UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-2752

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

Plaintiffs-Appellants,

v.

AT&T, INC., AT&T PENSION BENEFIT PLAN, and
AT&T PUERTO RICAN PENSION BENEFIT PLAN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF PLAINTIFFS-APPELLANTS AND APPENDIX VOLUME I

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TABLE OF CONTENTS

SUBJECT MATTER AND APPELLATE JURISDICTION 1

STATEMENT OF ISSUES. 1

STATEMENT OF THE CASE. 3

STATEMENT OF FACTS. 4

STATEMENT OF RELATED CASES AND PROCEEDINGS. 11

STANDARD OR SCOPE OF REVIEW.. 11

SUMMARY OF ARGUMENT.. 13

ARGUMENT 19

I. The age discrimination in employment claims. 19

A. The allegations in the Complaint that AT&T deliberately designed its "cash balance" transition to effect a discriminatory pension freeze provide fair notice of a disparate treatment claim under F.R.C.P. 8(a).. 19

B. The District Court erred in granting judgment to Defendants on Plaintiffs' disparate impact claims under the ADEA.. 23

1. Compliance with ADEA §4(i) cannot provide a "complete defense" to age discrimination claims relating to pension benefits... 23

2. The statistical evidence shows that AT&T's older employees lost an average of 7 years of retirement benefits because of the "wear-away" periods; this is obviously relevant to disparate impact and treatment.. 31

II. The plan amendment claims based on AT&T's failure to adopt the critical wear-away and residual annuity amendments until October 16, 2000 are not an "entirely new legal theory"; the allegations were in the Complaint since 2001 and Plaintiffs moved for summary judgment on them twice.. . 33

III. The inadequate disclosure claims. 37

A. AT&T never disclosed the reductions in future benefit accruals after the January 1, 1998 effective date of cash balance in an ERISA §204(h) notice 37

B. The disclosures in AT&T's SPD were inadequate; *Burstein* holds that relief for an inadequate SPD is not contingent on "extraordinary circumstances.".. 42

C. Under *Bixler*, it was a breach of fiduciary duty for AT&T not to tell its employees that taking a cash payment option or starting benefits before age 55 were "clearly less valuable" options. 48

IV. AT&T's wear-away design violates the "anti-backloading" protection in ERISA §204(b)(1)(B) because the cash balance accruals for each "plan year" are not "payable" 52

V. By reducing retirement benefits that commence before age 55 by an actuarially unreasonable 6% per year, AT&T violates the "anti-cutback" protection in ERISA §204(g)(2) 58

Conclusion. 61

TABLE OF AUTHORITIES

CASES

Ackerman v. Warnaco, 55 F.3d 117 (3d Cir. 1995). 45-46

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). 47

Battoni v. IBEW Local Union No. 102 Employee Pension Plan,
594 F.3d 230 (3d Cir. 2010). 2, 18, 56-57, 60

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). 12

Berger v. Xerox Corp. Retirement Income Guaranty Plan,
338 F.3d 755 (7th Cir. 2003). 60

Bixler v. Central Pa. Teamsters Health & Wel. Fund,
12 F.3d 1292 (3d Cir. 1993). 2, 18, 48-49, 51

Burstein v. Retirement Account Plan, 334 F.3d 365
(3d Cir. 2003)... *passim*

Central Laborers' Pension Fund v. Heinz, 541 U.S. 739
(2004).. 19, 55, 58, 60

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979).. 28

Cipollone v. Liggett Group, 505 U.S. 504 (1992)....................................... 26

Confer v. Custom Engineering Co., 952 F.2d 34 (3d Cir. 1991). 53

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995)...................... 35

Depenbrock v. CIGNA, 389 F.3d 78 (3d Cir. 2004). 2, 13, 15, 33-34

Devlin v. Empire Blue Cross and Blue Shield, 274 F.3d 76 (2d Cir. 2001). 51

Esden v. Bank of Boston, 229 F.3d 154 (2d Cir. 2000)............................... 52

Frommert v. Conkright, 433 F.3d 254 (2d Cir. 2006)................................. 51

Glaziers & Glassworkers Local 252 Annuity Fund v. Newbridge Sec., 93 F.3d 1171 (3d Cir. 1996). 49

Gridley v. Cleveland Pneumatic, 924 F.2d 1310 (3d Cir. 1991)............ 44-45

Herman v. Fabri-Centers of America, 308 F.3d 580 (6th Cir. 2002). 55

Hirt v. Equitable Retirement Plan, 441 F. Supp. 2d 516 (S.D.N.Y. 2006).. 42

Hullett v. Towers, Perrin, Forster, and Crosby, 38 F.3d 107 (3d Cir. 1994)... 55

Humphrey v. United Way of Tex. Gulf Coast, 590 F. Supp. 2d 837 (S.D. Tex. 2008)... 44

Hurlic v. So. Cal. Gas, 539 F.3d 1024 (9th Cir. 2008). 29

Jensen v. Solvay Chemicals, Inc., __ F.3d __, 2010 WL 3472945 (10th Cir. 9/7/10).. 26

Jordan v. Federal Express Corp., 116 F.3d 1005 (3d Cir. 1997). 46, 48-49

Kennedy v. Plan Admin. for DuPont Sav. & Inv. Plan, 129 S. Ct. 865 (2009).. 35

Lettrich v. J.C. Penney, 213 F.3d 765 (3d Cir. 2000). 46

Makky v. Chertoff, 541 F.3d 205 (3d Cir. 2008). 20

Marzano v. Computer Science Corp., 91 F.3d 497 (3d Cir. 1996). 13

NY State Department of Social Services v. Dublino, 413 U.S. 405 (1973).. 28

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995). 3, 27

Osberg v. Foot Locker, Inc., 656 F. Supp. 2d 361 (S.D.N.Y. 2009). 44

Powell v. Ridge, 189 F.3d 387 (3d Cir. 1999).. 23

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158 (1989).. 23

Register v. PNC Finan. Services Group, 477 F.3d 56 (3d Cir. 2007).. 25-26, 30, 52, 57

In re Ripley, 926 F.2d 440 (5th Cir. 1991).. 55

Richards v. FleetBoston, 2006 WL 2092086 (D. Conn. 2006). 44

Rocks v. Philadelphia, 868 F.2d 644 (3d Cir. 1989)................................... 12

Smith v. City of Jackson, 544 U.S. 228 (2005). 24-25

St. Paul Mercury Insurance Co. v. Williamson, 224 F.3d 425 (5th Cir. 2000).. 33

Steffen v. Meridian Life Insurance Co., 859 F.2d 534 (7th Cir. 1988). 3

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)......................... 12, 20, 33

Thermtron Products v. Hermansdorfer, 423 U.S. 336 (1976).................... 53

Union Pac. R.R. v. Greentree Transport, 293 F.3d 120 (3d Cir. 2002).. 12-13

In re Unisys Corp. Retirement Medical Benefit ERISA Litigation, 57 F.3d 1255 (3d Cir. 1995). 49

United States v. Doherty, 2009 U.S. Dist. LEXIS 94691 (E.D.N.Y. 4/27/09). 57

Varity Corp. v. Howe, 516 U.S. 489 (1996).. 50

Vaughn v. Air Line Pilots Association, 395 B.R. 520 (E.D.N.Y. 2008). 29

**STATUTES, REGULATIONS,
LEGISLATIVE HISTORY AND RULES**

ADEA §4(a), 29 U.S.C. §623(a)... *passim*

ADEA §4(f)(2), 29 U.S.C. §623(f)(2). 24

ADEA §4(i), 29 U.S.C. §623(i). .... *passim*

ADEA §11(l), 29 U.S.C. §630(l). 24

ERISA §3(23), 29 U.S.C. §1002(23). 52

ERISA §204(a)(1), 29 U.S.C. §1054(a)(1). 52

ERISA §204(b)(1)(B), 29 U.S.C. §1054(b)(1)(B)....................................... 52

ERISA §204(b)(1)(H), 29 U.S.C. §1054(b)(1)(H). 26

ERISA §204(c)(3), 29 U.S.C. §1054(c)(3). 52

ERISA §204(g), 29 U.S.C. §1054(g).................................. 3, 19, 56, 58, 60

ERISA §204(h), 29 U.S.C. §1054(h)... *passim*

ERISA §402, 29 U.S.C. §1102. .... 33, 35

ERISA §404, 29 U.S.C. §1104. 49

ERISA §502, 29 U.S.C. §1132. 50-51

Treas. Reg. 1.401(a)-20, 53 Fed. Reg. 31842 (8/22/88)............................. 48

Treas. Reg. 1.411(d)-3(b). 41

Treas. Reg. 1.411(d)-4. .... 58, 60

Treas. Reg. 1.411(d)-6, 63 Fed. Reg. 68678 (12/14/98). 16, 41

Treas. Reg. 1.417(e)-1(b)(2)(i). 48

29 C.F.R. 2520.102-2. .... 41, 43, 48

29 C.F.R. 2520.102-3(l). 44

52 Fed. Reg. 45360 (11/27/87). 30

H.R. Conf. Rep. 99-1012, 1986 U.S.C.C.A.N. 3868. 23

H. Rep. 93-533, 1974 U.S.C.C.A.N. 4639. 57

H. Rep. 101-664, 1990 WL 200383 (Leg. Hist.). 24, 28

S. Rep. 101-263, 1990 U.S.C.C.A.N. 1509. .... 14, 24, 28

Uniform Commercial Code §3-104, 3-108. 55

F.R.C.P. 8. .... 1, 12-13, 19

F.R.C.P. 9(b) 20

MISCELLANEOUS

Black's Law Dictionary (7th ed.). 54

Singer, *Sutherland Statutory Construction* (6th ed.). 54

Wright & Miller, *Federal Practice and Procedure*. 20

SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had subject matter jurisdiction of this civil action under ERISA, the ADEA, and the New Jersey Law Against Discrimination pursuant to 29 U.S.C. §§626(c) and 1132(f) and 28 U.S.C. §§1331 and 1367. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES

The issues presented in this appeal are:

1. Did the District Court err in dismissing Plaintiffs' disparate treatment claim under the ADEA on the ground that the Complaint only "baldly" alleges deliberate treatment, considering the factual allegations in Paragraphs 23-25 and 45 of the Complaint and the notice pleading standard in F.R.C.P. 8.

2. Did the District Court err in ruling that compliance with ADEA §4(i) creates a "complete defense" to any disparate treatment or impact claims relating to pension benefits, and that evidence that older employees disproportionately "[l]ost benefits" during "wear-away" periods is not relevant under the ADEA.

3. Did the District Court err in ruling that the Complaint's allegations that the critical "wear-away" and "residual annuity" provisions were not adopted by the AT&T Board of Directors or a duly-authorized delegate until October 16, 2000 presented an "entirely new legal theory" that permitted the Court to grant summary

judgment to AT&T without deciding whether those provisions could be applied retroactively under *Depenbrock v. CIGNA*, 389 F.3d 78 (3d Cir. 2004).

