PHILLIP C. ENGERS, WARREN J. MCFALL, DONALD G. NOERR, and GERALD SMIT, individually and on behalf of all others similarly situated, Plaintiffs,	: **UNITED STATES DISTRICT COURT** : **DISTRICT OF NEW JERSEY**
vs.	: C.A. No. 98-CV-3660 (JLL)
AT&T and AT&T MANAGEMENT PENSION PLAN, Defendants.	:

PLAINTIFFS' REPLY MEMORANDUM
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Introduction

This class action was brought to require AT&T to keep ERISA-protected promises of retirement benefits to its current and former employees. AT&T's 1998 cash balance conversion froze the future retirement benefits of older, longer service workers for as long as 13 years, reduced the rate of future benefit accruals across-the-board, eliminated undiscounted early retirement benefits, replacing them with much less favorable factors, and introduced benefit options that were "clearly less valuable" than the traditional annuity options. AT&T knew all the "bad parts" but disclosed none of them. To make matters worse, AT&T did not adopt the most unfavorable amendments until 3½ years later, which kept employees from inspecting the changes.

I. The two unfavorable amendments adopted on October 16, 2000 were not in the Board's April 1997 resolutions and therefore can "operate only prospectively"

The AT&T board of directors or its specified delegate has the sole authority to adopt changes to the Management Pension Plan. ¶11. Unauthorized persons, whether high-level executives or benefit consultants, cannot adopt changes. As the Supreme Court specifically observes: "There is [nothing] wrong with plan beneficiaries trying to prove that unfavorable plan amendments were not properly adopted and are thus invalid." *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 84 (1995).

A. The wear-away amendment provided that post-1997 pay and interest allocations are not actually payable

Plaintiffs have shown that the October 16, 2000 Plan document contains an unfavorable "wear-away" provision, which essentially provides that post-1997 pay and interest credits under cash balance will not actually be payable to older or longer-service participants. AT&T does not dispute that the new Plan formula has a wear-away. ¶¶39-40. AT&T also does not dispute that six prior updates to the pay window did not have a wear-away. ¶¶2, 40. The wear-away language which Section 4.06(a)(ii) "specifically includes" is not in the Board's April 1997 resolutions. AT&T's ¶ 151. After the Board

meeting, a delegate of the Board adopted amendments on November 5 and December 19, 1997. Section 4.06(a)(ii)'s language is not in any of those amendments. ¶¶17-21, 27.

It is also undisputed that it was impossible for participants to inspect the Plan language in Section 4.06(a)(ii) before October 16, 2000–3½ years after the April 1997 Board meeting. ¶26. In the absence of documents it would be impossible for participants to compare any "notices" that they might receive with the amendments themselves." *Smith v. National Credit*, 36 F.3d 1077, 1081 (11th Cir. 1994); accord *Hozier v. Midwest Fasteners*, 908 F.2d 1155, 1168 n.15 (3d Cir. 1990) (absence of amendment can "wreak especially substantial harm").

AT&T nevertheless argues that AT&T's Board should be considered to have adopted Section 4.06(a)(ii) in April 1997, *nunc pro tunc*: (1) because it is consistent with an oral presentation purportedly made to a Committee of the Board, D.Opp. 5-6, (2) because it follows by "necessary implication" from the resolutions that the Board adopted, D.Opp. 16-18 and 20 and see ¶47, or (3) because wear-away has been AT&T's "practice" since the start of the cash balance plan, D.Opp. 18.[1]

With respect to the first point, this Circuit's binding precedents establish that "Section 402(a)(1) of ERISA ... precludes oral or informal amendments." *Confer v. Custom Eng'g, 952* F.2d 41, 43 (3d Cir. 1990). See also *Hozier v. Midwest Fasteners*, 908 F.2d 1155, 1163 (3d Cir. 1990) ("ERISA precludes oral amendments"); *In re Unisys Corp. Retiree Med. Benefit Litig.*, 58 F.3d 896, 902 (3d Cir. 1995) ("written terms of the plan documents ... cannot be modified or superseded by the employer's oral undertakings"); *UAW v. Skinner Engine*, 188 F.3d 130, 146 (3d Cir. 1999) ("allowing parties to substitute oral testimony for contractual language, errs by depriving parties of the protection

