IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

CHARLES V. CALDER, *et al.*	
On behalf of themselves and on behalf of all others similarly situated,	
Plaintiffs,	**1:06-cv-01083**
v.	**Judge Gottschall**
AT&T PENSION BENEFIT PLAN and	
AT&T INC.,	
Defendants.	

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiffs, by and through their counsel, allege as follows:

NATURE OF THE ACTION

1. This is a class action under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001, *et seq.*

2. Plaintiffs are former management employees of AT&T Inc. ("AT&T" or the "Company," formerly known as SBC Communications Inc.), and participants in the AT&T Pension Benefit Plan (the "AT&T Plan" or "Plan," formerly known) (a/k/a AT&T Pension Benefit Plan), which AT&T both sponsors and administers.

3. The Plan is the Company's main defined benefit plan and one of the largest private pension plans in the country, with approximately $30 billion in assets and covering

some 350,000 current and former AT&T employees around the country. *See* Plan 2004 IRS Form 5500. The Plan has a significant concentration of participants who reside and earn or earned pension benefits in the Northern District of Illinois.

4. These Plan participants are current or former employees of the AT&T "controlled group" of corporations, namely, subsidiaries or affiliates that are owned at least eighty percent (80%), directly or indirectly, by AT&T. Several of these subsidiaries or affiliates under the common control of AT&T are headquartered in this District, including AT&T Teleholdings, Inc., the former Ameritech Corporation which does business as "AT&T Midwest," and one of AT&T Teleholding, Inc's operating companies, the former Illinois Bell Telephone Company now doing business as "AT&T Illinois." These subsidiaries or affiliates are "Participating Employers" in the AT&T Plan and employ thousands of residents of this District who also earn or earned their benefits under the Plan in this District.

5. Plaintiffs include Plaintiff David R. Koenig who lived and worked in this District for a Participating Employer (SBC Services, Inc., now known as AT&T Services, Inc.) and earned and received his Plan benefits here – except for the Plan benefit he would have received in the District had Defendants not calculated his benefit according to a purported amendment to the Plan that never had any legal force or effect and never became part of the Plan.

6. In this action, Plaintiffs Koening, Calder and Vaughn-Smith seek, among other things, an order, on behalf of themselves and all others similarly situated (the proposed "Class," defined below), declaring that a series of purported amendments to the Plan, known as the "actual base pay" or "actual pay" amendments, that had the effect of substantially

reducing their future rate of benefit accrual, never became effective as to them or other members of the proposed Class (with limited exceptions set forth below). They also seek an order declaring that Class members are entitled to have their benefits calculated and paid according to the Plan's lawfully effective, unamended terms, without regard to the ineffective, purported actual base pay amendments. They also seek corresponding injunctive relief directing that the Plan now be administered in that regard according to its unamended terms and that their benefits and those of the Class be recalculated and paid according to the undisputed, pre-existing way the Plan and the Administrator calculated all other similarly situated participants benefits prior to Defendants' assertion that the Plan had been effectively amended by the actual base pay amendments. They request that the Court retain jurisdiction over this matter following the issuance of the foregoing relief while the Plan and its Administrator perform this ministerial act -- which includes the ministerial act of now paying participants, with interest, the benefits they are indisputably due, as even Defendants read, construed, interpreted and applied the Plan prior to the ineffective adoption of actual base pay amendments.

BACKGROUND

7. The actual base pay amendments were five separate but very similar enactments that each would have significantly reduced the rate of affected participants' future benefit accrual under both the Plan's traditional and "cash balance" formulas.

8. The amendments were adopted on five different dates between 1997 and 2000, to be effective on six different dates between 1998 and 2000. The amendments were commonly referred to as the "actual base pay" or "actual pay" amendments because, among

other things, they were meant to change the way an employee's "Pension Compensation" (defined below) was calculated. Prior to the amendments, a participant's pension compensation accrued based on the *rate* at which he or she was paid, as opposed to the amount of pay the participant actually earned. Thus, if a participant missed work due to a short-term disability or worked on a part-time basis, and hence did not earn an amount equivalent to his or her designated salary rate, the participant would nevertheless accrue pension compensation as if he or she had done so. The actual base pay amendments sought to substitute "actual base pay" – the pay the employee actually earned and received – in place of *rate* of pay (*i.e.*, whether the employee actually earned and received that pay or not). The amendments would have also significantly reduced the rate of future benefit accruals by excluding "differentials" from the calculation of participant's pension compensation.[1]

9. The reason why the amendments, with limited exceptions set forth below, never became effective is because the Plan's administrator failed to satisfy the strict requirements of ERISA § 204(h), 29 U.S.C. § 1054(h) which, at all times relevant to this suit, provided that:

> 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.