4. Did the District Court err in ruling that the advance notice of "a significant reduction in the rate of future benefit accrual" required by ERISA §204(h) does not depend on the "rate" at which pension benefits accrue or the "future benefit accrual" after "the effective date" of the amendment.

5. In light of *Burstein v. Retirement Account Plan*, 334 F.3d 365 (3d Cir. 2003), did the District Court err in ruling that Plaintiffs must show "extraordinary circumstances" to obtain a remedy for AT&T's violations of ERISA's rules on summary plan descriptions ("SPDs").

6. In light of *Burstein* and *Bixler v. Central Pa. Teamsters Health* & *Wel. Fund,* 12 F.3d 1292, 1300 (3d Cir. 1993)*,* did the District Court err in ruling that Plaintiffs cannot proceed with a breach of fiduciary duty claim for failing to disclose the "relative values" of benefit options and misrepresenting that the "overall value" of the options was the "same."

7. Did the District Court err in ruling that the annual accrued benefits derived from the cash balance pay and interest credits are "payable" as required by ERISA's 133⅓% anti-backloading rule in light of the holding in *Battoni v. IBEW Local Union No. 102 Employee Pension Plan*, 594 F.3d 230, 235 (3d Cir. 2010),

that counting benefits that are only "hypothetically" payable is "nonsensical."

8. In light of *Battoni*, did the District Court err in ruling that an actuarially excessive 6% per year reduction for commencing retirement benefits before age 55 does not have "the effect of eliminating or reducing an early retirement benefit" in violation of ERISA §204(g)(2).

STATEMENT OF THE CASE

This case concerns the loss of over $2 billion in vitally important retirement benefits by more than 45,000 older AT&T employees following AT&T's conversion to a "cash balance" pension formula. AT&T designed and implemented the cash balance conversion in discriminatory and unlawful ways in violation of the ADEA and ERISA and failed to understandably disclose the lost benefits to its employees as ERISA requires. As remedial employment laws, the ADEA and ERISA must be construed and enforced to fulfill the Congressional purposes of ending age discrimination and protecting employee benefit rights. They should not be construed, as they have been by the court below, "in a 'hypertechnical manner' so as to defeat" those rights. *Steffen v. Meridian Life Ins. Co.*, 859 F.2d 534, 543 (7th Cir. 1988) (ADEA); *accord, New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (ERISA).

The Plaintiffs-Appellants are current and now principally former management employees of AT&T who participated in the AT&T Management Pension Plan before and after AT&T's conversion to a "cash balance" pension formula. The ERISA class consists of more than 45,000 current and former AT&T employees, 23,938 of whom have affirmatively opted into the ADEA claims, making this the largest opt-in collective action in United States history. However, none of the tens of thousands of plaintiffs have had a day in court to prove age discrimination– not because of any decision on the merits, but because of technical legal reasoning that cannot be reconciled with the text of the statute or Congress' intent to put an end to "age discrimination in all forms of employee benefits."

STATEMENT OF FACTS

Until the end of 1997, AT&T offered a traditional defined benefit pension plan to its management employees. The AT&T Management Pension Plan ("the Plan") provided retirement benefits equal to an employee's average compensation during a pay base averaging period, multiplied by their number of years of credited service times a benefit accrual percentage of 1.6%. At the end of 1996, the Plan provided benefits equal to a participant's average compensation during 1987-92 multiplied by years of credited service through the end of 1992 times 1.6%. For years of service after 1992, the benefit accrual rate was 1.6% of each

year's annual compensation. JA 603.

In April 1997, AT&T's Board of Directors met to authorize the Senior Vice-President for Compensation and Benefits to adopt: (1) "Special Update" amendments, which were effective retroactive to January 1, 1997, and (2) "Cash Balance" amendments, which were effective January 1, 1998. *See* JA 1338-61. As discussed below, two of the most unfavorable cash balance amendments were not adopted by the Board or a delegate until October 16, 2000 but were applied retroactively. JA 1277-78.

The "Special Update" amendments improved the retirement plan's 1.6% of pay formula by moving the "pay window" from an average based on pay in 1987-92 to an average based on pay in 1994-1996. The "Special Update" also offered a credit of an additional year of service for employees with over 20 years of service. JA 1287-88. The "Cash Balance" amendments changed the plan's traditional defined benefit formula to a cash balance formula under which a hypothetical initial cash balance account was established by multiplying the participant's prior accrued benefits as of July 31, 1997, by conversion factors. Hypothetical "pay" and "interest" credits were added to the account on an annual basis. JA 1843-44. The Plan's provisions for early retirement were changed from an unreduced benefit at age 55, to a less favorable set of early retirement reduction factors. JA

1854-55.

As a result of the conversion factors used to establish the initial cash balance accounts and the application of a "greater of" transition design that was not adopted until October 16, 2000, JA 1147, older employees experienced periods of "wear-away," or "crossover," in which the new cash balance pay credits added nothing to their retirement benefits for a period of years. JA 1848-54. The wear-away periods for employees who were 45 years and over averaged 8 years. JA 2074. For instance, named Plaintiff Gerald Smit was eligible for a retirement benefit of $1,985 per month as of August 1, 1997. When he retired after eight more years of work, he was still entitled to the same monthly benefit. JA 3500.

By contrast, "younger employees" earned additional benefits "immediately." JA 1626, 1648, 1745. A 2005 study by AARP found AT&T was virtually alone among large employers in failing to avoid "a period of no benefit accrual (commonly referred to as the 'wear-away' period)." AARP Public Policy Institute, *Transition Provisions in Large Converted Cash Balance Pension Plans*, at 1, 3, and 20.[1] To cut costs further, AT&T designed options under which older employees surrendered more of the value of their previously-earned benefits if

[1] Available online at http://assets.aarp.org/rgcenter/econ/2005_13_pension.pdf

they elected a cash payment option or commenced benefits before age 55. JA 1854-56.

If AT&T had used an "A+B" transition, rather than a "greater of" formulation, the benefits of both older and younger employees would have increased "immediately." JA 543-44, 1849, 3502. An "A+B" transition avoids wear-aways by protecting previously-earned benefits and adding the benefits earned under the cash balance formula to those benefits. JA 1849.

On October 16, 2000, 3½ years after the April 1997 Board meeting, a delegate of AT&T's Senior Vice-President for Compensation and Benefits finally adopted the plan provisions that (a) restricted payment of the accrued benefits derived from the cash balance formula based on a "wear-away" design, and (b) based "residual annuities" on less valuable benefits. *See* JA 1147, 1149-50. The wear-away and residual annuity provisions were in an "amended and restated" Plan document adopted by Brian Byrnes, AT&T's 30(b)(6) witness, on October 16, 2000. Mr. Byrnes admitted that the Board resolutions did not contain amendments on wear-away, JA 2333, stating: "They didn't say you could. They didn't say you could not." JA 2334. As late as September 1999, drafts of the formal Plan document did not contain the "residual annuity" provisions. JA 1534-38, 2303-4, 2377-78. Don Harrington, Senior Vice-President of Compensation and

Benefits, who presented the cash balance changes to the Board, testified that he believed that the "residual annuity" should be based on the Special Update annuity if this was higher than the cash balance annuity and he "didn't know how they [AT&T] could do otherwise." JA 2363-64, 2371.

Using data produced by AT&T in discovery and Excel spreadsheets prepared by Plaintiffs' actuarial expert, Claude Poulin, Plaintiffs' statistical expert, Dr. Robert Bardwell, performed individual calculations for each of 51,015 participants on the duration of the potential and actual periods of wear-away under AT&T's transition design. JA 2029, 2032-36. Dr. Bardwell found substantial statistical disparities based on age in the duration of the periods of "wear-away." The average potential wear-away period for employees age 40 and over was 6.8 years, nearly twice as long as the 3.7 year average for younger employees. JA 2063-64. Dr. Bardwell's regression analysis showed that the statistical significance of age on the duration of potential wear-away is 99 standard deviations which rules out the possibility that the impact is due to chance. JA 2071.

Discovery showed that AT&T knew that employees "within 7 years of retirement eligibility," *i.e.*, older employees, would not earn any additional benefits from the cash balance formula because of the transition design. JA 673.

Alan Sefcik, the in-house AT&T actuary who designed the cash balance transition, prepared Excel spreadsheets showing up to 8-year "crossovers" as a function of age and service. JA 2724-27. PowerPoint presentations and minutes of communications group meetings show that AT&T knew the Special Update benefit would not be "Overtaken by Cash Balance [for] 3-8 Years," except "Immediately for Younger Employees," JA 1626 and 2826, and that "employees in 40's could lose, have to wait 10 years for benefits." JA 780.

This design was developed by a group of in-house actuaries and consultants and previewed with a select circle of HR officials in 1997. See JA 1699-1700, 2400. The first review of "wear-away" by AT&T's "Operations Group," which included the CEO, did not take place until September 1999. JA 1998-2003. AT&T's Board of Directors never reviewed the wear-away design. Indeed, Robert Allen, AT&T's former CEO and the Chairman of its Board in 1997, testified in 2010 that he still did not understand what wear-away is. JA 2434-43.

Even outside of the periods of wear-away, Plaintiffs' actuarial expert found the cash balance formula reduced the rate of future benefit accruals. For participants ages 21 to 55, the average rate of accrual after the cash balance conversion was between 1.35% and 1.4%, compared to 1.6% under the prior pay base formulas. Plan participants between the ages of 55 and 65 experience a still

more substantial 20-35% reduction in their benefit accrual rates. JA 539. Spreadsheets and graphs prepared by AT&T in 1997 show indistinguishable "accrual rates" from Poulin's calculations. JA 565-70.

To "sell" the cash balance design to its employees, AT&T made a calculated decision not to disclose the "bad parts" of the conversion, including significant reductions in future benefits. JA 1725. Instead, AT&T's April 1997 letter and Fact Sheet suggested that cash balance benefits were at least comparable, JA 625-27, falsely describing "steady account growth" and misleadingly stating that "[y]our account's value will grow over time." JA 672-73. Although a "Key Dates" chronology said that accruals under the pre-Special Update benefit formula would "cease" on July 31, 1997, JA 669, employees were never told that benefits were reduced after that. AT&T made no disclosure of wear-away periods that could result in no additional benefits for 8 or more years, and no disclosure of reductions in the rate of future benefit accruals after the wear-away periods of 15-20% or more. JA 625-41.

Plaintiffs' communications expert, Professor James Stratman, found AT&T's summary plan description ("SPD") failed to disclose that the cash balance credits were not payable during periods of wear-away and that the cash balance credits represented a significant reduction in the rate of future accruals.