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[1] AT&T makes other arguments which the Class addressed previously: AT&T's "exhaustion" defense (D.Opp. 8-9) is addressed in Plaintiffs' Opposition at 2-4; see also Plf. Counter-Statement of Facts ("C-S") ¶150. AT&T's argument that wear-away is a plan "interpretation" subject to an "arbitrary and capricious" standard of review (id. at 14-20), is addressed in Plf. Opposition at 6-7.

of a written contract"). *In re New Valley Corp.*, 89 F.3d 143, 148 (3d Cir. 1996), explains:

> ERISA § 402(a)(1) "essentially operates as a strong integration clause, statutorily inserted in every plan document covered by the fiduciary duty provisions. Like any common law integration clause, 1102(a)(1) makes the plan document the entire agreement of the parties and bars the introduction of parol evidence to vary or contradict the written terms."

In this instance, the Court is not actually faced with an oral amendment by AT&T's Board, but with a purported oral presentation to a committee of the Board. No one, including AT&T's Rule 30(b)(6) witness, contends that the Board was asked to "adopt" a wear-away amendment–orally or in writing. ¶¶41-45. An oral presentation may qualify as evidence that a future change is under "serious consideration" under *Fischer v. Philadelphia Electric*, 96 F.3d 1533, 1539 (3d Cir. 1996), but it cannot substitute for an amendment adopted under the Plan's procedures.

With respect to the second point, despite bombast from AT&T about its position being "unassailable" or "the only possible one," D.Opp. 15-20, there is no "necessary implication" of a wear-away from the Board's resolutions. AT&T's 30(b)(6) witness testified that "They [the Board] didn't say you could [use wear-away]. They didn't say you could not." ¶43. AT&T draws the Court's attention to language in one resolution providing that benefits will be "no less than" their levels on July 31, 1997 as evidence of the "necessary implication." D.Opp. 16-17 and 20. In ERISA parlance, this is called "anti-cutback" language. It is in practically every plan document to comply with ERISA §204(g), whether or not a plan has wear-away. For instance, anti-cutback language was in AT&T's 1996 Plan document where there was no wear-away. ¶47. Defendants' counsel spin out some other debating arguments about how wear-away could reasonably follow from what the Board approved. D.Opp.17-18. But as we discussed in our Opposition at p. 8, wear-away is not a "necessary implication" of cash balance conversions in general or of AT&T's conversion in particular.

AT&T next tries to support wear-away as a "consistent" administrative practice. D.Opp.18.

But the Third Circuit has held that practices do not substitute for adopted plan terms. *Hamilton v. Air Jamaica*, 945 F.2d 74, 77 (3d Cir. 1991); *Epright v. Envir. Resources Mgmt.*, 81 F.3d 335, 339 (3d Cir. 1996). This is particularly true where, as here, an unadopted "practice" can cause a participant to lose further benefits for up to 13 years.

B. The benefit option amendment provided that certain options will be based on the lower of a participant's annuity entitlements

The October 16, 2000 Plan document provides that a cash payment option and a joint and 100% survivor's option are to be based on the participant's cash balance annuity, not on the "greatest" annuity payable to the participant under the Plan.[2] Previous drafts of the Plan document dated 7/15/1999 and 9/2/1999 did not provide for this. Those drafts said these options would be based on the participant's highest annuity–whether computed under one of the prior pay-based formulas or the cash balance formula. ¶ 63. The Board's April 1997 resolutions did not provide that the new options could be based on the lower of a participant's annuity entitlements. Indeed, in its Counter-Statement of Facts, AT&T admits that this was a "degree of detail that would get beyond the board resolution." DRPF ¶ 58.

