as the update that it was, but would instead be used as a credit against future reductions. AT&T would not consider Mr. Noerr to have "suffered" a reduction in his future annual rate of accruals until the 16% update was reduced back down to zero. In essence, AT&T wants to treat the 16% update as if it was an "advance" against "future" reductions under cash balance.[8]

In *Koenig v. Int'l Life Corp.*, 880 F. Supp. 372, 374 (E.D.Pa. 1995), the district court warned

[8] AT&T's actuarial expert used the "advance" analogy in his report. ¶129. However, under the common law and in industrial relations for well over 100 years, a payment is considered an "advance" only when the person receiving it knows that it is going to be deducted from future obligations--which clearly was not the case here. ¶¶129-30.

that allowing "how a plan change is labeled" by the defendant to affect the applicability of Section 204(h) "would place pension plan participants in a peculiarly precarious position at the mercy of semantics." Here, AT&T attempts to restructure both the regulations and the Plan's amendments in order to avoid notice.

Expert depositions further revealed that AT&T's actuarial expert, Lawrence Sher, had actually calculated that many participants would suffer reductions in accruals even under AT&T's revised approach, but omitted this from his report. At his deposition, Mr. Sher testified that he prepared spreadsheets showing even under AT&T's post hoc approach for participants with less than 15 years of service and an age of 45 would suffer reductions. ¶128 and Ex. 39.

In *Davidson v. Canteen Corp.*, 957 F.2d 1404, 1407 (7th Cir. 1992), the Seventh Circuit rejected a company's suggestion that notice need not be given if the reduction only applied to a small group of participants if certain conditions were met. The Seventh Circuit held that the Section 204(h) notice requirement is not limited "only to amendments affecting all plan participants or affecting all plan participants in a uniform manner." *Koenig* also holds that even if a plan administrator could rearrange the plan's recent amendments so that "one of the categories would show an increase" this would "not save the amendment from the notice requirement." 880 F.S. at 375.

Thus, even if a plan administrator was allowed to rearrange the Plan's accruals so that reductions appeared for fewer participants, Section 204(h) notice would still have to be given. Especially if reductions disappear only by revising the comparisons, the Plan administrator would have a fiduciary duty to disclose the assumptions under which the reductions appear or do not appear. An understandable notice cannot include misleading information or leave out information needed to make the information given complete and accurate. See 29 C.F.R. 2520.102-2(b).

AT&T also complains about Mr. Poulin not having demonstrated the reductions using more "actual plan participants." Def.Br. 25 and 28. With mathematical formulas, it does not make a difference whether an actuary demonstrates a reduction using "John Doe" making $60,000 per year or a named individual making the same salary. For this reason, the Treasury's regulations do not require plan administrators to use actual plan participants to test for a significant reduction but provide that the determination is made based on "relevant facts and circumstances." 26 C.F.R. 1.411(d)-6, Q&A 7.

Finally, AT&T's motion does not dispute that Section 204(h) requires notice for amendments that reduce the future benefits payable at normal retirement age by introducing a new "minimum benefit" or "benefit offset." 26 C.F.R. 1.411(d)-6, Q&A 6. Mr. Poulin's report found that the "wear-away" provision introduced a frozen "minimum benefit" or "offset" which eliminated the "plus" formula that had always applied following updates. Because the frozen "minimum benefit" was at a higher level than the opening cash balance account for "97%" of the participants, payment of the new cash balance accruals became contingent. ¶¶79-81, 118 and 136-42. AT&T does not contest Mr. Poulin's analysis or offer any legal rebuttal about the notice requirement applicable to such changes. This is another reason why summary judgment should cannot be granted to AT&T.

C. AT&T's brochures did not disclose the reductions in future accruals and therefore do not satisfy the Section 204(h) notice requirement

Review of the written materials that were distributed to participants before January 1, 1998 shows that there was no understandable disclosure of:

(1) The five-month freeze on any benefit accruals between Aug. 1, 1997 and Dec. 31, 1997;

(2) The reduction in the rate of future accruals after January 1, 1998 by 15% to 35%; or

(3) The effect of the frozen "minimum benefit" on the payment of future accruals.

¶¶93 and 101-2. Neither Professor Stratman, the class' communications expert, nor Professor Bosley, AT&T's communications expert, could find disclosures of any of these reductions. The closest Professor Bosley came was a sentence in an April 1997 letter that refers to keeping AT&T "competitive" with other companies, which she suggested could be a hint. ¶132.

Despite its expert's report and its preceding arguments that no reductions occurred, AT&T incongruously contends that it gave the statutory notice mandated by ERISA Section 204(h). Def.Br. 28-32. In various conclusory phrasing, AT&T maintains that the information AT&T provided to participants "about the changes to the Plan" (1) "more than satisfied any notice obligation it might have had," (2) provided "far more information about the Plan amendment than 204(h) required," and (3) provided an "explanation of each portion of the Plan amendment." Id. at 3, 29 and 31.

How can AT&T disclose so much about reductions that it contends never occurred? Review of the brief shows that AT&T is not contending that it actually disclosed any reductions. Rather, while not saying it directly, AT&T contends that Section 204(h) allows it to "summarize an amendment" without disclosing how it affects benefits.

When a Section 204(h) notice is required, both sides agree that the Treasury regulations require the plan administrator to distribute the text of the amendment or a summary to the participants after the amendment's adoption and at least 15 days in advance of the effective date. It is undisputed that the text of the amendments which provide for reductions was not distributed to participants. In fact, as late as the year 2000, AT&T was telling employees who asked for the plan amendments that they were "not available." ¶26.