[1] As discussed below, differentials are special compensation that an employee earned for work performed in a temporary job with a classification higher than the employee's immediately preceding job classification or on tours of duty where additional compensation was appropriate, in the judgment of the employee's "Participating Company," *i.e.*, AT&T-related entity participating in the Plan. Excluding such payments from the calculation of participants' benefits would thus also significantly reduce the future benefit accruals of affected participants.

Former ERISA § 204(h), 29 U.S.C. § 1054(h).[2]

10. To be valid, a § 204(h) notice must in timely fashion either "set [] forth the plan amendment" itself or must contain an accurate summary of it "written in a manner calculated to be understood by the average plan participant." *See* 26 C.F.C. ("Treas. Reg.") § 1.411(d)-6, Q&A 10.

11. Here, however, the Plan administrator either gave no notice whatsoever to affected participants or when it did it failed to set forth the amendment's terms or (with limited exceptions) provide in timely fashion an accurate summary of the amendment written in a manner calculated to be understood by the average plan participant. As a result, the Plan amendments in question did not become effective as to the affected participants who received no notice or who received inadequate notice, and cannot be applied against them. *See* Treas. Reg. § 1.411(d)-6, Q&A 13.

12. The chart below summarizes the actual base pay amendments, their adoption and effective dates, the dates on which notice, if any, was given, and the effectiveness of the amendments, if any, as to the affected participants. ("GB" = Grandfathered Benefit; "CB" = Cash Balance Benefit, as explained more fully below).

[2] Congress modified ERISA § 204(h) in 2001. The provisions of the modified version of the statute do not apply to the time period or events at issue here.

Participating Companies	Adoption Date	Effective Date	Notice Date	Amendment Valid as to Affected Participants?
SBMS SBWI WBCLP	11/17/97	1/1/98	None	No
PTG PB Directory PB Extras PB I Services PB Internet PB Mobile PT Elec. Pub. S PT Sh. Services PT Finance PBAHoldings SBC Interactive WBCLP	1/12/99	1/1/99	None	No
Nevada Bell Pacific Bell California Celcom	4/13/99	5/1/99	4/9/99	No
SBC-MSI	4/13/99	7/1/99	6/14/99	Not to exclude an entire pay period from the computation of Pension Compensation for the 5 year averaging period
SBC Asset M SBC MSI USA SBC Int'l SBC Int'l-MS SWB Internet SWBell CS SB Telecomm SBC Tech R SWB Video SWBY SB Advertising SB Adv. Group Worldwide Dir. SB Messaging SBC Operations SWBT	4/13/99	7/1/99	None	No

SBC Asset M SBC MSI USA SBC Int'l SBC Int'l-MS SWB Internet SW Bell CS SB Telecomm SBC Tech R SWB Video SWBY SB Advertising SB Adv. Group Worldwide Dir. SB Messaging SBC Operations SWBT	11/12/99	12/1/99	No notice for GB changes Notice as to CB changes given 11/15/99	Not as to any changes to the Grandfathered Benefit and not to exclude an entire pay period from the computation of Pension Compensation for the 5 year averaging period
All Partic. Cos. incl. SNET Cos.	1/4/00	1/100	None	No

13. Plaintiffs have each been denied thousands of dollars of pension benefits which they are owed under the terms of the (unamended) Plan based solely on Defendants' assertion that such denials were required by the actual base pay amendments. Defendants' refusal to acknowledge to participants its ERISA § 204(h) violations and failure to administer the Plan in accordance with its lawful terms necessitates the filing of this suit.