AT&T did not move for summary judgment on this claim and its opposition consists of a *non sequitur* that never addresses when the amendments in Section 4.06(b)(ii)(C) and (D) were adopted. D.Opp. 20-21. To illustrate what is at stake, Ed O'Brien's "normal retirement benefit" at age 65 was $1,623 per month. However, at age 50 when he separated from service with AT&T, his special update benefit was $999 compared to his cash balance annuity of $726. ¶230. Unbeknownst to Mr. O'Brien, the cash payment option that AT&T offered him was based on only the substantially lower $726 cash

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[2] At ¶ 59 of its own Statement of Facts, AT&T recognizes: "This [greatest of] only applied to the two forms of benefit available under the pre-amendment Plan, the single life annuity and the 50% Joint and Survivor Annuity."

balance annuity, and not his $999 special update annuity. ¶232.

The issue presented by the Fourth and Fifth Claims is <u>when</u> AT&T's Board or its delegate adopted this limitation. The Senior Vice-President who made the presentation to the CEBC testified that he did not think a rule like the one AT&T adopted in the October 2000 Plan document was even permissible. ¶57. Plaintiffs have shown that the first date on which this limitation appears in a duly-adopted document is October 16, 2000. ¶¶55-63. As with the wear-away, *Confer v. Confer Eng'g* holds that the amended rule can "operate only prospectively." 952 F.2d at 43. Mr. O'Brien and thousands of others retired <u>before</u> this limitation was adopted. A limitation that makes such a major difference in the amount of benefits that a participant receives is not a "detail" to be clarified later, but a substantive amendment that must be set out in writing and adopted before implementation.

II. AT&T did not give employees advance notice of a significant reduction in accrual rates

The Class' actuary, Claude Poulin, computed the rates of future benefit accruals under the cash balance formula and compared them with the 1.6% of pay rate of accruals under AT&T's prior pay-based formula. He found 15 - 35% reductions in the rates of future benefit accruals. AT&T spreadsheets show that AT&T computed its "accrual rates" using the same method as Mr. Poulin and came up with indistinguishable "rates." ¶¶69-77.

To shift the focus, AT&T challenges the method the Plaintiff Class' actuary uses to compute accrual rates. D.Opp. 23-24. But the method Mr. Poulin uses is the standard test for computing the "accrual rate" under ERISA's "133⅓%" accrual regulations, which have been in effect for over 25 years. See 26 C.F.R.1.411(b)-1(b)(2). This is the accrual method which AT&T selected to comply with ERISA as shown in its sworn 1995 and 2002 Applications for Determination to the Internal Revenue Service. As indicated, AT&T's internal calculations followed the same method and found the same rates as Mr. Poulin. ¶73. Because of the way cash balance plans are structured, this is,

moreover, the "only" accrual method that a cash balance plan "might satisfy." *Esden v. Bank of Boston*, 229 F.3d 154, 167 (2d Cir. 2000).

AT&T does not contend that the reductions would disappear if its "accrual rates" were computed under the other two accrual methods that ERISA authorizes. See 29 U.S.C. §§1054(b)(1)(A) and (C). Instead, AT&T contends that despite the statutory language, it should not have to compute "rates" of accrual at all, but should instead be able to use a modified "projected" approach, which it developed for this litigation. AT&T then takes another step and contends that not only should its approach be permitted, but the statute can only be interpreted in this way. D.Opp. 22.