When a summary is distributed instead of the amendments, the summary must be "written in a manner calculated to be understood by the average plan participant," although the notice "need not explain how the individual benefit of each participant ... will be affected by the amendment." 26 C.F.R. 1.411(d)-6, Q&A 10. This is consistent with the standard for summary plan descriptions

("SPDs") and the duties of fiduciaries. See 29 U.S.C. 1022(a); 29 C.F.R. 2520.102-2(a), and *Griggs v. E.I. DuPont*, 237 F.3d 371, 381 (4th Cir. 2001) (following *Bixler*, fiduciary has affirmative duty to inform when he knows that silence might be harmful, but "individualized disclosures" are not required). AT&T's brief concedes that a Section 204(h) notice has to meet the standards for an SPD. Def.Br. 28 n.13. But it would read the regulatory permission to "not explain how the individual benefit of each participant ... will be affected" as though it were a license to avoid any understandable disclosure about how the benefits of participants will be reduced. The natural reading of the regulation is that the plan administrator must explain how benefits will be affected by the amendment, but need not "explain how the <u>individual</u> benefit of <u>each</u> participant ... will be affected."

AT&T's reading would make a mockery of the statute and the regulations. The mandated notice of a significant reduction would not tell participants about the reduction. This is inconsistent with the statutory purpose. Section 204(h) is entitled "<u>Notice of significant reduction</u> in benefit accruals." P.L. 99-272, Sec. 11006. The Conference Report likewise states that an amendment reducing benefit accruals will not be "effective unless ... the plan administrator gives written <u>notice of the reduction</u> to each participant in the plan." H.R. Conf. Rep. 99-453 (Dec. 19, 1985); 99th Cong., 1st Sess. The Treasury Department regulations are also entitled "<u>Notice of Significant Reduction</u> in the Rate of Future Benefit Accrual." Those regulations further provide that Section 204(h) "requires written notice of an amendment ... that provides for a significant reduction in the rate of future benefit accrual." 26 C.F.R.1.411(d)-6, Q&A-1. An understandable notice cannot leave out information needed to make the information given "accurate and comprehensive." See 29 U.S.C. 1022(a); 29 C.F.R. 2520.102-2(b); and *Burstein v. Allegheny*, 334 F.3d 365, 375 and 378-79 (3d Cir. 2003).

The case law under Section 204(h) rejects the idea that a plan administrator can "summarize the amendment," without understandably disclosing how it affects benefits. See *Normann v. Amphenol Corp.*, 956 F.Supp. 158, 165-66 (N.D.N.Y. 1997) (notice that provided "no details" about the reduction was "not sufficient"); *Copeland v. Geddes Federal Sav.*, 62 F.S.2d 673, 678 (N.D.N.Y. 1999) (notice was inadequate because it was "ambiguous" and did not adequately identify the "specific" factors that were being eliminated).

Here, AT&T violated Section 204(h) not only by omitting disclosure of the reductions, but by making the cash balance amendments appear to be an improvement. Like an SPD, a Section 204(h) notice is not allowed to highlight the advantages and obscure the disadvantages of a change. 29 C.F.R. 2520.102-2(b). However, AT&T's communications created the impression that the cash balance design was going to offer comparable accruals to the prior formula but in an "easy-to-understand" savings account format. The April 1997 communication to employees indicated at most 24-hour cessation in accruals before the Special Update, which was described as a substantial "improvement," "goes into effect." ¶92 and Stratman Rpt. Ex. 1, second page. The same communication assured employees that their pensions "will grow more smoothly over the course of employment" under cash balance and contained a Q&A indicating that they would experience no interruption in accruals because "your 1997 pay will be taken into consideration under the new cash balance feature." AT&T's¶68 and Stratman Rpt. Ex. 1 at 2. A graph in a November 1997 cash balance brochure indicated that cash balance offered the same level of benefits as the prior formula and employees were told that "some of the best features" of the prior formula were "unchanged." ¶111 and Stratman Rpt. Ex. 2 at 14.

Lest there be any doubt about the salaried employees' interest in learning if AT&T was reducing their benefits, the record shows that employees <u>repeatedly</u> asked for information about benefit reductions. Fourteen focus groups of managers asked AT&T for comparisons and if benefits were reduced. ¶¶104-5. But AT&T did not want its employees to know about the reductions. At his deposition, George Fromme, AT&T's Director of Benefits Planning, testified that the issue that "everyone" involved in the cash balance design "was concerned about is that they [the employees] would make a comparison of the cash balance assuming the old plan would get updates." ¶106. In a videotaped presentation to HR Leaders, the individual responsible for the cash balance seminars anticipated questions about reductions and discusses how he will only admit there are reductions if asked the question precisely and will qualify his answer as based on "certain assumptions" and maintain that he can come up with different scenarios where no reductions occur. ¶107.

Obviously, the notice requirement in Section 204(h) can be in tension with a company's economic self-interest–just as there are tensions between human relations policies and immediate economic self-interest. It could be in AT&T's economic self-interest that employees not appreciate the full extent to which their retirement benefits are being reduced in the future. But this is exactly what Section 204(h) charges the Plan administrator with doing. The Plan administrator has a fiduciary duty, the "highest" duty known to the law, to comply with the statutory notice requirement.