14. Plaintiffs Calder and Vaughn-Smith pursued and exhausted such administrative remedies as were available to them under the Plan. They repeatedly argued that the terms of the Plan required Defendants pay them the exact benefits sought here. Defendants did not dispute and essentially agreed that Plaintiffs Calder and Vaughn-Smith were entitled to the payment of the benefits they seek here under the terms of the Plan assuming that the actual base pay amendments were ineffectively adopted. Plaintiffs Calder and Vaughan-Smith indicated in the claims and appeals process that they received no notice of any plan amendment that would justify or explain why their benefit under the plan was

calculated without including pay all pay earned in 1999 in the calculation of their Average Annual Compensation under the terms of the Plan. This was more than sufficient to allow the Plan to determine in the claims and appeals process that the benefits owed to Plaintiffs and the class should have been calculated without regard to the actual base pay amendments, or at least without omitting pay they earned in 1999.

15. Even before receiving these claims and appeals the Plan was aware that no applicable notice had been provided to participants such as Plaintiff Calder and that an insufficient notice had been provided to participants such as Vaughan-Smith. Accordingly, the Plan did not need these facts to be brought to its attention in the claims and appeals process in order to conclude on appeal that these Plaintiffs' benefit calculations, and the benefit calculations of all similarly situated participants, should have been made according to the terms of the unamended Plan. Rather, they responded that Plaintiffs Calder and Vaughn-Smith had failed to consider the actual base pay amendments. If during the claims process Defendants failed to consider the evidence Plaintiffs put before them, *i.e.*, that Plaintiffs had never received any (or any sufficient) notice of any amendments to the Plan such as would deprive them of the benefits they sought and seek here, Defendants only have themselves to blame. That is no reason, if and when the purported amendments are declared invalid, to put Plaintiffs and the Class through the time and expense of asking Defendants to recalculate their benefits in a way that Defendants did not dispute Defendants would be required to do in the absence of validly adopted actual base pay amendments.

16. Moreover, all Plaintiffs (Calder, Vaughn-Smith and Koenig) dispute that exhaustion was required under the circumstances here because the violations complained of

here are statutory in nature, the Plan's claims process did not and does not provide for voiding Plan amendments, and exhausting that process was otherwise futile.

17. Plaintiffs further contend that had Plaintiff Koenig challenged the calculation of his benefit on the grounds asserted herein when in 2001 he received his distribution of his benefit while residing in this District, no further benefits would have been paid to him, just as no further benefits had been paid to Plaintiffs Calder and Vaughn-Smith, making exhaustion by Plaintiff Koenig futile.

SUBJECT MATTER JURISDICTION

18. This Court has subject matter jurisdiction over this action by virtue of 28 U.S.C. § 1331 because this is a civil action arising under the laws of the United States. Specifically, this action is brought under ERISA § 502(a), 29 U.S.C. § 1132(a).

PERSONAL JURISDICTION

19. This Court has personal jurisdiction over Defendants AT&T and the AT&T Plan because they transact business in, and have significant contacts with, this District, and because ERISA provides for nationwide service of process. *See* ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

VENUE

20. Under ERISA, an action "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found." ERISA § 502(e), 29 U.S.C. § 1132(e).

21. Venue here is proper here on three of the four bases provided by the statute: (1) where the breach took place; (2) where a defendant resides; and/or (3) where a defendant may be found.

22. First, as to Plaintiff Koenig and a significant number of proposed Class members, this District is "where the breach took place" with respect to the ERISA § 204(h) violations and failure to pay benefits due occurred in this District because Plan participants such as Mr. Koenig were paid, while residing in this District, an insufficient benefit as a direct result of those violations.

23. Where a plaintiff claims that a violation of ERISA and a resultant failure to pay a benefit breaches the terms of an ERISA plan, the alleged breach is deemed, for purposes of venue under § 1132(e)(2), to have occurred in the place where the plaintiff receives his or her benefits. It was in this District that Plan benefits that were to have been paid to Plaintiff Koenig and a significant number of other Class members were not paid because the Company administered the Plan according to the terms of an invalid plan amendment and because the Plan calculated his benefit by reference to that same invalid amendment. This District, where performance was due, is thus one place "where the breach took place."

24. Plaintiff Koenig worked and earned pension benefits under the Plan in this District (in Hoffman Estates, Illinois) from 2000 to 2002 as an employee of one of the Plan's "Participating Companies." He was a resident of this District on or about June 29, 2001 when the Plan and/or the Company sent him what purported to be a full distribution of his Plan benefit via two separate checks mailed to him at his home address (in Carol Stream, Illinois)

in this District.[3] It was as a direct result of the alleged violations of ERISA § 204(h) and failure to follow the lawfully adopted and effective terms of Plan that Plaintiff Koenig and numerous other Class members were not paid, in this District, all of the benefits that they were (and are) owed.[4]

25. Second, AT&T and the AT&T Plan "may be found" in this District within the meaning of ERISA § 502(e), 29 U.S.C. § 1132(e).