Professor Stratman found the SPD indicated that initial cash balances were derived from undiscounted, updated benefits under the current benefit formulas and suggested that benefits continue to grow "each year." JA 621, 637-38; see also JA 737 (describing "How Your Cash Balance Account Grows"). He also found that the SPD and benefit election materials failed to disclose to participants that the cash payment option and any benefit commencement before age 55 were "clearly less valuable" than the annuities beginning at age 55, even though AT&T's benefit consultants were keenly aware of this. *See* JA 641-44, 819-23.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related or competing proceedings.

STANDARD OR SCOPE OF REVIEW

Plaintiffs appeal from five Opinions and Orders from four different District Judges, each of which was marked "not for publication."[2] This Court has plenary review over the District Court's orders granting AT&T's motions to dismiss and

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[2] The five decisions are:

(1) Opinion and Order entered on April 23, 1999 (JA 161-68) (Politan),
(2) Opinion and Order entered on June 29, 2000 (JA 139-60) (Politan),
(3) Opinion and Order entered on October 17, 2002 (JA 97-134) (Bassler), reconsideration denied December 2, 2002 (JA 135-38),
(4) Opinion and Order entered on March 31, 2006 (JA 31-83) (Linares), reconsideration denied November 20, 2006 (JA 84-96), and
(5) Opinion and Order entered on June 7, 2010 (JA 4-30) (Chesler).

for summary judgment. In reviewing a Rule 12(b)(6) dismissal, this Court reviews *de novo* whether the District Court followed the direction to "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party." *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989); *accord*, *Burstein v. Retirement Account Plan*, 334 F.3d 365, 374 (3d Cir. 2003). Under F.R.C.P. 8(a)(2)'s "notice pleading" standard, Plaintiffs are only required to provide a "short and plain statement" of their claim sufficient to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).[3]

Review of the District Court's orders granting AT&T's motions for summary judgment is *de novo* on determinations of whether facts are in genuine dispute and issues of law. *Union Pac. R.R. v. Greentree Transp.*, 293 F.3d 120, 125 (3d Cir. 2002). Summary judgment is appropriate only "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a

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[3] *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544 (2007), affirms that *Swierkiewicz* remains good law. *Id*. at 569-570 ("Plaintiffs say that our analysis runs counter to *Swierkiewicz* .... [H]owever, *Swierkiewicz* ... simply re-emphasized … that … a heightened pleading standard for Title VII cases was contrary to the Federal Rule[s] …. Here, in contrast, we do not require heightened fact pleadings of specifics, but only enough facts to state a claim to relief that is plausible on its face").

matter of law." *Depenbrock v. CIGNA,* 389 F.3d 78, 81 (3d Cir. 2004). "[T]he record on appeal must be viewed in the light most favorable to the party who lost on summary judgment in the District Court." *Union Pac. R.R.*, 293 F.3d at 125-26. Since employment discrimination cases focus on questions of fact regarding the employer's intent, "summary judgment is in fact rarely appropriate in this type of case." *Marzano v. Computer Science Corp.*, 91 F.3d 497, 509 (3d Cir. 1996).

SUMMARY OF ARGUMENT

The decisions below repeatedly excuse AT&T's discriminatory practices and its failure to protect employee benefit rights on procedural or technical grounds that cannot be reconciled with the statutory text and the purposes of the ADEA or ERISA.

The ADEA disparate treatment claim. The District Court dismissed Plaintiffs' disparate treatment claim under the ADEA on the ground that the Complaint only "baldly" alleged deliberate treatment. JA 151. However, Paragraphs 23-25 and 45 of the Complaint set forth facts from a Fact Sheet and a published article by two key AT&T decisionmakers indicating that AT&T "knew" that the cash balance transition provisions discriminated on the basis of age and that AT&T "deliberately" designed the transition to have this "feature." JA 246-47, 251. These allegations, already more than sufficient under F.R.C.P. 8's "notice

pleading" standard, have been confirmed by the discovery of internal Excel spreadsheets, PowerPoint presentations, emails, and other communications showing that AT&T knew about the age discrimination and intended it. *See* JA 1600-1728, 2724-3408.

ADEA §4(i)'s effect on discrimination claims relating to pension benefits. The District Court ruled that compliance with ADEA §4(i) offers a "complete defense" to any disparate impact or treatment claims relating to pension benefits, and therefore that evidence that older employees "[l]ost benefits" during "wear-away" periods is not "relevant" under the ADEA. Effectively, the District Court construed §4(i) as a "safe harbor" for any discriminatory practices related to pension benefits, rather than construing it consistent with the statutory text and Congressional intent. The ADEA was enacted to prohibit age discrimination in employment, including "discrimination in all forms of employee benefits." S. Rep. No. 263, 1990 U.S.C.C.A.N. 1509, 1521-22. ADEA §4(i) regulates a narrow set of practices as part of achieving that broad goal. ADEA §4(i) is not worded or intended to occupy the entire field of age discrimination claims "relating to benefit accrual." When a practice falls outside of §4(i) so that its regulation is "inapplicable," Congress intended for the claim to proceed under ADEA §4(a).

The plan amendment claims. The claims that neither AT&T's Board of

Directors nor a duly-authorized delegate adopted the critical wear-away and residual annuity provisions before October 16, 2000 did not present an "entirely new legal theory." The allegations to support these claims have been in the Complaint for almost ten years, Dkt.#104, ¶¶ 26-27, 61-62, 75-76, and present the same claim recognized in *Depenbrock,* 389 F.3d at 83, *i.e.*, unfavorable amendments that were not adopted until later dates cannot be retroactively applied.

Based on the Complaint's allegations, Plaintiffs made the same legal arguments in their April 2010 motion as in their October 2004 motion, namely, that the unfavorable amendments on wear-aways and residual annuities were *not* adopted until 3½ years after the fact and cannot be applied retroactively under *Depenbrock*. In a March 31, 2006 ruling, Judge Linares required the Plaintiffs to exhaust internal review procedures, JA 59, which Plaintiffs did before filing their second motion for summary judgment. JA 448-49.

Judge Chesler's ruling that Plaintiffs presented an "entirely new legal theory" was plainly in error. Given the Complaint's allegations and Plaintiffs' well-supported motion for summary judgment, the District Court should have determined that AT&T did not adopt these critical provisions until October 16, 2000 and that the amendments cannot be retroactively applied.

ERISA §204(h) notice of reductions. The District Court ruled that the

advance notice of "a significant reduction in the rate of future benefit accrual" required by ERISA §204(h) does not consider either the "rate" at which benefits accrue or the "future benefit accrual" after an amendment becomes effective. The District Court erred because the statutory language and purpose of ERISA §204(h) is to ensure that employees receive advance notice of a reduction in the "rate" at which benefits accrue after the effective date of an amendment. To determine if an amendment will reduce future benefits, Treasury regulations require a comparison of the "rate" and "future benefit accrual" after the effective date of an amendment. Treas. Reg. 1.411(d)-6; 63 Fed.Reg. 68678 (12/14/98).[4] In dismissing the claim, the District Court did not compare the rates or the future benefit accrual after the effective date, but compared "projected" (or "total") benefits under the cash balance formula with "projected" benefits if the formula in effect *two amendments earlier* had continued. The District Court erred because AT&T's own spreadsheets and graphs, prepared in 1997, showed the same reductions after the effective date that Plaintiffs' expert found. JA 565-70. ERISA §204(h) is satisfied by providing notice of reductions in the rate of future benefit accrual, which AT&T's spreadsheets show it knew to be the end-product of the cash balance changes. ERISA §204(h) is not satisfied by *post hoc* mathematical manipulations or

[4] This regulation is no longer in the Code of Federal Regulations.

repackaging of amendments to avoid providing such notice.

The SPD disclosure claims. AT&T's SPD failed to disclose that: (a) the cash balance changes reduced benefits after the January 1, 1998 effective date, (b) the cash balance credits were not payable because of wear-aways, and (c) commencing benefits before age 55 or taking the cash payment option was "clearly less valuable" than taking an annuity after age 55. Without reaching any of those issues, the District Court ruled that Plaintiffs need to prove "extraordinary circumstances" to obtain a remedy for inadequate disclosures in an SPD. JA 75-77. This is contrary to this Court's *Burstein* decision establishing that relief may be obtained for violations of ERISA's SPD rules without such a showing. 334 F.3d at 377-80. Moreover, even if extraordinary circumstances were required, Plaintiffs produced documentary evidence of active concealment, i.e., that AT&T hid the "bad parts" of cash balance and refused to compare the old and new benefits to avoid an employee backlash concerning the reductions. JA 1725.

Breach of fiduciary duty to disclose option values. The District Court held that Plaintiffs could not proceed with breach of fiduciary duty claims based on AT&T's failure to disclose the "relative values" of benefit options and its misleading representations that the "overall value" of a benefit available before age 55 subject to a 6% per year reduction was the "same" as an unreduced benefit

at age 55. JA 67-69, 641-44. After holding that Plaintiffs could not proceed with these claims because they potentially could recover for violations of ERISA's SPD rules, the District Court *granted summary judgment to AT&T* on those very same claims. JA 82. Dismissing the fiduciary duty claims under this Catch-22 analysis was plainly error because *Bixler* holds that fiduciaries have the duty to give employees "complete and accurate information" about options. 12 F.3d at 1300.

Anti-backloading violation because benefits for each "plan year" are not "payable." The District Court ruled that the annual cash balance credits satisfy ERISA's 133⅓% benefit accrual rule–even if the accrued benefits derived from the cash balance credits in each "plan year" are not "payable" as required by ERISA §204(b)(1)(B). JA 44-49. In three places, this section of ERISA requires the rate of accrual to be "payable." The statutory protection is negated and pension promises are allowed to be illusory–just as in the pre-ERISA benefits landscape–if the benefit accruals that ERISA protects do not have to be "payable." *Battoni* holds that it is "nonsensical" to count benefits "hypothetically" as if an offset does not exist. 594 F.3d at 235.

Anti-cutback violation because benefits are excessively reduced. AT&T does not dispute that a 6% per year reduction for commencing benefits prior to age 55 is an actuarially excessive discount. Dkt.# 461 at 33. In fact, a 6% per year

reduction reduces the value of a $1,000 per month early retirement benefit to zero for commencement at age 38 or before, which is actuarially impossible. JA 1855. The District Court erred in ruling that AT&T's adoption of this discount did not have the effect of reducing a participant's "accrued benefit" in violation of ERISA §204(g)(2), because AT&T's Plan had previously used the same 6% discount for a limited group of participants who retired between ages 50 and 55 with between 25 and 30 years of service. JA 129-31. The Supreme Court has held that an amendment "expanding" the categories that trigger a reduction decreases accrued benefits in violation of ERISA §204(g)(2) "just as surely" as a decrease in the monthly payment amount. *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 741, 744 (2004).