The statutory language is also clear that a 204(h) notice must be given "after adoption of the plan amendment." *Production and Maintenance Employees' Local 504 v. Roadmaster*, 954 F.2d 1397, 1403 and 1406 (7th Cir. 1992). This Court's December 4, 2003 Opinion recognizes that Section 204(h) can be violated by implementing reductions before the adoption of the actual amendments. Id. at 5. In this instance, the wear-away provision was not adopted until October 2000. AT&T does not contest that it violates the statute if its 204(h) notice was given before the adoption of the wear-away provision. In effect, AT&T contends that the October 2000 wear-away provision could be considered a "clarification" of the Board's resolutions. Def.Br. 22. But the *Roadmaster* decision rejects the defendant's labeling of a change as a "clarification" in order to avoid 204(h) notice. 954

F.2d at 1403-4; accord *Abels v. Titan Int'l*, 85 F.S.2d 924, 936-37 (S.D. Iowa 2000).

III. The incomplete and inadequate disclosures of material modifications, disadvantages and reductions in the SPD

The Sixth Claim concerns violations of the disclosure requirements for SPDs. The expert reports of Mr. Poulin and Professor Stratman, a communications expert from the University of Colorado at Denver, show that AT&T's SPD did not reveal that:

> (1) the rate of future accruals under cash balance is significantly lower than before, with still lower rates at older ages;
>
> (2) the initial cash balance accounts often represent less than 50% of the value of the participant's previously earned benefits;
>
> (3) the conversion factors used to compute the opening accounts had "no true actuarial basis" and favored younger employees over older employees;
>
> (4) the Plan's historical "plus" formula under which future accruals added to previously earned benefits was being modified so that cash balance accruals would not be added for up to 13 years;
>
> (5) the Plan's valuable "undiscounted" early retirement benefits at age 55 were being replaced by discounted factors specified in a table; and
>
> (6) the two new cash balance benefit options were "clearly less valuable" than the traditional options, i.e., the single life annuity or joint & 50% survivor's annuity. ¶¶173-93 and 229-34.

AT&T's motion nevertheless asks for summary judgment on the Class' claim that the 1998 SPD inadequately disclosed new limitations on the plan's benefits. AT&T asserts that the SPD offers "substantial detail as to all the features of the post-amendment Plan." Def.Br. 39. However, this assertion has an unstated reservation: "detail as to all the features" apparently does not include any of the disadvantages. AT&T also asserts, without support, that it made "herculean" and "enormous" efforts to ensure the SPD was written in manner calculated to be understood. Def.Br. 39 and 45. The record tells a different story: It shows that AT&T actively concealed information about the "bad parts" of the conversion not just once, but time after time. ¶¶106-12, 118-19, 123, 203-5, 209, 239.

The statutory and regulatory requirement that the circumstances resulting in denial, loss or forfeiture of benefits be clearly identified is mentioned only in a footnote and there AT&T acts as though the rule must applies to a different type of circumstances than those the Class' actuary has identified. Def.Br. 34 n.15. AT&T contends that none of those disadvantages "is required to be included in an SPD." Id. at 32. But it offers no support for this assertion other than a thread-bare assertion that an SPD is not required to "compare provisions with provisions that had been deleted from the Plan" or disclose features "the post-amendment Plan does not have." Def.Br. 33, 36.

A. Judge Politan's denial of AT&T's motion to dismiss the SPD claim

AT&T filed a motion to dismiss on August 16, 1999, which asked Judge Politan to dismiss the SPD claim on indistinguishable grounds. As now, AT&T asserted "the SPD contains everything ERISA requires it to contain" and that "none of the information which plaintiffs claim is missing from the Plan SPD ... is required by ERISA." Mem. filed Aug. 16, 1999 at 21-23. Judge Politan denied the motion, recognizing that the Sixth Claim "specifically alleges that the SPD failed to disclose certain "new" features included in the Plan and that the Sixth Claim "appears to state a cause of action in light of Section 102's requirement that the SPD be sufficiently accurate and comprehensive to reasonably apprise the participants and beneficiaries of their rights and obligations under the Plan." Slip Op dated June 29, 2000 at 17. Nearly four years later, Defendants' motion replays the same arguments, with no adjustment for Judge Politan's ruling. A defendant's motion for summary judgment is, of course, subject to a different procedural standard than a motion to dismiss in that the plaintiff may no longer rest on the factual allegations in the complaint. But when the complaint's allegations have been proven, the rule of law should be the same.

B. The expert reports on AT&T's disclosures

In line with its challenge to Mr. Poulin's report on the reductions in the rate of future accruals under Section 204(h), AT&T asks the Court not to consider the report of Professor Stratman, the Class' communications expert, although AT&T has made no motion in limine. Def.Br. 37 n.17. AT&T does not mention the expert communications report that it commissioned from Professsor Deborah Bosley of the University of North Carolina at Charlotte. Professor Bosley acknowledged that Professor Stratman is an authority on the understandability of technical communications and she did not challenge his analysis of the disclosures in any significant respect. ¶¶172 and 218-22. The Third Circuit has also relied on Professor Stratman's research on SPDs in *Alexander v. Primerica,* 967 F.2d 90, 93 (3d Cir. 1992).