26. In order to determine where a defendant is "found" for venue purposes, the personal jurisdiction "minimum contacts" principles derived from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny are applied to the defendant's contacts with the forum district. Personal jurisdiction can be general or specific. A court has general jurisdiction if the defendant is domiciled in the forum or has continuous and systematic general business contacts with the forum. A court has specific jurisdiction provided that the defendant has sufficient minimum contacts with the forum and the litigation is related to or arises out of those specific minimum contacts.

27. The Court may exercise specific jurisdiction over Defendant AT&T and/or Defendant Plan because this action arises out of and relates to both Defendants' contacts with this District.

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[3] Both checks were drawn from an "SBC Communications Inc." account with Bankers Trust in Nashville, Tennessee, although the check stub also had a return phone number for the "SBC Pension Plan Service Center." (For the purposes of this suit, Plaintiffs allege that the payments were made to Plaintiff Koenig by both Defendants). One of the checks represented a gross distribution, payable directly to Plaintiff Koenig. The second check was made out to Salomon Smith Barney ("SSB") for the benefit of Plaintiff Koenig who subsequently forwarded it to SSB in Chicago to be deposited in an individual retirement account.

[4] Plaintiff Koenig does not currently reside in this District. He does, however, work for an employer in this District and he comes into the District on a regular basis. Venue here is thus not only proper but convenient for him. Plaintiff Koenig may return to reside in this District in the future if promoted to a more senior position by his employer.

28. The action arises out of AT&T's failure to satisfy the requirements of ERISA § 204(h) in its communications concerning the actual base pay amendments with participants residing or earning pension benefits in this District (among other districts) and AT&T's subsequent application of those amendments to residents of this District to reduce their future rate of benefit accruals notwithstanding that failure. AT&T, as Plan Administrator, either gave no notice whatsoever of the actual base pay amendments to affected participants residing or earning pension benefits in this District or when it did it failed to set forth the amendment's terms or (with limited exceptions) provide in timely fashion an accurate summary of the amendment written in a manner calculated to be understood by the average plan participant. As a result, the Court may exercise specific jurisdiction over AT&T and hence AT&T "may be found" here for venue purposes.

29. The action also arises out of the AT&T Plan's calculation of benefits under the terms of a plan amendment that was void as a result of AT&T's failure to satisfy ERISA § 204(h) and the Plan's and AT&T's subsequent underpayment of benefits to participants in this District, who had earned some or all of their pension benefits here and/or who lived here at the time when they received those legally insufficient benefit payments. As a result, the Court may exercise specific jurisdiction over the AT&T Plan and hence the AT&T Plan "may be found" here for venue purposes.

30. This Court may also exercise general jurisdiction over Defendant AT&T and/or Defendant Plan because both have continuous and systematic general business contacts with this District.

31. Defendant AT&T is a *Fortune* 50 company. Through its subsidiaries and affiliates, AT&T is the largest U.S. provider of broadband DSL and long distance and local voice services and serves millions of customers, with one of its greatest concentrations in Illinois, including northern Illinois and the territory comprising this District. *See* http://att.sbc.com/gen/investor-relations?pid=5711; 2006 Form 10-K (both making similar statements). Through its subsidiaries and affiliates, AT&T employs approximately 185,000 people including many thousands of people residing and/or working for AT&T "Participating Employers" in this District.

32. Defendant AT&T is a holding company incorporated in Delaware with headquarters in Texas. It nevertheless has continuous and systematic general business contacts with this District both directly and indirectly through its controlled group of affiliates and subsidiaries operating under the "AT&T" brand at AT&T's direction and control, often without distinguishing or clearly distinguishing between AT&T (the holding company) and its subsidiaries and affiliates.