ARGUMENT

I. The age discrimination in employment claims.

A. The allegations in the Complaint that AT&T deliberately designed its "cash balance" transition to effect a discriminatory pension freeze provide fair notice of a disparate treatment claim under F.R.C.P. 8(a).

"[A]n employment discrimination complaint 'must contain only a short and plain statement of the claim showing that the pleader is entitled to relief' and need not include 'specific facts establishing a prima facie case of discrimination.'"

Swierkiewicz, 534 U.S. at 508; *accord*, *Makky v. Chertoff*, 541 F.3d 205, 214 (3d Cir. 2008) ("the *McDonnell Douglas* prima facie case is an evidentiary standard, not a pleading requirement"). In the same vein, F.R.C.P. 9(b) expressly provides that the "intent...or other condition of mind of a person may be averred generally" because "any attempt to require specificity in pleading a condition of mind would be unworkable and undesirable" and inconsistent with Rule 8(a)'s controlling mandate that the pleading contain a "short and plain statement of the claim." Wright & Miller, *Federal Practice and Procedure*, §1301.

The Court below ruled that the Complaint's First and Second Claims "contain[] no factual assertions supporting a claim of 'deliberate' discrimination." JA 151. This ruling simply overlooks the allegations that AT&T deliberately designed the cash balance transition rule to effect an age-discriminatory freeze in current and future retirement benefits. Specifically, Plaintiffs allege:

> 24. When AT&T adopted a resolution about the cash balance formula on April 16, 1997, AT&T knew that employees within 7 years of retirement eligibility would not earn any additional benefits from the cash balance formula because of the transition features that AT&T was implementing. AT&T knew that for some older workers, their cash balance accounts would not "move ahead of the old plan" for 13 years.
>
> 25. ... In a November 1998 article in the publication Compensation and Benefits Review, Michael Gulotta, president of ASA [a wholly-owned subsidiary of AT&T until June 1998], and

> Harold W. Burlingame, AT&T's executive vice-president for Human Resources, explained the benefit calculations for older AT&T employees under the cash balance feature and transition provisions:
>
> > "When 47-year-old mid career employees projected the value of their annuities -if they were to retire at age 55 -they found they were coming up short [that is, the benefits under the old plan were greater than the cash balance account]. They hadn't miscalculated -this was a feature of the cash balance plan.
> >
> > ".... AT&T encouraged employees to examine the figures beginning at about age 60 - when cash balance moves ahead of the old plan."

JA 246-47. Paragraph 45 further alleged that "In designing the transition provisions from the old pension plan to the new cash balance plan, Defendant deliberately treated Plaintiffs differently because of age." JA 251.

The April 28, 1997 Fact Sheet quoted in ¶24 states that for managers who are "within 7 years of retirement eligibility under the current plan," the cash balance feature would not produce a better benefit than the traditional formula with the "special update." JA 673. Conversely, the Fact Sheet states: "If you're more than 7 years from retirement eligibility from the current plan though, the cash balance feature will most likely produce a better benefit than the special update." *Id*. The article cited in ¶25 similarly shows AT&T's knowledge that the transition to cash balance would keep older managers from earning any additional benefits for a number of years. JA 1601-6. Indeed, it states that "For younger

employees, the ‘crossover’ to the new plan was immediate.” JA 1605.

In opposition to AT&T’s motion to dismiss, Plaintiffs’ October 4, 1999 brief discussed additional facts that could be developed consistent with the Complaint’s allegations, including AT&T’s motive for designing this discriminatory “feature” of the cash balance plan. *See* JA 214-16, 225-29. The published article and a February 1996 presentation show that AT&T used the transition “as a tool to restructure its workforce” so it would have a “younger” demographic. JA 1601, 2482. Indeed, when AT&T was making decisions about cash balance transition design, it was planning a Voluntary Retirement Incentive Plan (“VRIP”), aimed at reducing AT&T’s managerial workforce by 25%. Ultimately, over 90% of the managers who left AT&T under the VRIP were over age 40. JA 2672-73, 2677. A December 1, 1997 memo about the VRIP (from Gulotta to Burlingame) states: “High rates of election to retire with modest incentives should be expected” for employees “within 5 years of eligibility” “especially considering the fact that it will take some time for the cash balance benefit to overtake the ‘Special Update’ transition benefit.” JA 2487. Deposition testimony from C. Michael Armstrong, AT&T’s former CEO, was consistent with the use of the cash balance transition and the VRIP to eliminate “retention” incentives for older employees. JA 2708, 2711-12.

Accepting Plaintiffs' allegations as true and drawing reasonable inferences therefrom, the District Court erred in holding that it was beyond doubt that Plaintiffs could not prove their claim of disparate treatment. *See, e.g., Powell v. Ridge*, 189 F.3d 387, 395-96 (3d Cir. 1999).

B. The District Court erred in granting judgment to Defendants on Plaintiffs' disparate impact claims.

1. Compliance with ADEA §4(i) cannot provide a "complete defense" to age discrimination claims relating to pension benefits.

As enacted in 1967, Section 4(a) of the ADEA, 29 U.S.C. §623(a), provides that it "shall be unlawful for an employer":

> (1) to ... discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

In 1986, Congress added ADEA §4(i) to "prevent the reduction or cessation of benefit accruals on account of the attainment of age." H.R. Conf. Rep. 99-1012, at 378-79, reprinted in 1986 U.S.C.C.A.N. 3868, 4023-24. In 1990, Congress amended the statute again in reaction to the ruling in *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 177 (1989), on whether the protections in ADEA

§4(a) applied to early retirement benefits available on disability. In a swift response, Congress amended §4(f)(2) to codify the EEOC's equal cost/equal benefit regulations and add subsection 11(l), 29 U.S.C. §630(l), to define "compensation, terms, conditions, or privileges of employment" in §4(a) to "encompass[] all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. §630(l). Congress thus made it "unmistakably clear" that §4(a) protects employees against "age discrimination in all forms of employee benefits." S. Rep. No. 263, 1990 U.S.C.C.A.N. 1509, 1521-22. The House and Senate reports on the 1990 amendments identically describe the interaction between the amended protections against age discrimination in all employee benefits in §§4(a) and 4(f)(2) and the protection in §4(i):

> In circumstances in which the provisions of section 4(i) are inapplicable, claims of discriminatory accruals or pension credits in defined benefit and defined contribution pension plans shall continue to be resolved under section 4(f)(2) as modified by these amendments.

H.R. Rep. 664, 101st Cong., 2d Sess., at 35-36, 1990 WL 200383 (Leg.Hist.); S. Rep. 263, 101st Cong., 2d Sess., 1990 U.S.C.C.A.N. 1509, 1525.

In *Smith v. City of Jackson*, 544 U.S. 228 (2005), the Supreme Court affirmed, despite inconsistent rulings in four circuits, that ADEA §4(a)(2) authorizes disparate impact claims, recognizing that EEOC regulations "have

consistently interpreted the ADEA to authorize relief on a disparate impact theory" and that disparate impact claims must be viable because the ADEA "focuses on the effects of the action on the employee rather than the motivation of the employer." *Id*. at 236-37, 239.

Here, after reinstating the Plaintiffs' disparate impact claims based on *City of Jackson*, and rebuffing Defendants' motion to dismiss the §4(a) claim based on §4(i), the District Court ultimately granted Defendants' motion for summary judgment on the same claim.[5] In doing so, the District Court followed a three-step syllogism. First, it held that Plaintiffs' wear-away claims "relate to" benefit accruals within the meaning of §4(i). JA 9. It next determined that under *Register v. PNC Finan. Servs. Group*, 477 F.3d 56 (3d Cir. 2007), §4(i) only regulates "inputs," or "the credits deposited into the participant's cash balance accounts," and not the "[l]ost benefits" or "Plan outputs that stop increasing during the wear-

[5] The District Court's ruling on §4(i) follows a very tortured path. In 2001, the Court held that it lacked "subject matter jurisdiction" over Plaintiffs' §4(i) claims because §4(i) did not apply to employees under age 65. 2001 U.S. Dist. LEXIS 25889, *13. In 2006 and 2007, the Court refused to reconsider that decision. See 2006 WL 3626945 *2; 2007 WL 958472 *2. Without distinguishing or vacating those rulings, the Court held in June, 2010 that AT&T was in compliance with §4(i) on the basis that the cash balance "inputs" are not "reduced because of age." JA 10.

away period." JA 11-12.[6] Finally, the Court held that, considering only "inputs," Defendants' evidence of the methods for establishing initial account balances and computing annual pay credits, demonstrated compliance with §4(i). JA 9-11. Concluding that "[p]assing" §4(i) "becomes a complete defense to any claim of violation of §4 (relating to benefit accrual)," the Court held that "judgment must be entered in favor of Defendants." JA 9, 12.

The District Court's ruling that ADEA §4(i)(4) effectuates a "complete defense" (JA 9), in other words, a "safe harbor,"[7] from claims of age discrimination in pension benefit "outputs" under §4(a) improperly construes §4(i)(4) to occupy the entire field of pension benefits, rather than looking at the text and Congressional intent that it cover only one part of that field. For the past 20 years, the Supreme Court has rejected such interpretations without clear expressions of Congressional intent. *See, e.g., Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992) (field preemption occurs only "if federal law so thoroughly

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[6] *Register* examined a wear-away claim in the context of the anti-backloading protection under ERISA, but did not review whether wear-away periods violate ADEA §4(a) or the ERISA counterpart to ADEA §4(i), ERISA §204(b)(1)(H). 477 F.3d at 61-70.

[7] *Jensen v. Solvay Chemicals, Inc.*, __ F.3d __, 2010 WL 3472945 * 15 (10th Cir. 9/7/10), erroneously concluded that §4(i) is a "safe harbor" based on a similar type of analysis.

occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it"); *New York State Conf. of Blue Cross & Blue Shield Plans*, *supra*, 514 U.S. at 655.

Here, the statute's text and purposes show that §4(i)(4) is not intended to create a "complete defense" from all age discrimination claims relating to pension benefits. There is no "safe harbor" language in §4(i)(4), in contrast to §4(f)'s unambiguous statement that "*[i]t shall not be unlawful for an employer...to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section* where age is a bona fide occupational qualification." Emph. added. Instead, §4(i)(4) simply provides:

> Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

This text contains no indication that practices *not* regulated by the §4(i) "requirements" will enjoy a "complete defense" or "safe harbor" from age discrimination claims under §§4(a)(1) or 4(a)(2). Indeed, under the District Court's "complete defense" analysis, an employer could provide that all of its employees will be credited with the same "inputs" under a pension plan, thereby satisfying §4(i), except that any employee who is age 40 or over will not receive

any retirement benefits from those credits. The "complete defense" the District Court created would insulate this discriminatory practice from review. Under the District Court's exegesis, "requirements ... relating to benefit accrual" would become a safe harbor for "otherwise discriminatory practices relating to pension benefits." Such an outcome plainly undermines the ADEA.