We have reviewed the reasons why AT&T's projected approach is inconsistent with the statute in Plaintiffs' Opposition at 13-16. In brief, both the statute and the regulations require computation of the "rate" of accruals before the amendment and after the amendment. 29 U.S.C. §1054(h) and 26 C.F.R. 1.411(d)-6, Q&A 5(b) and 7. In 2003, a commentator asked the Treasury Department if it was possible to apply different kinds of comparisons instead of determining rates "annually." The Treasury Department rejected the suggestion, confirming that the rate of future benefit accrual is determined by looking at the "benefits accruing for a year." 68 Fed. Reg. 17279.[3] An example in the 1995 and 1998 regulations is also at odds with AT&T's proposed approach.[4]

AT&T's position is further undermined by the fact that AT&T wants to only selectively use "projected" benefits. Persevering with a declaration that Judge Politan reviewed and rejected, see Plf.

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[3] AT&T points to an exception in the 2003 regulations, D.Opp. 26, but the exception only applies to an amendment that combines an increase with a decrease in a manner that will not result in a reduction "under any conditions" for "any participant." 26 C.F.R. 54.4980F-1, Q&A-8(d).

[4] 26 C.F.R. 1.411(d)-6, Q&A 6(c). AT&T's effort to distinguish this example falls flat. AT&T asserts that a change in the fraction's numerator or denominator "automatically changes the amount of the plan's projected normal retirement benefit." D.Opp. 25. But this is not so. The normal retirement benefit in the example remains at 50% of final pay but the "rate" of accrual changes.

Opp. at 10-11, AT&T would not compare projected accruals under the most recent pay-base formula (the Special Update) with accruals under cash balance, but instead would compare cash balance with the formula in effect prior to the Special Update, which was lower for 97% of the participants. ¶118. *Koenig v. Intercontinental Life*, 880 F.S. 372, 374-5 (E.D. Pa. 1995), rejects an attempt to perform the 204(h) comparison using the formula in effect two amendments earlier.

Alternatively, AT&T argues that even if it did reduce benefits, it can satisfy the Section 204(h) notice requirement by distributing a summary of cash balance that does not disclose any reductions. D.Opp. 31-32. AT&T's position has an Orwellian quality best encapsulated by the heading for this section of its brief: "AT&T Distributed a "Summary" of Cash Balance, Though It Did Not Reduce the Rate of Future Benefit Accrual." Id. Plainly, the whole purpose of the 204(h) notice requirement is to require plan administrators to tell participants that future benefits are being reduced. The title of Section 204(h) is "notice of significant reduction in benefit accruals." *Normann v. Amphenol*, 956 F.Supp. 158, 165-66 (N.D.N.Y. 1997), shows that a notice that provides "no details" about a reduction is "not sufficient."

In addition to failing to disclose the 15 - 35% reductions in the future rates, AT&T failed to disclose two related reductions: (1) the five-month freeze in benefits for all employees between August 1, 1997 and December 31, 1997, and (2) the wear-away provision that was applied beginning on January 1, 1998 (although not adopted until 3½ years later). AT&T's opposition addresses these points, but the responses are not persuasive.

AT&T's opposition first denies that a freeze occurred, D.Opp. 30-31-even though its witnesses uniformly acknowledged that it did. ¶93. In the alternative, AT&T argues that if a freeze did occur, it disclosed it. D.Opp. 31. Not only is this contradictory, it simply is not so. Both the time line and the narrative in the April 1997 fact sheet–the only communication distributed before August

1, 1997–disclosed no freeze. The time line shows benefits under a prior formula ceasing on July 31st but starting up under the Special Update the next day. ¶¶92, 94. The narrative assures participants they will receive benefits based on their 1997 compensation. Plf. C-S ¶68. AT&T asserts nevertheless that "by [its] nature" the description of the Special Update as based on service to the end of 1996 indicated a freeze. D.Opp. 31. However, the last six updates in AT&T's pay-base were structured in the same way with no freezes. ¶¶2, 40 and Poulin Rpt Ex K.