33. For example, in this District, Defendant AT&T has continuous and systematic general business contacts through subsidiaries and affiliates including AT&T Teleholdings, Inc., the former Ameritech Corporation which does business not under its legal name but under the d/b/a of "AT&T Midwest," and one of its operating companies, the former Illinois Bell Telephone Company now doing business as "AT&T Illinois," headquartered or otherwise found in this District.[5]

[5] Several Ameritech subsidiaries remain legally named "Ameritech," such as Ameritech Advanced Services, however, they too do business under the AT&T name as "AT&T Advanced Solutions."

34. Other subsidiaries or affiliates with continuous and systematic contacts with this District include AT&T Capital Services (based in Hoffman Estates) and SBC Business Communication Services (based in Chicago).

35. Whether AT&T makes clear distinction or not between it and its subsidiaries and affiliates operating in this District, the Company has continuous and systematic general business contacts with this District, including through its highly interactive website, www.att.com, and its extensive marketing efforts through and on behalf of its controlled group of subsidiaries and affiliates.

36. Defendant AT&T in other ways has continuous and systematic general business contacts with this District. For example, the Company sponsors, administers and is a named fiduciary of the 350,000 participant, $30 billion AT&T Plan (which also "may be found" here, as discussed below) and also sponsors, administers and is a named fiduciary of numerous other employee benefit plans, such as the AT&T Savings Plan (which also "may be found" here). In its role as sponsor and/or administrator and/or named fiduciary of these plans, AT&T interacts and transacts plan-related business with participants who work and reside in this District; distributes plan-related information and other written and electronic plan-related materials to participants who work and reside in this District; and conducts other plan-related business in this District on a continuous and systematic basis. For example, the Plan's actuary, CCA Strategies LLC (until recently known as "Chicago Consulting Actuaries LLC") is located in this District and performs on a continuous and systematic basis a substantial amount of work for the Plan and/or the Company at the direction of the Company in this District.

37. For some or all these reasons, the Court may exercise general jurisdiction over AT&T and hence AT&T "may be found" here for venue purposes.

38. The Court also may exercise general jurisdiction over the AT&T Plan and hence the AT&T Plan "may be found" here for venue purposes because it also has continuous and systematic general business contacts with this District directly and indirectly through its sponsor AT&T and/or through AT&T's subsidiaries and affiliates as Participating Employers.

39. For example, many thousands of Plan participants who reside or resided in this District during the relevant time such as Plaintiff Koenig earn or earned pension benefits under the Plan while working for Participating Employers in this District. Without more, the existence of a large number of Plan participants residing in this District and earning pension benefits under the Plan means that the Plan "may be found" here for venue purposes.

40. Additionally, many thousands of Plan participants who reside or resided in this District during the relevant time such as Plaintiff Koenig received or receive their pension benefits in this District. Without more, the existence of a large number of Plan participants residing in this District and receiving pension benefits under the Plan in this District means that the Plan "may be found" here for venue purposes.

41. In addition to accruing and paying participant benefits in this District, the Plan may also be "found" in this District because it has continuous and systematic general business contacts with this District in many other ways. For example, the Plan transacts other Plan business in the District with District residents on a daily basis through the use of the U.S. mails and wires (including a number of toll-free telephone numbers and faxes); the Internet including email and a highly interactive, password-protected Plan website

(http://access.att.com) that comes into this District on a continuous basis; and one or more highly interactive, password-protected Plan-related intranets (for example, the SBC Employee Benefit Web site (http://intranet.sbc.com/benefits/ under the Pension section) that also come or came during the relevant time into this District on a continuous basis.

42. By these and other means, the Plan has and had during the relevant time continuous and systematic contacts with the District and District residents who are participants in the Plan, including but not limited to the following continuous and systematic contacts:

- Communications (many interactive) with participants about their estimated pension benefits; about their rights, options and obligations under the Plan; about amendments (or purported amendments) to the Plan; and about the funding, financial condition and fiduciary administration of the Plan, such as was had with Plaintiff Koenig in this District.
- Solicitation of distribution elections and beneficiary designations from participants, such as was sought and obtained from Plaintiff Koenig in this District; and
- Offering increased Plan benefits in exchange for residents' agreements to retire early from the employ of a Participant Employers, such as in connection with the November 2000 Enhanced Pension and Retirement program ("EPR") which Plaintiff Koenig was offered and accepted while living and working in this District.

43. Third, venue is also proper here because AT&T and/or the Plan "reside[]" here within the meaning of ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) , by way of 28 U.S.C. § 1391(c) and Fed. R. Civ. P. 4(k)(1)(D).