AT&T agrees that the standard of whether the SPD was "written in a manner calculated to be understood by the average plan participant" is an "objective" one. Def.Br. 38. Whether the Court accepts the ultimate conclusions, it should assist the Court to have communications professionals like Professors Stratman and Bosley offer their analyses of the disclosures. See FRE 702 and *Calhoun v. Yamaha Motor Corp., U.S.A.*, 350 F.3d 316, 321 (3d Cir. 2003) (FRE 702 is interpreted "liberally").[9] The alternative would be for the Court to consider whether the SPD is written in a manner calculated to be understood by the average participant by itself, informed by arguments from counsel and conclusory assertions like AT&T's that it made "herculean" efforts.

C. AT&T has gone from contending that the disadvantages are "not true," to arguing that the Plan administrator has "no duty" to tell participants

AT&T's tack through most of discovery was to contend that it did not need to disclose the key features identified in the Complaint and by the Class' actuary because they were "not true." Interrogatory answers contended that the key features that the Class identified were "not true." ¶215.

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[9] As support, AT&T relies on cases that have nothing to do with SPDs or testimony from communications experts. Id. (citing *Bilzerian, Steele, Haberen*, and *Green Machine*). If the Court requests, Plaintiffs can provide additional briefing on this issue.

However, the December 30, 2003 report prepared by Defendants' actuarial expert did not disagree with the analysis of the Plaintiffs' actuary in any significant respect, but only disagreed with the legal implications of his analysis. ¶¶177, 180, 217, and 236.

In its motion, AT&T no longer argues that the disadvantages that Mr. Poulin identified are "not true," but contends that a plan administrator has "no duty" to disclose features that the cash balance plan "does not have." Def.Br. 33-34. The same contention is rephrased in various ways. AT&T says the "omissions" identified in the Complaint "relate to information which is not required to be included in an SPD." Id. at 32. The SPD "is to describe what is in a plan, not what is *not* in it." Id. at 35. It is "not required to discuss provisions the Plan lacked, or to compare provisions with provisions that had been deleted from the Plan." Id. at 36.

AT&T complains that the Plaintiffs are insisting that it have "clairvoyance" about what the "participants *might* want to know about." Def.Br 35-6 (emph.in orig.). The record clearly shows, however, that focus groups of managers and individuals repeatedly asked for comparisons of the old vs. new benefits and for information about benefit reductions. The record also shows that AT&T was acutely aware of what the employees "*might* want to know about" but did not wish to tell them.

While AT&T cites dicta from other circuits about not adding to ERISA's list of specific disclosure obligations, Def.Br. 34-35, it virtually ignores the unparalleled body of case law in this circuit on disclosures in SPDs, SMM's and other fiduciary communications (and it jumps over the predicate of whether it complies with ERISA's list of disclosure obligations).[10] The Third Circuit's

[10] AT&T miscites this Circuit's *Horvath and Schoonejongen* decisions, in each instance excising quotes from their context. See Def.Br. 34-35. The quote in *Horvath* refers to another circuit's ruling about "physicians' reimbursement" incentives. See 333 F.3d at 462. It does not indicate that this Circuit uses a checklist for SPDs. Likewise, the full quote in *Schoonejongen* states that SPDs "cannot state specific circumstances that are not part of the plan's terms but could hypothetically be added to the plan in the future through a valid amendment." 18 F.3d at 1042 n.7.

2003 *Burstein* decision establishes that SPDs are the "primary" instrument of disclosures and that the disclosures must be "transparent, accurate, and comprehensive." 334 F.3d at 378-9. AT&T cites *Burstein* only in a footnote in an effort to distinguish its holding on reliance. AT&T never recognizes the impact of *Bixler v. Central Pa. Teamsters Health & Wel. Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993), and related decisions which establish that a plan administrator must provide "complete and accurate" information when it knows or should have foreseen the participants' need for information, e.g., because other communications are "vague, "“confusing" or "likely to be misunderstood." See *Harte v. Bethlehem Steel*, 214 F.3d 446, 448 and 452-3 (3d Cir. 2000); *In re Unisys Corp. Ret. Med. Benefit "ERISA" Litig.*, 57 F.3d 1255, 1265 (3d Cir. 1995).

AT&T's rhetoric about "what is in the plan" as opposed to "what had been deleted from the Plan" shows a lack of appreciation for basic fiduciary responsibilities. The duty to inform participants about limitations, losses, or reductions in "anticipated benefits" is precisely what the SPD, the Summary of Material Modification (SMM) and Section 204(h) notice are about. Indeed, Congress enacted ERISA because participants were "losing anticipated retirement benefits." 29 U.S.C. 1001(a). The SPD regulations require that the SPD "clearly identify" the circumstances that can result in losses or reductions of benefits that a participant might reasonably expect to receive. The regulations specifically require that disclosures of "disadvantages" and "reductions" be no less prominent than the disclosures of advantages. 29 C.F.R. 2520.102-2(b).

Both ERISA and the regulations likewise require understandable disclosure of "material modifications." 29 U.S.C. 1022(a) and 29 C.F.R. 2520.104b-3. A disclosure of a material modification necessarily involves a comparison (as does a notice of a "reduction" under ERISA Section 204(h)). In *Baker v. Lukens Steel Co.*, 793 F.2d 509, 511-12 (3d Cir. 1986), an employer eliminated a "special" early retirement benefit but did not disclose the elimination to participants.