With respect to the second point, AT&T first contends that no disclosure of the wear-away was required. D.Opp. 27. But Section 204(h) requires that understandable notice be given of the introduction of a "minimum benefit" or "offset" that "may affect the rate of future benefit accruals." 26 C.F.R. 1.411(d)-6, Q&A 6. The wear-away rule is incontrovertibly a "minimum benefit" provision. ¶ 80. Mr. Poulin's report as well as deposition testimony showed that this resulted in "no further accrual" during the wear-away period. ¶¶ 79, 81, 139-44. AT&T asserts that Plaintiffs offer "no support" that this part of the regulation applies (D.Opp. 27), but simply ignore the evidence.

A wear-away is like a "punch in the stomach."[5] It means that employees like Bonny Berger receive no additional benefits for up to 13 years of future employment. ¶¶113, 181-82, 210. AT&T argues that it disclosed this by telling employees about a "greatest of" rule. D.Opp. 32-33. But this only exemplifies the inadequacy of its communications. As the Class' communications expert explained, telling employees that they are going to receive the "greatest of" two benefits sounds fine. It does not communicate that they will receive nothing for up to 13 years. ¶116. AT&T next resorts to the boilerplate "anti-cutback" language as if it discloses that employees will earn no additional benefits for up to 13 years. D.Opp.32. However, a reference to an employee receiving "no less than"

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[5] *Associated Press*, Sept. 17, 2004 (quoting Professor Bruce Wolk, who is the co-author of *Pension and Employee Benefit Law*).

certain accruals obviously fails to communicate that the employee's benefits will no "more than" those accruals until many years later.

AT&T has not complied with the 204(h) notice requirements applicable to the wear-away for a second reason. A Section 204(h) notice must come <u>after</u> adoption of the amendment, which allows employees to compare the notice and the actual amendment before the reductions take effect. Because the wear-away amendment was not adopted until October 2000, plan participants were unable to see the amendment until nearly three years after this administrative practice began.

As a last resort, AT&T threatens to "wipe out" the 1997 improvements if the Court should rule that the 1998 reductions are invalid because of the absence of Section 204(h) notice. D.Opp.34. But Section 204(h) supplies its own remedy. It is the amendment that provides for a reduction that is invalid until the required notice is given. See Plf. Opp. at 16-17.

III. AT&T violated the SPD rules and its fiduciary duties by not disclosing the disadvantages and reductions caused by the cash balance conversion

The Third Circuit has a virtually unparalleled line of precedents on disclosure obligations. In *Burstein v. Allegheny*, 334 F.3d 365, 379 (3d Cir. 2003), the Third Circuit required disclosures in an SPD about a cash balance conversion to be sufficiently comprehensive and understandably written to reasonably apprise employees of the changes. *Bixler v. Central Pa. Teamsters*, 12 F.3d 1292, 1300-01 (3d Cir. 1993), and related decisions establish that a fiduciary breach occurs when fiduciaries know or should know the information participants need, but fail to disclose it. *Harte v. Bethlehem Steel*, 214 F.3d 446, 451 (3d Cir. 2000), holds that employees must receive "sufficient information ... to make well-informed employment and retirement decisions."

AT&T offers no response to the Third Circuit's precedents and in its opening brief made the incredible assertion that "there is simply no general fiduciary duty to keep beneficiaries informed."

DB 45. Contrary to the *Bixler* line of precedents, AT&T continues to dismiss the information that its employees repeatedly requested as "legally irrelevant." D.Opp. 35. AT&T also remarkably continues to argue that ERISA establishes no duty to disclose how benefits have been modified, D.Opp.37-38, even though the regulations clearly require disclosure of "material modifications," "reductions," "restrictions," "losses" and "disadvantages." 29 C.F.R. 2520.102-2(b), 2520.102-3(l), and 2520.104b-3(a). AT&T also never faces up to the point that it has not followed its prescription to "stand mute" about comparisons, but instead conveyed the impression that the cash balance "features" were comparable to the prior plan or improvements. ¶¶99, 111-12, 185. Once AT&T "elected ... to communicate" about comparisons, it had a duty to provide "complete and accurate information" "material" to participants' circumstances. *Meinhardt v. Unisys*, 74 F.3d 420, 442-43 (3d Cir. 1996).