The statutory text–"compliance with the requirements of this section relating to benefit accrual"–simply cannot be construed as an *unambiguous* direction that employers receive a "complete defense" from discriminatory practices relating to pension benefits. Absent an unambiguous direction, a statute must be interpreted "in light of the purposes Congress sought to serve." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979); *NY State Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973) (courts "cannot interpret federal statutes to negate their own stated purpose").

Here, Congressional intent is clear: The 1990 amendments were enacted to make it "unmistakably clear" that Congress intends to end discrimination in "all forms" of employee benefits. S. Rep. 101-263, at 11, 1990 U.S.C.C.A.N. 1509, 1521-22. The legislative history states that Congress intends for §4(a) to achieve that end if §4(i) is "inapplicable." *Id*. at 1525; H. Rep. 101-664, at 35-36, 1990 WL 200383 (Leg. Hist.). Indeed, in construing the ERISA counterpart to §4(i),

Register holds that "we are concerned with what [an employer] puts into an employee's account [the inputs], not what the employee eventually may obtain from the plan on retirement." If §4(i) does not regulate "what the employee eventually may obtain from the plan on retirement," §4(i)(4) cannot reasonably be interpreted to preclude §4(a) from regulating the age discriminatory practices to which §4(i) is "inapplicable."

The District Court's analysis is further undermined by the *City of Jackson* decision, which recognizes disparate impact claims based on age. It is illogical to construe §4(i) to preclude the disparate impact actions recognized in *City of Jackson* when disparate impact claims relating to benefit accruals are not "cognizable" under §4(i).[8] If compliance with §4(i) establishes a "complete defense," this would mean that no action is available to protect employees against disparate impact relating to "what the employee eventually may obtain from the plan on retirement." The language in ADEA §4(i)(6) on disregarding the "subsidized portion of any early retirement benefit" also cannot be reconciled with a "complete defense" from age discrimination claims related to pension benefits;

[8] *See Hurlic v. So. Cal. Gas*, 539 F.3d 1024, 1037 (9th Cir. 2008) ("wear-away claim is not cognizable under ADEA §4(i)"); *Vaughn v. Air Line Pilots Ass'n*, 395 B.R. 520, 542 n. 14 (E.D.N.Y. 2008) (disparate impact claims can only proceed under the general prohibition of §4 because §4(i) only pertains to discrimination in the terms of a plan).

§4(i)(6) provides that a plan "shall not be treated as failing to meet the requirements of paragraph (1) *solely because* the subsidized portion of any early retirement benefit is disregarded." Emph. added. The "solely because" language also indicates that a discriminatory practice related to subsidized early retirement benefits may otherwise violate §4(a).

Finally, the EEOC's interpretation of ADEA §4(i)(4) is not consistent with the District Court's decision. The EEOC has stated:

> Section 4(i)(4) of the ADEA provides that compliance with the requirements of section 4(i) with regard to benefit accruals under a pension plan satisfies all pension benefit accrual requirements in section 4 of the ADEA. Accordingly, after the effective date of section 4(i), sections 4(a)(1) and 4(f)(2) will no longer apply to such benefit accrual issues.

52 Fed.Reg. 45360, 45361 (11/27/87). Thus, the EEOC does not interpret §4(i)(4) to offer a complete defense against the *disparate impact* claims authorized under §4(a)(2), nor does it interpret §4(i)(4) to establish a safe harbor for discriminatory practices that are not regulated by the "pension benefit accrual requirements."

In sum, while *Register* holds that §4(i) is concerned only with "inputs," it also recognizes that cash balance "inputs" are neither employer contributions nor benefits; instead they are "hypothetical" notations. 477 F.3d at 62, 68. Turning hypothetical notations into a "complete defense" to age discrimination claims

would subvert the ADEA and leave employees without protection from practices designed to discriminate against them based on age.

2. The statistical evidence shows that AT&T's older employees lost an average of 7 years of retirement benefits because of the "wear-away" periods; this is obviously relevant to disparate impact and treatment.

The District Court erred in holding that evidence that older employees "[l]ost benefits" during "wear-away" periods is not "relevant" under the ADEA. JA 11. If the ADEA is to end discrimination in employee benefits, evidence of discrimination clearly must be relevant. Here, Plaintiffs presented more than ample evidence to defeat summary judgment, showing that AT&T's cash balance transition was designed to discriminate on the basis of age. Plaintiffs' evidence, including Excel spreadsheets and numerous PowerPoint presentations by AT&T, supports the claim that AT&T designed the wear-away periods to treat older employees unfavorably. See JA 1600 to 1728, 2724 to 3408.

Plaintiffs' statistical expert performed individual calculations for each of 51,015 employees in AT&T's database and found the average wear-away period for employees age 40 and over was 6.8 years, compared to 3.7 years for younger employees. JA 2063-64. Dr. Bardwell also found that the wear-away periods for employees between ages 45 and 55 averaged 8 years, while the periods for

employees under age 30 were less than 2 years. JA 2074. He found statistical disparities such that age could not possibly be ruled out as a determinative factor. JA 2071.

In rejecting the relevance of Dr. Bardwell's findings, the District Court opined that:

> 29 U.S. C. §623(i)(1)(A) refers to the benefit accrual that is the input to a plan. Dr. Bardwell did not analyze inputs to the Plan. The wear-away period is neither an input nor an output, but a higher-level construct derived from output functions of the Plan. Lost benefits are outputs.

JA 11. The District Court thus concluded that "Dr. Bardwell's analyses are not relevant evidence of benefit accrual, within the meaning of 29 U.S.C. §623(i)(1)(A)." *Id.* The District Court's reasoning stands or falls on the premise the ADEA is not concerned with "what the employee eventually may obtain from the plan on retirement." As explained above, that premise is false; Plaintiffs' statistical evidence of age discrimination in "lost benefits" must be relevant if the ADEA is to put an end to "discrimination in all forms of employee benefits."

II. The plan amendment claims based on AT&T's failure to adopt the critical wear-away and residual annuity amendments until October 16, 2000 are not an "entirely new legal theory"; the allegations were in the Complaint since 2001 and Plaintiffs moved for summary judgment on them twice.

Under the "notice pleading" standard of FRCP 8(a)(2), Plaintiffs are merely required to provide a "short and plain statement" of their claims sufficient to provide "fair notice." *Swierkiewicz,* 534 U.S. at 512. Plaintiffs are not required to plead every legal theory, much less to specifically plead a claim under "ERISA §402(b)(3)" as opposed to an inclusive reference to "ERISA §402." See *id.*, 534 U.S. at 512; *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 434 (5th Cir. 2000).

In *Depenbrock,* this Court reviewed whether the approval by CIGNA's CEO of a summary of an unfavorable proposed amendment constituted a plan amendment under ERISA §402, such that the unfavorable rule could be applied before the date the CEO formally adopted a plan amendment. Although CIGNA's CEO had approved a summary with a bullet point about a change to a "rehire" rule and was authorized to make changes to the plan, *Depenbrock* held that CIGNA's "CEO did not exercise his authority to amend the plan until ... the date the written amendment was executed and formally adopted" a year later. 389 F.3d at 83-84. The Court held that because "an indispensable requirement under ERISA for

effective plan amendment is that the amendment be in writing," approving the summary was not equivalent to approving the actual amendment. *Id*. at 82.

Here, the persons with the authority to amend AT&T's Plan were the Board of Directors and the Senior Vice-President for Benefits and Compensation, or his delegate. None of those persons adopted the critical amendments on wear-aways and residual annuities until October 16, 2000. Indeed, AT&T's Rule 30(b)(6) witness admitted that the Board "didn't say you could. They didn't say you could not" with respect to wear-away. JA 2334.

When the District Court erroneously held that the Plaintiffs' *Depenbrock* claims presented an "entirely new legal theory," the District Court improperly avoided deciding whether the unfavorable wear-away and residual annuity provisions were adopted by the AT&T Board of Directors or a duly-authorized delegate before October 16, 2000, and could be retroactively applied. The District Court's reason for not reaching the merits–that this was an "entirely new legal theory"–is unsupportable.

As amended on October 28, 1999, the Complaint alleges that AT&T did not adopt a complete set of cash balance amendments on April 16, 1997 and told employees and their attorneys as late as February 1999 that the new cash balance amendments were still being prepared. JA 247. The Complaint also alleges that

AT&T violated "ERISA §402," which includes both §§402(a)(1) and 402(b)(3), by implementing the new cash balance formula without a written Plan document. JA 254.[9] After Plan amendments were adopted on October 16, 2000 to add the unfavorable "greater-of" and "residual annuity" provisions, Plaintiffs amended the Complaint again to allege that the rules on payment of pensions in those amendments "were not in the preceding Plan document or any amendment adopted by the AT&T Board of Directors or a duly authorized delegate prior to October 16, 2000." Dkt.#104 at ¶¶75-76.

The parties' briefing has recognized repeatedly that Plaintiffs allege that these critical rules were not adopted in a timely manner in violation of ERISA. In their October 2004 motion for summary judgment, Plaintiffs stated:

> Plaintiffs' Fourth and Fifth Claims allege that AT&T did not amend the Plan document in a timely manner to adopt two of the most adverse rules on benefit accruals and benefit options.

JA 301-8.[10] In opposing Plaintiffs' motion, AT&T also recognized the claims

[9] The Complaint also alleges that this violated the fiduciary duty to act "in accordance with the documents and instruments governing the plan insofar as... consistent with the provisions" of title I. JA 466-67 and *see, e.g.*, *Kennedy v. Plan Admin. for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875 (2009); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 82 (1995).

[10] *See also* Dkt.#35 at 26-28 (October 4, 1999 opposition to Defendants' motion to dismiss, stating that Plaintiffs "allege that AT&T has implemented cash balance rules that have not been duly adopted" as required by ERISA §402, and in

Plaintiffs were making:

> As now defined in plaintiffs' brief, those claims allege that AT&T did not amend 'the Plan document in a timely manner' to adopt the 'greatest of' rule or the optional forms of benefit available under the Cash Balance formula.

JA 340. On January 21, 2005, after the Third Circuit decided *Depenbrock*, Plaintiffs sent a notice of supplemental authority to Judge Linares, again contending that "AT&T's 'wear-away' rule and the benefit options provision" "were not effective until they were adopted on October 16, 2000 in accordance with the Plan's written procedures." JA 368. Judge Linares directed the named Plaintiffs to exhaust their claims that "certain language" in the Plan was not included in the April 1997 resolutions in order to permit AT&T to "analyze whether certain language was included as of certain time periods" and determine "*when* that provision was validly adopted under ERISA." JA 49, 59 (emph. orig.).[11]

Plaintiffs were clearly not advancing an "entirely new legal theory" when they moved for summary judgment in 2010. Plaintiffs presented the same set of

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particular, "[s]ubsection 402(b)(3)").