44. Under 28 U.S.C. § 1391(c), the general venue statute's definition of corporate residence, a corporation such as AT&T and an unincorporated association or entity such as the Plan reside for venue purposes wherever they are subject to personal jurisdiction. *See* 28 U.S.C. § 1391(c).[6]

45. Under Fed. R. Civ. P. 4(k)(1)(D), service of a summons is effective to establish jurisdiction over the person of a defendant anywhere in the country when authorized by a federal statute. *See* Fed. R. Civ. P. 4(k)(1)(D). ERISA contains such a "nationwide service of process" provision. *See* ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

46. Here, summons were properly served on both defendants within the United States. *See* Docs. 7-8. Moreover, tested on a national contacts basis, both Defendant AT&T, which is a domestic corporation, and Defendant Plan, a domestic employee benefit plan and trust, have "minimum contacts" with the United States as a whole. Accordingly, both Defendants "reside[]" here for the purposes of ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

THE PARTIES

47. Plaintiff Charles V. Calder is a former employee of one or more subsidiaries of the Company who worked during the relevant time for Southwestern Bell Telephone Co. ("SWBT"). Mr. Calder participated in the Plan during his period of employment with the Company and remains a participant, as defined in ERISA § 3(7), 29 U.S.C. §1002(7), in the Plan because although he received benefits from the Plan, it owes him additional benefits that it has not yet paid him, as set forth herein.

[6] Under the principles of controlling Supreme Court and Seventh Circuit authorities, 28 U.S.C. § 1391(c) supplements the special ERISA venue provision, ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), which provides no definition of "resides" and contains no indication that its undefined use of the term "resides" was intended to be the exclusive source of that term's meaning.

48. Plaintiff Leslie J. Vaughn-Smith is a former employee of one or more subsidiaries of the Company who worked during the relevant time for SBC Management Services, Inc. ("SBC-MSI"). Ms. Vaughn-Smith participated in the Plan during her period of employment with the Company and remains a participant, as defined in ERISA § 3(7), 29 U.S.C. §1002(7), in the Plan because although he received benefits from the Plan, it owes her additional benefits that it has not yet paid her, as set forth herein.

49. Plaintiff David R. Koenig is a former employee of one or more subsidiaries of the Company who worked during the relevant time for SBC Services, Inc., now known as AT&T Services, Inc. Mr. Koenig participated in the Plan during his period of employment with the Company and remains a participant, as defined in ERISA § 3(7), 29 U.S.C. §1002(7), in the Plan because although he received benefits from the Plan, it owes him additional benefits that it has not yet paid him, as set forth herein.

50. Defendant AT&T Pension Benefit Plan (EIN 43-1301883; Plan Number 006) is and was at all relevant times an "employee pension benefit plan," and more specifically a "defined benefit plan," within the meaning of ERISA §§ 3(2)(A) and 3(35), 29 U.S.C. §§ 1002(2)(A) and 1002(35). Reference to the Plan also includes, depending on context, reference to its Master Trust, formally known as the AT&T Master Pension Trust. As of the December 31, 2004, the following four plans sponsored and administered by AT&T merged with and into the AT&T Pension Benefit Plan: the Ameritech Management Pension Plan (formerly EIN 36-3251481; Plan Number 001); Ameritech Pension Plan (formerly EIN 36-3251481; Plan Number 002); the SNET Pension Plan (formerly EIN 06-0542646; Plan

Number 005); and the Pacific Telesis Group Pension Plan (formerly EIN 94-2919931; Plan Number 002).

51. AT&T is the sponsor of the Plan, the Plan's Plan Administrator and a named fiduciary of the Plan, within the meaning of ERISA §§ 3(16)(A)-(B), 402(a), 29 U.S.C. §§ 1002(16)(A)-(B), 1102(a). *See, e.g.*, Plan § 3.1.1(a).[7] AT&T is sued in all of these capacities.

52. "AT&T" also refers, depending on context, to all "AT&T Participating Companies" and "Controlled Group Members" as those terms are used in the Plan and the Plan's IRS filings, as well as all predecessors, subsidiaries, affiliates, and subsidiaries and affiliates of all predecessors.