AT&T admits to the duty to disclose "what is in the plan," DB 35 and D.Opp. 35, but it basically asks the Court to assume compliance and does not address the Class' points about how the SPD does not do this. See Plf. Opp. at 27. For example, like the SPD in *Burstein,* 334 F.3d at 375, AT&T's SPD "conveys the impression" that the cash balance pay and interest credits will be paid regardless of any other conditions, when they actually are not. ¶¶189-91 and 214. In a departure from its opening brief which flatly contended that there is no duty to disclose reductions and disadvantages, DB 32-36, AT&T's opposition now contends that it has specific excuses for not disclosing some of those features and even disclosed some of the others: First, AT&T maintains that because Section 204(h) covers reductions, AT&T should not have to disclose reductions in the SPD, too. D.Opp. 36. But the Treasury Department specifically rejects the idea that disclosure of a reduction in a 204(h) notice eliminates the duty to disclose in an SPD or summary of material modification. See, e.g., 60 Fed. Reg. 64320-21 (Dec. 15, 1995) and 26 C.F.R. 1.411(d)-6, Q&A 1(b). Moreover, as we have seen, AT&T believes that reductions do not actually have to be disclosed in a Section 204(h) notice,

so in practice its position would be that both obligations can be satisfied without disclosing the reductions at all.

Second, AT&T contends that it need not disclose restrictions on pay credits because Judge Bassler's October 17, 2002 opinion "held ... there are no restrictions on the payment of pay and interest credits." D.Opp. 37. Actually, Judge Bassler agreed that there were conditions on payment but held that AT&T did not violate ERISA's nonforfeitability requirements. Slip Op. at 18, 22. The *Unisys* and *Jordan* cases hold that compliance with one rule does not affect the duty to "communicate candidly" about material features of the Plan. *Unisys*, 57 F.3d at 1274; *Jordan*, 116 F.3d at 1012.

Third, AT&T suggests that it disclosed the modified early retirement factors through a table of "simplified monthly annuity factors." D.Opp. 38. However, that table does not disclose the early retirement factors: instead, AT&T's "simplified" table inextricably combines interest projections, annuity conversion factors, and early retirement reduction factors. There is no way for a participant to extract early retirement reduction factors to determine how much his or her benefits will be reduced for early retirement.[6]

AT&T labels it "speculation" that managers could have bargained if it gave them candid information about the material terms. D.Opp. 47. However, the Class has offered unusually concrete evidence that employees with additional information were able to make better benefit arrangements. Plf. Mem. 33-34. This is like *Genter v. Acme Scale*, 776 F.2d 1180, 1185-86 (3d Cir. 1985), where "a few" were given information about a "midstream method" of increasing insurance coverage and

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[6] AT&T tries to distinguish *Baker v. Lukens*, 793 F.2d 509, 511-2 (3d Cir. 1986), which requires disclosure of the elimination of early retirement factors, and the *Normann* and *Geddes* decisions from the Northern District of New York, which require that participants be given the modified early retirement factors and not an ambiguous description of them. AT&T suggests these decisions are distinguishable because they involve summaries of material modifications or Section 204(h) notices. However the standard of understandable communication is the same for each type of disclosure. See 29 C.F.R. 2520.102-2(a) and 2520.104b-3(a) and 26 C.F.R. 1.411(d)-6, Q&A 10.

were able to protect themselves.

AT&T contends that "detrimental reliance" must be shown to establish any SPD violation beyond *Burstein*'s "explicitly-bounded scope." D.Opp. 45. Plaintiffs have already shown that AT&T's nondisclosures are within *Burstein*'s holding, which is not bounded in the manner that AT&T suggests. Plf. Opp. 33-34. Even if detrimental reliance were somehow still required, the Third Circuit has held that a presumption of reliance applies to "nondisclosures and half-truths." *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 202-3 (3d Cir. 1990).[7] As AT&T opening memo recognized, the *Bixler* line of cases "presuppose[s]" reliance when nondisclosures are material. DB at 47 n.22.