[11] In 2007, Plaintiffs filed a Rule 15(d) motion to supplement pleadings to reflect exhaustion, which also reiterated the basis for their claims. JA 428. The Court entered a Consent Order reinstating the Fourth and Fifth Claims on October 17, 2007. JA 448-49.

facts and theories in the Complaint in 2001 and moved for summary judgment in 2004. Defendants' own statements show that they have had more than adequate notice of Plaintiffs' claims. Accordingly, the District Court's decision must be reversed.

Summary judgment should, moreover, be entered in the Plaintiffs' favor. Plaintiffs presented detailed evidence, including Rule 30(b)(6) testimony from the officer who executed the October 16, 2000 amendments, that AT&T did not adopt until 3½ years after the fact: (1) the "wear-away" provisions that restricted payment of the accrued benefits derived from the cash balance formula, and (2) the "residual annuity" provisions that provided less valuable benefits. *See* JA 1147, 1149-50 and *supra* at 7-8. There is no genuine issue that the "wear-away" and "residual annuity" amendments were not adopted until October 16, 2000.

III. The inadequate disclosure claims

A. AT&T never disclosed the reductions in future benefit accruals after the January 1, 1998 effective date of cash balance in an ERISA §204(h) notice.

Since its enactment in 1986, ERISA §204(h) has mandated that employees be notified at least 15 days in advance of the effective date of an amendment that will significantly reduce the rate at which they earn pension benefits in the future. ERISA §204(h) provides:

> a plan ... may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date to ... each participant in the plan.

P.L. 99-272, Sec. 11006.

Temporary regulations, entitled "Notice of Significant Reduction in the Rate of Future Benefit Accrual" which were issued in 1995 and finalized in 1998, provide that whether a plan has been "amended so as to provide for a significant reduction in the rate of future benefit accrual" is determined "by comparing the amount of the annual benefit commencing at normal retirement age" under the amended plan with the amount of the annual benefit ... under the terms of the plan prior to amendment." Treas. Reg. 1.411(d)-6, Q&A-5, 7, 63 Fed.Reg. 68678, 68681. An example is provided in which an amendment is adopted that does not change a plan's normal retirement benefit of 50% of pay, but changes the "numerator or denominator" used to compute the rate at which that benefit accrues. The example concludes that the amendment "must be taken into account in determining whether there has been a reduction in the rate of future benefit accrual." Treas. Reg. 1.411(d)-6, Q&A-6 (example). This Court has held that ERISA §204(h) notice is required when a cash balance amendment is "reasonably

expected to result in a significant reduction in the rate of future benefit accrual" after the effective date of an amendment. *Charles v. Pepco Holdings, Inc.*, 314 Fed.Appx. 450, *2-3 (3d Cir. 11/4/2008),

In a 2003 expert report, Plaintiffs' actuarial expert applied the Treasury Department's methodology to determine AT&T's rates of accrual effective January 1, 1998. He found that, even apart from the wear-aways, AT&T had reduced participants' rates of future benefit accrual from 1.6% to approximately 1.35% of pay. JA 538-39. For participants ages 21 to 55, the average rate of accrual after the cash balance conversion was between 1.35% and 1.4% compared to 1.6% under the prior pay base formulas. For participants between ages 55 and 65, the reduction was between 20-35% of their previous benefit accrual rate. JA 539, 560. Excel spreadsheets and graphs AT&T prepared in 1997 show indistinguishable "accrual rates" from those that Poulin computed. JA 565-70.[12]

The District Court erroneously concluded, however, that ERISA §204(h) does not consider either the "rate" at which benefits accrue or the "future benefit accrual" after an amendment becomes effective. JA 42. Instead, it held that "to determine whether §204(h) notice is required, the Court must examine the effect of

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[12] AT&T also attached calculations of the reduced rates to a 2006 motion for judgment on the pleadings. *See* JA 408-10.

any amendments on the amount of future benefits, not the rate at which they accrue." *Id*. The Court did not actually examine "the amount of future benefits" either. Instead, it compared "projected" benefits (i.e., past and future) benefits if a formula in effect two amendments earlier had continued. JA 42-43.

The District Court held that Mr. Poulin's report disproved "a reduction in accrued benefits" by showing that each of the four named plaintiff's "post-amendment accrued benefits" was "higher than the projections of accrued benefits under the pre-amendment plan." JA 43. In arriving at this conclusion, the District Court misread a 2001 declaration that Mr. Poulin prepared and, based on that misreading, improperly compared "projected" benefits under the cash balance formula with "projected" benefits if the pre-1997 pay base formula that used 1987-92 pay had continued. The pre-1997 formula that the District Court used as the comparator was the benefit formula in effect two amendments earlier. JA 603. The immediately preceding formula was the Special Update, which took effect on January 1, 1997–a full year before the effective date of the cash balance formula.

After Plaintiffs moved for reconsideration, the District Court acknowledged that it "mistakenly" referred to the 2001 declaration as Mr. Poulin's 2003 report, but held that the Court's "reasoning and determinations still stand." JA 88. Since the Special Update that was effective January 1, 1997 was a benefit improvement,

the effect of grouping it with the cash balance reduction effective January 1, 1998 was to net the cash balance reductions against one-time gains from the Special Update. The purpose of §204(h), however, is to provide employees with advance notice of a reduction in the rate of accruals after the effective date of the amendment reducing benefits. It is not to allow employers to avoid such notices by packaging such amendments together with an earlier improvement so that reductions after the effective date are "rendered obscure or ... made to appear unimportant." 29 C.F.R. 2520.102-2(b).

The Treasury Department adopts this position by providing that any summary must be "calculated to be understood by the average plan participant and contain[] the effective date" of the amendment. Treas. Reg. 1.411(d)-6, Q&A-10. That "effective date" cannot be confused with the date on which an amendment is "adopted," which both statute and the regulations describe separately. See ERISA §204(h) (as was in effect prior to 2001) (requiring notice "after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment"); Treas. Reg. 1.411(d)-6, Q&A-17.[13]

Here, from the January 1, 1998 effective date of the cash balance

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[13] Another set of Treasury regulations provides that amendments cannot be considered together unless they have the same effective date. Treas. Reg. 1.411(d)-3(b).

amendments forward, AT&T Excel spreadsheets and graphs, as well as Poulin's calculations, show that employees experienced benefit reductions. See *supra* at 9-10. Yet AT&T never provided its employees with the statutorily-required advance notice of those reductions. With timely notice, the employees could have challenged the reductions and taken action to protect themselves had AT&T not been receptive either to changes or enhancing their compensation to make up for the reductions.

AT&T's claim that it need only disclose the combined effect of the Special Update and cash balance would leave employees to deconstruct the effects of the two amendments and uncover that there are only reductions after January 1, 1998. ERISA §204(h)'s requirement of "fair warning" of reductions is not satisfied when employees are required to do their own research to uncover reductions. *See, e.g.*, *Hirt v. Equitable Ret. Plan*, 441 F. Supp. 2d 516, 538 (S.D.N.Y. 2006) (holding §204(h) notice must provide employees "fair warning [of the reduction], and fails to do so if it is cryptic, or requires research beyond the document itself").

B. The disclosures in AT&T's SPD were inadequate; *Burstein* holds that relief for an inadequate SPD is not contingent on "extraordinary circumstances."

ERISA §102 and the DOL regulations require employers to prepare and distribute an SPD containing an understandable statement "clearly identifying

circumstances which may result in disqualification, ineligibility, or denial, loss [or] reduction ... of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits." 29 C.F.R. 2520.102-2(a), (b); 2520.102-3(l).

AT&T's SPD failed to disclose that the cash balance credits reduced future benefit accruals and that the cash balance credits were not payable at all during periods of wear-away. AT&T also failed to disclose that taking the cash payment option, or commencing any benefits before age 55, would be "clearly less valuable" than taking an annuity after age 55. Plaintiffs' communications expert, Professor Stratman, found that AT&T's SPD indicated that initial account balances were derived from the unreduced monthly Special Update benefit, contained no description of wear-away periods in which participants' cash balance pay and interest credits were not actually paid, and instead suggested that benefits would continue to grow "each year." JA 635-41. There was also no mention of reductions in the rate of future accrual after January 1, 1998, and no indication that participants who took a cash payment option, or who commenced benefits before age 55, would receive a clearly less valuable benefit than the benefit available at age 55. JA 641-44.

As a result, tens of thousands of employees lost benefits they "might

otherwise reasonably expect the plan to provide." 29 C.F.R. 2520.102-3(l). In *Osberg v. Foot Locker, Inc.*, 656 F.Supp.2d 361, 374 (S.D.N.Y. 2009), the court found an SPD's "single reference to participants' 'greater-or' option was insufficient to inform participants" of reduced benefits or "varying periods of wear-away" under the amended Plan. *Accord, Humphrey v. United Way of Tex. Gulf Coast*, 590 F.Supp.2d 837, 847 (S.D. Tex. 2008); *Richards v. FleetBoston*, 2006 WL 2092086, *8 (D. Conn. 2006).

The District Court did not reach the merits of Plaintiffs' SPD claims, holding that: (1) Plaintiffs must show "extraordinary circumstances in the form of active concealment" to obtain "substantive remedies" for an SPD that inadequately discloses or fails to disclose the adverse changes to a plan, and (2) Plaintiffs did not show that "AT&T actively concealed any change in benefits available under the plan" and were therefore "unable to demonstrate the existence of extraordinary circumstances." JA 75, 77-82.

Prior to the decision below, however, this Court held in *Burstein* that district courts should remedy violations of ERISA's SPD rules without requiring "extraordinary circumstances." 334 F.3d at 380-81. *Burstein* expressly distinguished as "dictum" the discussion of SPDs in *Gridley v. Cleveland Pneumatic*, 924 F.2d 1310 (3d Cir. 1991), on which the District Court relied (JA

75):

> [I]n *Gridley*, we held no more than: Gridley could not recover benefits because there was no summary plan description upon which to base her claim, since the overview brochure did not constitute an SPD ... once *Gridley* held that no summary plan description existed, its discussions as to the place of a summary plan description in the statutory scheme can constitute no more than dictum.

334 F.3d at 377, citing 924 F.2d at 1316-17.[14]

As in *Burstein*, material conflicts between the SPD and the plan document are present here. In *Burstein,* the SPD stated: "If the plan is terminated you will automatically become vested in your account," but the plan document provided that "upon termination or partial termination of the Plan," benefits "shall become nonforfeitable...to the extent funded." *Id*. at 380. This Court found this conflict was "unquestionably material;" "[t]he fact that the AHERF Retirement Account plan would not be fully funded is never expressed in the Summary Plan Description." *Id.* at 379.