53. One of the principal means by which AT&T operates and/or administers the Plan is through its subsidiary AT&T Services, Inc., Plaintiff Koenig's former employer. AT&T Services, Inc. has offices and personnel in this District. AT&T Services, Inc. performs services with respect to the Plan in this District.

54. Throughout the relevant time period and until April 1, 2006, AT&T used Affiliated Computer Services, Inc. or one of its predecessors ("ACS") as the Plan's third-party administrator. All or almost all of ACS's services with respect to the Plan occurred in New Jersey. Since April 1, 2006, the Plan's third-party administrator has been Fidelity Investments, which performs all or almost all of its services in connection with the Plan in Ohio.

[7] All citations to the "Plan" are to the plan instrument governing the Plan as restated through February 1, 1995 and as amended thereafter (through January 31, 2002). A subsequent version of the Plan, restated January 31, 2002, is also referenced. Both versions of the Plan, as amended, are incorporated herein by reference in their entirety, along with all documents and instruments governing the Plan and subsequent amendments.

55. All of the Plan's actuarial work is performed in this District. As noted, the Plan's actuary, CCA Strategies LLC (until recently known as "Chicago Consulting Actuaries LLC") is located in this District and performs on a continuous and systematic basis a substantial amount of work for the Plan and/or the Company at the direction of the Company.

STATEMENT OF FACTS

56. To understand the actual base pay amendments and their impact on participants' benefits, it is necessary to understand the Plan's benefit formulas and the way those formulas have changed over the past 10 years or so.

A. Pre-June 1997: The Traditional Pension Formula.

57. The Plan is a successor in interest to a number of defined benefit pension plans formerly maintained by Bell telephone companies. Plan, § 1.2. The Plan's immediate predecessor was the Southwestern Bell Corporation Management Pension Plan. That plan was amended and restated as of May 1, 1992, to become the SBC Pension Benefit Plan – Nonbargained Program (also referred to as the "SBC Plan" or the "Plan"). Thereafter the Plan was Restated effective February 1, 1995, amended at various times thereafter, and then again Restated through January 31, 2002, and also subsequently amended. *See supra* note 7.

58. Prior to June 1, 1997, the Plan calculated benefits by reference to a traditional, five-year final average pay pension formula. The Plan promised any participant who terminated employment on or before June 1, 1997, and certain other specified participants, a monthly benefit payable at normal retirement age (age 65) equal to 1.6% of the participant's "Adjusted Career Income" (defined below), divided by twelve. Plan § 4.2.1(a); *see also id.*, § 4.5.1(a).

59. For example, a participant with 25 years of Pension Calculation Service as defined in Appendix A to the 1995 Plan and whose Average Annual Compensation (defined below) was $70,000 would be entitled to a monthly benefit commencing at age 65 equal to approximately 1.6% *times* (25 x $70,000) ÷ 12 = $2,333.33 per month, or $28,000 per year.

60. "Adjusted Career Income" meant the participant's "Average Annual Compensation" *times* "Pension Calculation Service" through the end of the applicable five year averaging period, *plus* the participant's Pension Compensation earned after the end of the applicable averaging period. Plan, § 4.2.1(b)(1).

61. "Pension Calculation Service" meant the participant's continuous employment with one or more Participating Companies.

62. "Average Annual Compensation" meant the average of the participant's "Pension Compensation" during the applicable averaging period, divided by five years. Plan § 4.2.1(b)(3); *see also id.* § 4.2.2(b) (special rules for determining average annual compensation).

63. "Pension Compensation" included the participant's "Basic Compensation," "Differentials," any applicable group incentive compensation, nondiscretionary incentive compensation, and Bellcore buyout and rotational compensation. *Id.*, Appendix A, § 2.66; *see also id.*, § 2.1 (incorporating definitions from Appendix A into the Plan).

64. "Differentials" meant the amount of compensation paid to a participant over a specified period in addition to his Basic Compensation either for the performance of work in a temporary job classification that is higher than the participant's preceding regular job classification, or for the performance of work during a tour of duty which in the judgment of

the participant's Participating Company the participant would not accept in the absence of such additional compensation, excluding overtime. *Id.*, App. A., § 2.26.

65. "Basic Compensation" meant the amount of the participant's compensation "calculated on the basis of his Basic Rate of Pay, as determined by his Participating Company, over a specified period . . . [excluding certain deferred compensation]." *Id.*, App. A, § 2.8.