Following *Burstein* and *Jordan v. Federal Express*, 116 F.3d at 1014, "extraordinary circumstances" are also not required to obtain appropriate equitable relief for an SPD violation or a breach of the fiduciary duty to disclose. As *Jordan* makes clear "materiality" is the test, 116 F.3d at 1016, i.e., the "likelihood" that the lack of information will affect the participant's ability to make "well-informed employment and retirement decisions." *Harte*, 214 F.3d at 451; see also *Unisys*, 57 F.3d at 1264 and 1266. Nondisclosures and confusing or potentially misleading disclosures about information that is required to be in an SPD or SMM are necessarily "material" because ERISA requires disclosure of material modifications and circumstances that cause losses or reductions in benefits that participants might otherwise reasonably expect. 29 U.S.C. § 1022(a) and (b) and 29 C.F.R. 2520.102-3(l) and 2520.104b-3(a). Moreover, if "extraordinary circumstances" were still required, the Third Circuit has held that "active concealment" and the absence of the plan document are extraordinary circumstances–both of which are established here. See Plf. Opp. at 31-32.[8]

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[7] AT&T miscites *Peachin v. Aetna*, 1996 WL 22968 (N.D. Ill. 1996). D.Opp. 45 n.17. *Peachin* addressesa misrepresentation claim, not "ERISA claims generally."

[8] Plaintiffs concede that there may be sufficient factual disputes about the extent of the distribution problems with the SPD that summary judgment cannot be granted either party on that

IV. AT&T's disclosures about the value of benefit options are clearly inadequate

Thousands of employees have elected less valuable options because of the well-established preference for cash lump sums when individuals are not told that other options have higher values. Bonny Berger and Ed O'Brien both gave up close to 40% of the value of their benefits without disclosure of what they were losing. ¶¶229-41. Internal memos within AT&T recognized that the cash balance options would be "clearly less valuable." ¶239. Rather than tell employees about the often huge differences in value, AT&T led employees in the other direction: It assured them that the options had the "same" "overall value." ¶¶242-44.

AT&T's opposition offers no response on this claim. Instead AT&T incredibly tries to excuse its failure to oppose by contending that the claim is not in the Complaint. D.Opp. 49. This must be based on some technical form of pleading standard from over half a century ago. The Class' claim that AT&T's disclosures about benefit options were inadequate has been in this case since the Third Amended Complaint. Judge Bassler recognized that the class is claiming that AT&T "induced employees to take an earlier pension for a lesser amount of money than they otherwise would" and that this is "in keeping with the notice and fiduciary duty claims contained ... in the viable portions of Plaintiffs' Third Amended Complaint." Oct. 17, 2002 Slip Op at 36 n.15. The Complaint alleges inadequate disclosures about the elimination of the early retirement benefit, the excessive 6% reduction for retirement before age 55, and comparisons between old and new benefits. DA 16-17, 25, ¶¶63-64, 66, 92-93. AT&T's position is all the more incredible because both parties took extensive discovery on this claim. AT&T's 30(b)(6) witness and other members of AT&T's litigation

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particular issue. The deposition testimony shows that receipt of the SPD was an "iffy'" proposition at the least. ¶¶223-5. Moreover, AT&T did not fulfill its duty to keep records of measures it took "to ensure actual receipt." 29 C.F.R.2520.104b-1(b). The Form 5500 Annual Return Report asked whether an SPD on any amendments "has ... been furnished." See http:/www.dol.gov/ebsa/pdf/1998-5500.pdf. 29 U.S.C. 1027 requires that records be kept to support the response.

control group were deposed on benefit options. See, e.g., ¶¶ 237, 239-40. In addition, both parties had their actuarial and communications experts prepare reports on this claim. ¶¶229-31, 236. Defendants took the depositions of ten class members concerning benefit option disclosures, including the two individuals who are used to illustrate these issues (Ms Berger and Mr. O'Brien). See, e.g., ¶¶232-33. Lastly, both AT&T's Statement of Facts and Counter-Statement of Facts address AT&T's communications about the benefit options at length. AT&T's ¶¶99-115, 118, 120-21, 130-45 and DRPF ¶¶229-52. Obviously, Defendants were unable to formulate an opposition and are simply trying to find a procedural excuse to prevent summary judgment from being entered against them.