Here, AT&T's cash balance plan provisions result in undisclosed reductions in rates of future benefit accrual and wear-away periods during which participants earned no additional benefits for 8 or more years. The amended plan provisions

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[14] *Ackerman v. Warnaco*, 55 F.3d 117, 122 (3d Cir. 1995), which the District Court cited (JA 75-77), involved whether a handbook was distributed at a particular plant, and not the adequacy of disclosures.

also invited employees to accept "clearly less valuable" options to commence benefits before age 55 or to elect a cash payment option with misleading representations that those options offered the "same" value as taking an annuity after age 55.

Even if "extraordinary circumstances" were required, this Court held in *Ackerman* that "actively" concealing information about a plan change is an extraordinary circumstance, and remanded to determine whether there was "mere bureaucratic 'bungling'" or active concealment. 55 F.3d at 124-5; *see also Jordan v. Federal Express Corp.*, 116 F.3d 1005, 1011 (3d Cir. 1997) ("attempts to actively conceal a significant change in the plan" present extraordinary circumstances"); *Lettrich v. J.C. Penney*, 213 F.3d 765, 772 (3d Cir. 2000) (active concealment sufficiently pled by allegations that notice of plan termination was placed "deep within" proxy statement without warning to participants).

In this case, Plaintiffs offered extensive documentary evidence of active concealment. The minutes of internal AT&T communications meetings specifically discuss not disclosing the "bad parts" of cash balance, asking "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?" JA 776. An internal memorandum from the chief spokesperson for the company that

conducted cash balance seminars for AT&T, as well as a videotaped seminar for AT&T's Human Resources leaders, show AT&T deliberately avoiding comparing the plan's old and new benefits because it did not want employees to know about the reductions. JA 532, 4240-41. Focus groups of managers who reviewed the disclosures repeatedly asked AT&T representatives, without success, whether cash balance "reduces benefits." JA 792. Other documents show intentional withholding of information about the basis for the conversion factors, the difference between opening account values and previously-earned benefits, and whether a cash payment option that close to three-fourths of participants eventually selected was "clearly less valuable" than the annuity. See JA 776, 811, 819, 821, 1700, 1748.

Thus, there is substantial evidence that AT&T was actively concealing the "bad parts" of the cash balance conversion to avoid a backlash from employees. In diminishing that evidence to the status of "spin[ning] the Plan transition to make it more palatable for employees," JA 78, the Court below engaged in improper "[c]redibility determinations, weighing of evidence, and drawing of ... inferences" on summary judgment. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

C. Under *Bixler*, it was a breach of fiduciary duty for AT&T not to tell its employees that taking a cash payment option or starting benefits before age 55 were "clearly less valuable" options.

The Labor Department's SPD regulations require an understandable explanation of the circumstances that can cause a participant to lose part of the value of his or her benefits. 29 C.F.R. 2520.102-2(a), (b); 2520.102-3(l). In addition, before a participant and his or her spouse can "consent" to an "immediate distribution" such as a cash payment option, and give up an annuity with a higher-value, Treasury regulations require "sufficient" information to be provided "to explain the relative value of the optional forms of benefit available under the plan (e.g., the extent to which optional forms are subsidized relative to the normal form of benefit)." Treas. Reg. 1.401(a)-20, Q&A-36, 53 Fed.Reg. 31842, 31849 (8/22/88).[15] The Treasury regulations provide that "no consent is valid" unless both the participant and spouse receive an "explanation of the relative values" of benefit options. Treas. Reg. 1.417(e)-1(b)(2)(i).

This Court has recognized repeatedly the critical fiduciary duty of providing "complete and accurate information material to the beneficiary's circumstance." *Bixler v. Central Pa. Teamsters Health & Wel. Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993); *accord*, *Jordan*, 116 F.3d at 1015 (failure to inform "constitute[s] a

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[15] This regulation is no longer in the Code of Federal Regulations.

material omission" if "there is a substantial likelihood that it will mislead a reasonable employee in making an adequately informed retirement decision"); *Glaziers & Glassworkers Local 252 Annuity Fund v. Newbridge Sec.*, 93 F.3d 1171 (3d Cir. 1996); *In re Unisys Corp. Retirement Medical Benefit ERISA Litigation,* 57 F.3d 1255, 1265 n.15 and 1266 (3d Cir. 1995).

This duty is most commonly applied when employees are not given complete information about benefit options. *Bixler*, 12 F.3d at 1300-3 (fiduciary had duty to help participant's spouse find her best options, "even if that information comprises elements about which the beneficiary has not specifically inquired"); *Jordan*, 116 F.3d at 1014-17 (even if Treasury regulations do not specifically mandate disclosure that benefit elections are irrevocable, fiduciary must inform participants of material features).

Here, Plaintiffs allege that AT&T breached its fiduciary duties under ERISA §404, 29 U.S.C. §1104, because AT&T's SPD and its benefit election materials failed to disclose the "relative values" of benefit options, misrepresenting instead that the "overall value" of the options was the same. JA 467-68, ¶¶63-66. Plaintiffs' actuarial expert reviewed the pension plan's payment election form and found AT&T was inviting participants and their spouses to elect cash payments in lieu of lifetime annuity benefits and to commence benefits before age 55 with no

disclosure that the annuities they were surrendering had substantially higher values. JA 547-49. For example, Edward O'Brien's election form showed that the annuity to which he was entitled at the age of 50 years and two months was $999.65, with a 50% Joint and Survivor Annuity at the same age of $899.69. JA 574. Mr. Poulin found, however, that the cash payment option presented to O'Brien corresponded to a single life annuity of only $726.34 a month. JA 548. With insufficient information about relative values, O'Brien selected the cash payment option with the lowest value.

Although the District Court recognized that ERISA §502(a)(3) "may afford Plaintiffs an equitable remedy for Defendants' alleged breach of fiduciary duty to keep beneficiaries informed," it held that pursuant to *Varity Corp. v. Howe*, 516 U.S. 489 (1996), an action for equitable relief is limited "to situations where ERISA does not provide a plaintiff with an alternate remedy." JA 67. The Court concluded that Plaintiffs could not proceed with their breach of fiduciary duty claims under ERISA §502(a)(3) because they had "an alternative means to recover for Defendants' alleged failure to disclose certain information in the SPD." JA 68. This ruling was plainly erroneous because the Court *simultaneously granted summary judgment to AT&T* on those same SPD claims, JA 82, thereby eliminating any "alternative means" of recovery.

Burstein permits plaintiffs to proceed with breach of fiduciary duty claims concurrently with SPD claims under ERISA §502(a)(1)(B). 334 F.3d at 374 and 382. In examining the merits of such claims concurrently, *id*. at 384-89, *Burstein* is consistent with other decisions that address this part of *Varity*. *See, e.g., Devlin v. Empire Blue Cross and Blue Shield*, 274 F.3d 76, 89-90 (2d Cir. 2001) ("Varity Corp. did not eliminate a private cause of action for breach of fiduciary duty when another potential remedy is available; instead, the district court's remedy is limited to such equitable relief as is considered appropriate"); *Frommert v. Conkright*, 433 F.3d 254, 272 (2d Cir. 2006) ("we disagree with the district court's conclusion that all of the relief sought by the plaintiffs in their claim for breach of fiduciary duties can be adequately addressed by the relief available under §502(a)(1)(B)"; the district court must "determine what appropriate equitable relief is necessary" if plaintiffs prevail on their claim).

If it were upheld, the District Court's ruling would undermine this Circuit's *Bixler* line of precedents on the fiduciary duty to provide "complete and accurate information material to the beneficiary's circumstance." 12 F.3d at 1300. This would create a Catch-22 in which participants would be blocked from a breach of fiduciary duty claim because of a concurrent SPD claim–regardless of whether any relief was obtained for the SPD violation. Both *Bixler* and *Burstein* prohibit this

result.

IV. AT&T's wear-away design violates the "anti-backloading" protection in ERISA §204(b)(1)(B) because the cash balance accruals for each "plan year" are not "payable."

ERISA §204(a)(1) and (b)(1), 29 U.S.C. §1054(a)(1) and (b)(1), provide that every defined benefit pension plan must satisfy one of three benefit accrual methods. Because cash balance formulas offer a benefit based on each year's pay rather than an average of highest pay, "it is undisputed that the only test" a cash balance plan "might satisfy is the so called 133⅓% test under ERISA section 204(b)(1)(B)," 29 U.S.C. §1054(b)(1)(B). *Esden v. Bank of Boston*, 229 F.3d 154, 167 n.18 (2d Cir. 2000); *accord*, *Register,* 477 F.3d at 70.

ERISA §204(b)(1)(B) provides that "the accrued benefit payable at the normal retirement age [must be] equal to the normal retirement benefit" and prescribes "the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at the normal retirement age." ERISA §3(23), 29 U.S.C. §1002(23), and ERISA §204(c)(3), 29 U.S.C. §1054(c)(3), fill out the effect of the rule. ERISA §3(23) defines the "accrued benefit" as the "individual's accrued benefit determined under the plan" "expressed in the form of an annual benefit commencing at normal retirement age" "except as provided in §204(c)(3)." ERISA §204(c)(3) provides that "[f]or purposes of this section," if

"an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age" the employee's accrued benefit "shall be the actuarial equivalent of such benefit."[16] Accordingly, the 133⅓% rule requires AT&T to provide an "annual rate" of benefit accrual for each "plan year" that is payable at "normal retirement age," or to provide "the actuarial equivalent of such benefit" at any earlier commencement age.

Plaintiffs' actuarial expert and AT&T's own documents show that the annual rates of accrual AT&T uses to show compliance with the 133⅓% rule in the years after the cash balance conversion are not actually "payable" to older, longer-service employees when they retire and select early retirement benefits. JA 780, 1583-84 1849-50. To illustrate, named Plaintiff Donald Noerr was employed by AT&T from June 1981 through January 2002. Based on Mr. Noerr's service to the end of 1996, he was entitled to a retirement benefit of $1,523 per month. JA 1808. Had he left AT&T's employ on January 1, 1997, that amount was payable to him without reduction anytime after reaching age 55. Mr. Noerr continued to work for AT&T for five more years before he retired.

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[16] Provisions, like ERISA §§3(23), 204(b)(1)(B), and 204(c)(3), which are enacted "in pari materia" "must be construed together." *Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336, 345 (1976); *Confer v. Custom Eng'g Co.*, 952 F.2d 34, 37 (3d Cir. 1991) (we "must read these sections (402 and 405 of ERISA ...) in pari materia with [the] section 3(21)(A)" definition of a fiduciary).