The Third Circuit held that the "deletion" was a "material modification" and therefore a summary had to be distributed to each employee. If AT&T's proposed "line-in the-sand" against comparative disclosures was adopted, Lukens Steel would <u>not</u> have been required to give notice because it would involve disclosure of "what is not in the plan." See also *Chambless v. Masters Mates & Pilots,* 772 F.2d 1032, 1040 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) (a plan administrator must explain "the full import of the interaction" between an amendment and existing plan provisions on the computation of benefits). Tellingly, AT&T recognizes in another passage that without disclosure of modifications, employees have an "expectation that benefits which used to be offered in the pre-amendment Plan would continue in the future." Def.Br. 43.

AT&T's dichotomous argument that it only left out what "had been deleted from the Plan" is also faulty because it asks the Court to accept the predicate that the SPD adequately disclosed what is in the Plan. However, review of AT&T's SPD showed that it does not follow that precept. The SPD never understandably discloses (1) the current rates of benefit accrual under cash balance, (2) the wear-away contingency on payment of those accruals, (3) the non-actuarial basis for the conversion factors, (4) the early retirement reduction factors under cash balance, or (5) how the new cash balance options can be "less valuable" than the traditional options. ¶¶173-93 and 229-34.

AT&T cleverly tries to deflect disclosure of the wear-away feature by characterizing it as an age discrimination claim. Def.Br. 36-37. Building on that characterization, AT&T contends that it was not required to disclose this feature because Judge Politan dismissed the class' age discrimination claims. Id. This is wrong for two reasons. First, age discrimination is obviously not the only issue implicated by the wear-away provision. As we have shown, it also involves the timeliness and validity of plan amendments, compliance with Section 204(h), and disclosure of reductions and limitations in benefits. Second, the Third Circuit has already ruled that an employer's compliance with one rule does not excuse its fiduciary duty to comply with others. *In re Unisys, supra,* 57 F.3d at 1264, holds that even though it was clearly lawful for Unisys to terminate benefits, the company breached its fiduciary duty by telling employees that the benefits would continue for life after employees retired. See also *Jordan v. Federal Express*, 116 F.3d 1005, 1014 (3d Cir. 1997) (failure of regulations to specifically mandate disclosure is "not dispositive" of duty to disclose).

Finally, AT&T's position that it had "no duty to inform" employees about the disadvantages of its cash balance conversion fails for another reason. AT&T briefly addressed each of these subjects but did not give employees a complete and accurate story. In *Meinhardt v. Unisys*, 74 F.3d 420, 442-43 (3d Cir. 1996), *cert. denied*, 519 U.S. 810 (1996), Unisys "elected and indeed intended to communicate with participants about the risks accompanying investments [in GICs] and Executive Life's financial condition." As a result, the issue was not about whether Unisys had an absolute duty to provide information about risks, but whether the information that was provided was complete. Likewise, *Harte v. Bethlehem Steel* shows that a plan administrator has a fiduciary obligation to clear up vague or confusing statements in its communications. 214 F.3d at 448 and 452-3.

Here, AT&T engaged in a self-described "extensive" communications campaign, including the SPD, the earlier brochures, and seminars. Br. at 28-32. An October 29, 1999 brief submitted to Judge Politan represented that participants were, in fact, given the information to "determine whether they would fare better or worse under the Cash Balance formula than under the prior Plan formula." Reply Br. at 17. A graph in the November 1997 cash balance brochure suggested that cash balance offered the same benefit levels as under the prior Plan formula. ¶111. Likewise, the August 1997 brochure told employees that the "best features" of the prior plan remained "unchanged," including that "your pension will grow steadily over the years." Stratman Rpt. Ex. 2 at 14. A November 1997 brochure mentioned "crossover" but did not explain the disadvantages. ¶¶122-24.

Brochures and cash balance seminars described how the opening account balances were based on the value of the "undiscounted" age 55 benefit. ¶¶120-21. An August 1997 brochure assured employees that no matter which benefit option they chose, the "overall value" of the benefits was the "same." ¶¶242-3. Thus, the issue is not simply about whether AT&T had a duty to inform participants about the modifications that the Class has identified, but about whether having "elected and indeed intended to communicate with participants" about those modifications, it had a duty to provide "accurate and complete" information.

D. The ill-starred decision to use bulk mail to distribute the SPD

AT&T's use of bulk mail to distribute the SPD and the resulting problems in delivery only adds to the story of inadequate disclosures. *Leyda v. Allied Signal*, 322 F.3d 199, 201-3 and 208-9 (2d Cir. 2003), holds that the distribution must be calculated to reach "each" participant and that absence of receipt functions the same as non-disclosure. The facts related to the bulk mail distribution of the SPD are summarized in Plaintiffs' opening memorandum and will not be repeated here. In its motion, A&T contends that it followed the rules for use of bulk mail in the Labor Department's regulations and that any returns were remailed. Def.Br. 40-41. AT&T also attempts to minimize the problems with the mailing, observing that only two deponents testified with absolute certainty that they did not receive the SPD in 1998. Def.Br. 41 n.19.

Brenner v. Johns Hopkins, 88 Fed.Appx. 555, 558-59 (4th Cir. 2004), on which AT&T relies, emphasizes that the use of second or third class mail is "sufficient only if certain standards are met." There is no record that those standards were met, even though ERISA requires those records to be maintained. 29 U.S.C. 1027 (establishing duty to maintain records about certified matters–which includes distribution of the SPD–for a period of at least six years). AT&T never cites Second Circuit's *Leyda* decision on the effect of not receiving the SPD, but instead contends that it makes no difference if SPDs are not received as much as "10 years late" because it is only a procedural violation. However, in *Amatuzio v. Gandolf*, 994 F.S. 253, 275 (D.N.J. 1998), the case on which AT&T relies, Judge Irenas stated that failure to distribute an SPD can give rise to substantive relief when it is combined with "active concealment of plan terms." As discussed next, active concealment was clearly present here.[11]

Although AT&T disputes exactly how poor the distribution of the SPD actually was, summary judgment cannot be granted to AT&T. AT&T used bulk mail, which is notoriously unreliable, and there is evidence that some of the mail was not delivered at all or for over a year and one-half. None of the records that AT&T was statutorily required to keep were produced to show that the mailing was accomplished in compliance with the regulations.