V. AT&T has not opposed two legal theories based on facts undeniably in the Complaint

AT&T also failed to oppose two other claims (D.Opp. 49): First, that AT&T exacted an actuarially excessive reduction by reducing benefits by 6% per year for commencements before age 55, Plf Mem. at 23-24, and second, that AT&T's wear-away violates ERISA's 133⅓% accrual rule by making payment of accrual rates for "plan years" after 1997 contingent. Plf. Mem. at 18-19.

Both claims are founded on facts that are undeniably pled in the Third Amended Complaints. See ¶¶ 83 (on ERISA's 133⅓% rule) and 92-93 (on the 6% reduction). While Judge Bassler dismissed two related statutory claims, he expressly withheld judgment on these two legal theories because they were not specifically pled. Slip Op. at 17 n.9 and 36 n.15. Whether or not Judge Bassler could have gone ahead and recognized these legal theories in light of *Swierkiewicz v. Sorema*, 534 U.S. 506, 512 (2002), the Plaintiff Class obviously wants the claims adjudicated. Accordingly, Plaintiffs informed Judge Bassler in their motion for re-argument on November 6, 2002 that they intended to pursue the 133⅓% violation. Id. at 15. On October 3, 2003, Plaintiffs served an expert actuarial report on the elements of both claims. ¶¶144-47, 156-65. On October 27, 2003, Plaintiffs wrote Magistrate Judge Hedges in advance of a scheduling conference telling him that their motion

for summary judgment would include both theories, while concurrently moving for leave to clarify the complaint. Defendants asked Magistrate Judge Hedges to block Plaintiffs from pursuing these claims. Certif. in Support of Mot. for Leave to Amend, Exs. 2 & 4. Magistrate Judge Hedges denied that request and told Defendants' counsel that they should respond based on what is in the report. Id., Ex. 3. Subsequently, Defendants prepared an expert report on each of the issues. ¶¶150, 158.

AT&T is mistaken if it believes it is excusable to now decline to oppose a summary judgment motion based not on lack of notice, but on a hyper-technical position about pleading:

> "The formal issues framed by the pleadings are not controlling on a motion for summary judgment; the court may consider the issues presented by the other material offered by the parties on the motion."

Wright & Miller, *Federal Practice & Procedure*, §2721; see also §2722 (court "may evaluate the pleadings both in terms of their content at the time of their submission and as they might be amended at some later date"). In *Adams v. Gould*, 739 F.2d 858, 868-69 (3d Cir. 1984), Judge Becker recognized that amendments to complaints are "not unusual at the summary judgment stage of the case" and that "it would be unusual" not to allow leave to amend where an alternative legal theory "has been raised" based on facts already pled in the Complaint.

AT&T has been on notice of these facts for over three years and on notice of Plaintiffs' intention to move for summary judgment on these specific legal theories for over a year. If Defendants thought their actuarial expert's report offered a sufficient defense, they could have offered it. Instead, Defendants gamble on a procedural defense that is built on a "heightened pleading" standard which both the Federal Rules and the Supreme Court reject.

Conclusion

For the foregoing reasons, summary judgment should be granted to the members of the Plaintiff class.

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Respectfully submitted,

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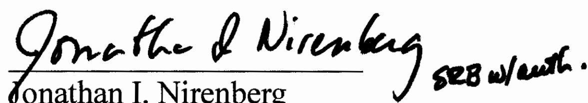

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