Under the cash balance formula, Mr. Noerr accrued additional retirement benefits payable to him at age 65 of approximately $662 per month based on his years of employment from 1997 to the end of January 2002. JA 1812-13.[17] But when Mr. Noerr commenced his retirement benefits on February 1, 2002, two months before age 60, AT&T paid him only $1,593 per month, which is only $70 per month more than he was due on January 1, 1997. *Id.* A benefit of $70 per month for five years of service is obviously much less than the $662 per month in additional benefits payable at age 65, and much less than any reasonable "actuarial equivalent" of that benefit.[18]

In a 2007 decision, the District Court recognized that "payment is implicated" in the 133⅓% rule, and posed three questions concerning the meaning of the word "payable." JA 419-20. ERISA does not define the term "payable," but terms with well-established meanings are frequently not defined by the legislature. Singer, *Sutherland Statutory Construction* (6th ed.), §47:07. "Payable" is defined in *Black's Law Dictionary* (7th ed.) as an adjective used to describe "a sum of

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[17] Subtracting $1,523 from $2,184.96 (the "Projected Age 65 Single Life Annuity from Cash Balance"). *Id*.

[18] Applying AT&T's own "Early Commencement Factors," the "actuarial equivalent" of $662 per month at age 59 and 10 months is $489. JA 1203-4 ($662 x .738809239 = $489.06).

money ... that is to be paid.... An amount may be payable without being due. Debts are commonly payable long before they are due." The Uniform Commercial Code uses the term "payable" to describe an amount of money payable "on demand or at a definite time." UCC §§3-104(a)(2), 3-108(a, b).

When Congress legislates that an amount of money must be "payable" without qualification, the individuals or companies governed by the legislation are not authorized to impose qualifications on their obligation. *See, e.g., Herman v. Fabri-Centers of Am.*, 308 F.3d 580, 588-89 (6th Cir. 2002) ("we reject FCA's argument that 'payable' ... evinces Congress' intent to allow 'extra compensation' to be credited against any overtime liability due"); *In re Ripley*, 926 F.2d 440, 444 (5th Cir. 1991) ("taxes that have 'become payable' are those that must be paid now"); *Hullett v. Towers, Perrin, Forster, and Crosby*, 38 F.3d 107, 113 (3d Cir. 1994) ("payable means the point at which money may be paid on demand, not the point at which payment actually commences").

In *Heinz*, the Supreme Court recognized that "placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." 541 U.S. at 744-45 (we "do not see how, in any practical sense, this change of terms could not be viewed as shrinking the value of Heinz's pension rights and reducing his promised benefits").

This Court's 2010 *Battoni* decision follows *Heinz* in rejecting as "nonsensical" the argument that a provision "conditioning the receipt of ... an accrued benefit on surrendering" another benefit can be treated as if it "did not exist." 594 F.3d at 235, 237. *Battoni* holds that the "accrued benefit" is "devalued" by an amendment that "imposes a new condition on the receipt" "at the moment" the new condition is adopted. *Id*. at 236-37. *Heinz*'s and *Battoni*'s reasoning leads to one of two conclusions here: either (1) the accrued benefits derived from the cash balance credits for each "plan year" are *not* "payable" as ERISA §204(b)(1)(B) requires "in any practical sense" because of the condition on their receipt, or (2) the imposition of "a new condition on the receipt" of early retirement benefits, namely, that an employee like Mr. Noerr must surrender the cash balance accruals, violates the protection in ERISA §204(g)(2) against an amendment that "has the effect of eliminating or reducing an early retirement benefit."

After recognizing in 2007 that "payment is implicated" in the 133⅓% rule, the District Court ultimately disregarded the requirement that the benefit accruals be "payable," finding no violation of the 133⅓% rule based on *Register*. The Court acknowledged it "is true" that *Register* does not address "the requirement that the benefits be payable," but reasoned that if the requirement was significant, *Register* would have discussed it. JA 18-19.

Battoni postdates *Register*, however, and the *Register* plaintiffs did not raise the requirement that the accruals be "payable."[19] Statutory requirements cannot be nullified "just because a party [in another suit] has not raised them." *United States v. Doherty*, 2009 U.S. Dist. LEXIS 94691, *6 (E.D.N.Y. 4/27/09). Disregarding the requirement that the accruals for each plan year be "payable" would nullify the central purpose of the accrual rule and ignore *Battoni*'s holding that counting benefits "hypothetically" is "nonsensical." 594 F.3d at 235. Clearly, a Congress that was so dedicated to ending "illusory" pension promises (H. Rep. 93-533, at 10, 1974 U.S.C.C.A.N. 4639, 4648) did not intend for the judiciary to count benefits that are not "payable" for purposes of compliance. Because AT&T has offered no evidence showing that benefits are "payable" in each "plan year," the District Court's decision should be reversed and summary judgment entered in Plaintiffs' favor on this claim.

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[19] *Register* rejected the argument that "zero" accruals during the wear-away period followed by a "resumption of accruals once the cash balance exceeds the frozen amount" violates the 133⅓% rule, based on the "plan amendment provision" in ERISA §204(b)(1)(B)(i) that "any amendment which is in effect for the current year shall be treated as in effect for all other plan years." *Id.* 477 F.3d at 71-72. Here, Plaintiffs have shown that no accruals are "payable" to them, with or without application of that special rule. Dkt. #454-1 at 26-28.

V. By reducing retirement benefits that commence before age 55 by an actuarially unreasonable 6% per year, AT&T violates the "anti-cutback" protection in ERISA §204(g)(2).

ERISA §204(g)(2) protects a participant's early retirement benefits from reduction by amendment of the plan. An amendment to a plan violates the statutory protection when it creates a new circumstance in which the value of the protected benefits will be lost or forfeited. Treas. Reg. 1.411(d)-4, Q&A-7. In *Heinz*, 541 U.S. at 741, the Court held that "an amendment expanding the categories of postretirement employment that triggers suspension of payment of early retirement benefits" was a violation of the anti-cutback rule. Imposing additional conditions on receipt of protected benefits violates ERISA §204(g) because "placing materially greater restrictions" on payment "reduces" an "accrued benefit" "just as surely" as a decrease in the amount. *Id*. at 744-45.

Here, AT&T reduced or eliminated the value of early retirement benefits promised to employees by imposing a 6% per year reduction for commencing benefits before age 55. Section 4.06(a)(ii) of the amended AT&T Plan document provides that ERISA-protected early retirement benefits will be reduced by "one half percent" per month, or 6% per year, for commencement before age 55. JA

1147.[20] Before this amendment, only participants with over 25 years of service were eligible to retire before age 55, and no participant was eligible to retire before age 50 unless he or she had 30 years of service (in which case only a 3% per year reduction was used). Since 1997, 19,446 participants have elected benefits before age 55 – 15,114 of whom were younger than age 52 and 11,239 of whom were not yet age 50. JA 1830.

Plaintiffs' actuarial expert opined that the reduction of an age 55 annuity by 6% per year for commencing benefits before age 55 exceeds a reasonable actuarial reduction. JA 1854-56. Among other indicia, he compared the 6% reduction with the reduction factors for annuities derived from the Cash Balance Accounts, which are 3.8% per year for the 10 years before age 55, and 2.65% per year for the next 10 years. *Id*. Plaintiffs' actuarial expert found that a 6% per year reduction means that a participant's age 55 benefit is reduced to 10% for commencement at age 40, whereas a reasonable actuarial reduction would leave between 39 and 55% of the benefit. JA 550. AT&T's former Vice-President for Compensation and Benefits conceded that a 6% reduction for commencing benefits at age 45 is actuarially unreasonable. JA 2365-66. In the summary judgment briefing below, AT&T

[20] If the participant has over 30 years of service, the reduction was only one quarter percent per month, or 3% per year. *Id*.

finally admitted that the Plan "sets forth … factors that can cause some participants to receive less than the actuarial equivalent of the Special Update if their benefits begin before age 55." Dkt.# 461 at 33.

The Court below excused the actuarially excessive 6% per year reduction because the Plan previously applied the same discount to the limited group of participants with between 25 and 30 years of service who retired between ages 50 and 55. *See* JA 131. That ruling is contrary to ERISA §204(g), *Heinz*, and Treas. Reg. 1.411(d)-4, Q&A-7. *Heinz* shows that an amendment "expanding" the application of an existing rule violates ERISA §204(g) "just as surely" as directly decreasing the monthly benefit amount. 541 U.S. at 741, 744.

The fact that participants were invited, but not required, to commence benefits before age 55 is not a defense to the unlawful reduction of the protected benefit. In *Battoni*, this Court rejected the argument that "merely restrict[ing] access to healthcare benefits ... does not decrease any accrued benefit." "[A]t the moment" the condition is adopted, the accrued benefit is "devalued" and reduced, "irrespective" of whether the condition is or is not "invoked" for a particular individual. 594 F.3d at 236-37; *see also Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 761-62 (7th Cir. 2003) (participants were "offered the alternative of taking a lump sum now in lieu of a pension later, but the lump sum

[was] not the prescribed actuarial equivalent of the pension"; participants "are, in short, being invited to sell their pension entitlement back to the company cheap, and that is a sale that ERISA prohibits"). Accordingly, the District Court should be reversed and summary judgment granted to Plaintiffs on this Claim.

Conclusion

For the foregoing reasons, Plaintiffs-Appellants request that this Court reverse the District Court's dismissal of Claims One, Two, Six and Seven and remand for trial, and reverse the dismissals of Claims Four, Five, Ten and Twelve, and direct that summary judgment be entered for Plaintiffs-Appellants on those Claims.

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Respectfully submitted,

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Combined Certifications

I, Stephen R. Bruce, hereby certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. According to the word-count feature of WordPerfect 14, the foregoing Brief of Plaintiffs-Appellants contains 13,899 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and therefore complies with the type-volume limitations in Fed. R. App. P. 32(a)(7)(B)(i). The Brief also complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally-spaced typeface using WordPerfect 14 in 14 point Times New Roman.

3. On this 3rd day of November, 2010, I have: (a) electronically filed and served the Brief and Appendix Volumes I to XI; (b) filed an original and nine copies of Plaintiffs-Appellants' Brief and Appendix Volume I and four copies of Appendix Volumes II to XI with the Clerk of the United States Court of Appeals for the Third Circuit; and (c) served one copy of Plaintiffs-Appellants' Brief with Appendix I, one copy of Appendix Volumes II to XI, and a CD with the entire Appendix in PDF format on Defendants-Appellees' lead counsel via FedEx next-day delivery addressed to David W. Carpenter, Sidley Austin LLP, One South Dearborn, Chicago, IL 60603 (tel. 312-853-7000).

4. The text of the paper copies of the brief being filed is identical to the version of the brief being electronically filed.

5. Prior to electronically filing Plaintiffs-Appellants' Brief and Appendix Volume I, it was scanned with AVG Anti-Virus version 9.0.864. No viruses were detected.

6. Pursuant to 28 U.S.C. §1746, I certify under penalty of perjury that the foregoing is true and correct.

s/ Stephen R. Bruce
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