E. "Extraordinary circumstance" is not a requirement to obtain relief for an inadequate SPD, but it is present here in the form of "active concealment"

AT&T maintains that relief for reporting and disclosure violations is offered only in conjunction with "extraordinary circumstances", e.g., active concealment, citing *Ackerman v. Warnaco*, 55 F.3d 117, 124-25 (3d Cir. 1995), *Jordan v. Federal Express*, *supra*, 116 F.3d at 1011, and *Lettrich v. J.C. Penney*, 213 F.3d 765, 770 (3d Cir. 2000).

The first response to this is that the Third Circuit's 2003 opinion in *Burstein v. Allegheny*, 334 F.3d 365, is the controlling precedent. *Burstein* clearly does <u>not</u> require extraordinary circumstances to obtain relief for inadequate disclosures in an SPD. AT&T does not mention *Burstein* at all in this context, even though it is this circuit's leading decision and the only one that applies the SPD requirements to a cash balance pension conversion.

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[11] *Heil v. Midwest Operating Eng'rs*, 1993 WL 226303 (N.D. Ill. 1993), on which AT&T relies, has the same reservation: "[A]n amendment to a Plan is valid" despite a beneficiary's lack of personal receipt of the SPD "unless the beneficiary can show active concealment by the Plan or some significant reliance upon or possible prejudice flowing from the lack of notice." Id. at *5.

Second, the earlier decisions on which AT&T relies do not actually stand for the proposition that relief for an inadequate SPD requires "extraordinary circumstances." *Ackerman* and *Lettrich* involved whether any notice of termination of two separation pay programs was given to employees. *Jordan*, too, never discusses inadequate disclosures in the SPD (moreover, *Jordan* specifically holds that extraordinary circumstances are not required to obtain relief for a breach of fiduciary duty based on inadequate disclosures, 116 F.3d at 1012-14).

Before *Burstein*, the only Third Circuit decision on relief for an inadequate disclosures in an SPD was *Genter v. Acme Scale*, 776 F.2d 1180, 1186 (1985). Like *Burstein*, *Genter* did not require the plaintiff to establish reliance or extraordinary circumstance to obtain relief. As Judge Bissell has observed, at most, an "implicit finding of prejudice may be gleaned from the court's analysis" in *Genter* of what the participant could have done if he had been "properly informed." *Schoonejongen v. Curtiss-Wright*, 1998 U.S. Dist. LEXIS 19350 *41 (D.N.J. 1998) (unpublished).

Even if extraordinary circumstances were required, the Third Circuit concluded in *Ackerman v. Warnaco*, that "actively" concealing information about a plan change is an extraordinary circumstance. 55 F.3d at 124-5. See also *Jordan, supra,* 116 F.3d at 1011 ("attempts to actively conceal a significant change in the plan" present extraordinary circumstances); *Lettrich v. J.C. Penney*, 213 F.3d at 772 (plaintiffs sufficiently alleged active concealment by placement of notice of a plan termination "deep within" a proxy statement without any warning to participants); *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1553 (3d Cir. 1996) (extraordinary circumstances may exist if employees "repeatedly and diligently inquired"about the information that was not disclosed); *Amatuzio v. Gandalf Systems Corp.*, 994 F.S. 253, 273 (D.N.J. 1998) ("Court has little difficulty in finding that [extraordinary circumstances] obtained in light of the number and scope of the layoffs ... and the obvious need for plaintiffs to have accurate and complete information about their severance packages as they faced prospective unemployment").

In this case, active concealment permeates the record. As described above, the minutes of communications meetings specifically talk about not disclosing the "bad parts" of cash balance and ask "Why would we want to tell people that the special update is higher than Cash Balance?" and "Do we want to explain the crossover or sell Cash Balance?" ¶¶118, 123. Focus groups of managers who reviewed AT&T's draft disclosures repeatedly asked AT&T, with no success, for disclosures about whether cash balance "reduces benefits." ¶¶104-5. Deposition testimony and a videotape show that AT&T purposefully avoided comparisons of the plan's old and new benefits because it did not want employees to see the reductions. ¶¶106-10. Other documents reveal intentional withholding of information about conversion factors, the difference between opening balances and the value of previously-earned benefits, and the relative values of benefit options. ¶118-19, 202-4, 239.

Inadequate disclosures are also particularly egregious when the plan amendments are not available for inspection. Participants cannot "determine with certainty ... exactly what the plan provides" without the amendments themselves. *Curtiss-Wright v. Schoonejongen*, 143 F.3d 120, 124 (3d Cir. 1998). In *Hozier v. Midwest Fasteners*, 908 F.2d 1155, 1168 n.15 (3d Cir. 1990), the Third Circuit pointed out that disclosure violations "wreak especially substantial harm" when the plan amendments are not available. Here, it is undisputed that the plan amendments were not made available to participants for inspection until after October 2000.

F. "Detrimental reliance" is not a requirement for relief for an inadequate SPD, but it is present here, too

As a fallback, Defendants contend that even if extraordinary circumstances are not required or are present because of the concealment of the "bad parts" of cash balance, the Plaintiff must establish "detrimental reliance" to obtain equitable relief for the omission. Def.Br. 44. Proceeding from that premise, AT&T engages in what could be described as a rant about how disclosure "makes no difference" because its managerial employees had "no ability" to avoid the reductions:

> • "Regardless of what, when, or how" the employees were told about the amendment, they had "no ability to prevent the amendment or avoid its provisions, no matter how they felt about the "new" features it introduced." Id. at 45.
>
> • It makes no difference what employees were told because they "could not opt out" Id at 48.
>
> • "No amount of information . . . could have enabled them to secure benefits under any formula other than the ones provided in the post-amendment Plan." Id. at 48.

The syllogistic, rather than factual, underpinning of this argument is revealed by the contention that detrimental reliance is "logically impossible here." Def.Br. 45. But AT&T's effort to saddle its employees with a determination that they had "no ability" to protect themselves based on self-serving "logic" is flatly wrong. As the Third Circuit has ruled, "full disclosure" "permits employees to bargain further or seek other employment if they are dissatisfied with their benefits." *Hamilton v. Air Jamaica*, 945 F.2d 74, 78 (3d Cir. 1991); *Harte,* 214 F.3d at 451 (ERISA "ensure[s] that employees receive sufficient information ... to make well-informed employment and retirement decisions").

AT&T also seeks to avoid the Third Circuit's holding in *Burstein* that proof of detrimental reliance is <u>not</u> a requirement to obtain relief for an inadequate SPD. As *Burstein* makes quite clear, the elements of an SPD violation are based on contract, not estoppel. AT&T only acknowledges *Burstein* in a footnote, contending that it is limited to inadequate disclosures which are in "conflict" with the Plan document, in contrast to all other types of inadequate disclosures. Def.Br. 44 n.21. But *Burstein* itself did not involve a direct conflict between the SPD's terms and the Plan documents in AT&T's suggested sense, but involved disclosures that "convey[ed] the impression" that benefits were vested and fully funded when they were not. 334 F.3d at 378. *Genter v. Acme Scale*, 776 F.2d at 1185, also involved non-disclosure of an option for increasing benefits rather than a direct conflict between affirmative representations in the SPD and Plan document.

AT&T complains further that Plaintiffs have not claimed that the SPD describes benefits that are missing from the underlying documents. Def.Br. 44 n.21. Plaintiffs have, however, described how AT&T's SPD omits circumstances contained in the underlying documents that limit the benefits that participants reasonably anticipate receiving:

> (1) The SPD describes the schedule of cash balance pay and interest credits without disclosing that they translate to <u>lower</u> annual annuities than before when the terms of the underlying plan document are applied, ¶¶73-78 and 186;
>
> (2) The SPD describes the cash balance pay and interest credits without any "cross-reference" to the wear-away contingency in the underlying plan document which can nullify payment of those credits, ¶¶189-92;
>
> (3) The SPD promises that participants will always be eligible for the "highest" benefit when the underlying documents actually base the two cash balance options on a lower benefit; ¶¶ 229, 234-35, and 244 and AT&T's¶59; and
>
> (4) The SPD does not describe the elimination of the favorable unreduced early retirement factors or specify the new reduction factors in the underlying documents, ¶¶187-88.

Even if we assumed arguendo that these were not the kind of "conflicts" that *Burstein* contemplates, Plaintiffs would prevail under the standard of "significant reliance or possible prejudice" that *Burstein* considered as the alternative to its holding. 334 F.3d at 380-81.[12] Plaintiffs have shown possible prejudice from the inadequate disclosures of the disadvantages of cash balance in the SPD because they did not receive reasonably "anticipated benefits" and did not get to "bargain further or seek other employment" based on "full disclosure." *Hamilton,* supra, 945 F.2d at 78. The ASA consultants and union staffers who were fully informed were able to secure substantially better benefits for their compatriots and themselves.

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[12] See also *Burke v. Kodak Ret. Inc. Plan*, 336 F.3d 103, 113-14 (2d Cir. 2003), *cert. denied*, 124 S.Ct. 1046 (2004) (under "likely prejudice" standard, there is "a presumption of prejudice in favor of the plan participant after an initial showing that he was likely to have been harmed").

With knowledge of how their benefits were being reduced, AT&T's managers could have asked to have the reductions modified, requested other compensation or benefits to make up, or initiated efforts to find other positions. The depiction of managerial employees with "no ability" except to meekly accept benefit reductions presents an inaccurate picture. The options that the managers had might not be ones that AT&T wanted to see exercised, e.g., hundreds or thousands of complaints, meetings with supervisors and executives, and employees inquiring about finding other employment. But clearly the managers had options if they had been given full information.

AT&T's motion simply ignores the fact that the employees also possessed direct benefit options to defer receipt of benefits or receive them immediately and to decide to elect the cash balance options versus the traditional benefit options. Employees like Ed O'Brien and Bonny Berger were prejudiced by AT&T's failure to disclose the relative value of benefit options in the SPD or benefit election materials when they commenced benefits and selected options. ¶¶229-33.

Finally, even if detrimental reliance was required, it could be shown here. To establish detrimental reliance, plaintiffs must show that the defendant's representations (1) induced action or forbearance, and (2) the plaintiffs were harmed. *Curcio v. Hancock Mut. Life Ins.*, 33 F.3d 226, 240 (3d Cir. 1994). *Harte v. Bethlehem Steel* shows that reliance on non-disclosures is established if the plaintiff-employees might predictably and reasonably take action or forbear because of the lack of information. 214 F.3d at 448. Here, it is predictable and reasonable that employees were led to believe that cash balance benefits would "grow steadily" at rates comparable to those under the prior plan and that they forbeared from taking actions to protect themselves because AT&T did not give them complete and accurate information about the changes. As stated in the class' opening memorandum, class-wide reliance is presumed "when the material non-disclosure is part of a common course of action." Pltfs. Mem. at 32. AT&T's analysis of *Bixler, Glaziers and Jordan* as having "<u>presupposed</u>" reliance is entirely consistent with Plaintiffs' position that reliance is presumed when non-disclosures are material. Compare Def.Br. 47 n.22 with Pltfs. Mem. at 32-33.

IV. AT&T has breached its fiduciary duties under the *Glaziers/Bixler* line of precedents

AT&T asks that the Court rule in its favor on the breach of fiduciary duty claim because "there is simply no general 'fiduciary duty to keep beneficiaries informed.'" Def.Br. 45. AT&T's legal proposition is incredible because *Glaziers, Bixler*, *Harte,* and *Jordan* all firmly establish a fiduciary duty to keep participants informed if the plan administrator knew or should have foreseen the employees' need for material information. *Glaziers v. Newbridge Sec.*, 93 F.3d 1171, 1181-2l (3d Cir. 1996); *Bixler*, 12 F.3d at 1300. AT&T does not distinguish these cases but only seeks to cast a glimmer of doubt by quoting a passage from *Horvath v. Keystone Health Plan E.*, 333 F.3d 450 (3d Cir. 2003), that it "would be inappropriate to infer an unlimited disclosure obligation." 333 F.3d at 462 n.9. However, AT&T's quote is pulled from a case parenthetical about a district court decision in the Second Circuit; it is not even part of *Horvath*'s dicta. Moreover, as in the *Glaziers/Bixler* line of cases, Plaintiffs do not infer "unlimited" disclosure obligations; they base the plan administrator's duty on their requests for this information and the plan administrator's knowledge or ability to foresee the information that they needed.

The nearest AT&T gets to addressing the *Bixler, Glaziers, Jordan, Unisys, and Harte* line of decisions comes in a lengthy footnote about *Horvath*. See Def.Br. 47 n.22. In it, AT&T rejects the distinction that the Third Circuit drew in *Horvath* (based on *Bixler*, *Glaziers*, and *Jordan*) between a "misrepresentation-based breach of fiduciary duty claim" and a breach of fiduciary duty based on a "failure to disclose material information." 333 F.3d at 459-62. AT&T contends that this Court's unpublished decision in *Peterson v. AT&T* "correctly recognize[s] that there is no difference" between breaches of these two kinds and that both require proof of "detrimental reliance." Id. But

Peterson did not rule on that issue. Furthermore, AT&T ends the footnote by conceding that *Bixler, Glaziers and Jordan* "presuppose" reliance. It would be a pyrrhic victory for the defense if reliance was required but presupposed.

AT&T also tries to redefine the Plaintiff class' breach of fiduciary duty claim, contending that "the only conceivable breach plaintiffs allegations could reasonably be construed to assert is one based on misrepresentation. If that is what plaintiffs intend ...." Def.Br. 46. As *Burstein* and *Horvath* indicate, the elements for breach of fiduciary duty claims "of this kind, i.e., involving misrepresentation" are different than the elements for fiduciary duty claims in general or under the *Glaziers* and *Bixler* line of decisions. 334 F.3d at 387 and 333 F.3d at 459-60. The more general elements for breach of fiduciary duty claims are set out in *UAW v. Skinner Engine*, 188 F.3d 130, 148 (3d Cir. 1999). According to *Skinner*, the plaintiff must show:

(1) the company was acting in fiduciary capacity;

(2) it made affirmative representations or failed to adequately inform participants;

(3) the company knew of confusion generated by its misrepresentations or its silence; and

(4) there was resulting harm to the employees.

The first of these elements is uncontested. The company acted in a fiduciary capacity in communicating information about benefits. See, e.g., *Varity Corp. v. Howe*, 516 U.S. 489, 502-4 (1996). The second element is also uncontested: AT&T "failed to adequately inform participants" about the disadvantages that the Plaintiffs' expert has identified. Discovery shows that AT&T was aware of each of these features and touched on them in the SPD and other brochures, but did not want to offer complete disclosures about the "bad parts."

Third, AT&T knew about the confusion generated by its silence and its vague or misleadingly reassuring representations. As discussed, the record shows that employees repeatedly asked about benefit reductions, comparisons with the old plan's benefits, the basis for the conversion factors, and the relative values of benefit options. Fourth, there was resulting harm. The non-disclosures were "material" and with full disclosures, the employees could have (1) bargained with AT&T for better benefit terms or offsetting improvements in compensation or other benefits, (2) made informed employment and retirement decisions about how long to stay with AT&T and whether to seek work elsewhere on different terms, and (3) made wiser elections about benefit options.

Conclusion

For all these reasons, AT&T's summary judgment motion should be denied and for the reasons stated in Plaintiffs' motion, summary judgment should be granted the members of the class.

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Respectfully submitted

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