66. "Basic Rate of Pay" meant "the greater of the following, as determined by a Participant's Participating Company":

> a) a Participant's pay rate in effect on the first day of the calendar month, or
>
> b) the Participant's pay rate in effect on either the date the Participant terminates employment or the last day of the calendar month, whichever occurs first.

Id., App. A, § 2.9; *see also id.*, App. A, § 2.3 (defining "Annual Basic Rate of Pay" as meaning an employee's "specific, annualized, fixed wage rate").

67. When a participant's "Basic Rate of Pay" was used to calculate his "Basic Compensation . . . over a specified period" this meant that the participant would get credit for their full-time base pay rate whether the participant worked full-time or not during that period. Thus, if the participant's full-time base pay "over a specified period" -- for example, per month -- was $3,000 but the participant was off work for ½ the month without pay, the participant's basic rate of pay would remain $3,000.

B. <u>Post-June 1997: The Cash Balance Formula and the Grandfathered Benefit.</u>

68. The Company converted the basic benefit formula under the Plan from the traditional pension formula described above to a "cash balance" formula, effective June 1,

1997. *See* 2002 Plan, § 4.2.1(a). The cash balance formula was in effect from June 1997 until January 2005 when it was frozen.[8]

69. Under the cash balance formula, effective June 1997 the Plan established a hypothetical account in each participant's name.[9] This "Opening Balance" was thereafter increased each pay period by "Basic Benefit Credits" in an amount equal to 5% of each participant's "CB Compensation." Amendment to the 1995 Plan adopted March 28, 1997; 2002 Plan, §§ 4.2.1(a)(2)(ii)-(a)(3). "CB Compensation" meant "Pension Compensation" subject to certain modifications not at issue here. *Id.,* § 2.1.

70. Participants' account balances also were credited each month with "Interest Credits" based on the Plan's Monthly Interest Crediting Rate. Plan § 4.2.1(a)(2)(iii).

71. Employees who were on payroll as of March 31, 1997 and still employees as of June 1, 1997 were classified as "Grandfathered Employees" entitled to a "Grandfathered Benefit."

72. The Grandfathered Benefit was the benefit the participant would have received

[8] The freeze was effective January 14, 2005. *See* SBC Communications Inc. SEC Form Def 14A filed March 11, 2005 at 51. Interest credits continue to be credited to existing participants' cash balance accounts. *See* "Understanding Your Pension Benefit," at 2, SBC participant communication, March 2005 (cash balance benefits henceforth "will not increase except with interest"). As discussed further below, the Plan has in essence reverted to a traditional formula.

[9] The account was initially credited with an amount equal to what the Company informed employees was the "lump sum present value" of their approximate age-65 accrued benefit under the prior Plan formula as of June 1, 1997, calculated using modified 1996 Pension Compensation (instead of Adjusted Career Income) and using "legally required" conversion factors, which included an interest rate of 6.69% and the GATT mortality table. *See* participant communication entitled *Introducing Cash Balance* at 5 and PB 11 (incorporated herein by reference); 2002 Plan, Supp. 2.4.

under the old five year final average pay design with modifications.[10]

73. Grandfathered Employees were entitled to the greater of their benefit calculated under the cash balance formula (including any "Transition Credits") or under the Grandfathered Benefit. The Grandfathered Benefit was designed to last for a period of five years and grow as the participant earned additional service and compensation until May 31, 2002, whereupon it was to be frozen. Thereafter, the lump sum value of the monthly Grandfathered Benefit would be compared with the Cash Balance Benefit, with the participant receiving the larger of the two.

74. The Plan paid Grandfathered Benefits based on the type of pension the participant was eligible for, as follows: (1) a Service Pension, with eligibility dependent on satisfying any of the various permutations of the "Modified Rule of 75"; (2) a special "EMP" Service Pension, from a 1991 early retirement window; (3) a Deferred Vested Pension for participants with at least five years of vesting service but not eligible for the prior two service pensions; and (4) a Disability Pension, where the participant was initially disabled on or before March 31, 1997 and continued to be disabled after short term disability benefits ended, had 15 years of Net Credited Service before the end of the month he turned 65, and was otherwise not eligible for a service pension.

C. <u>The PTG Cash Balance Plan and its Merger into the AT&T Plan</u>.

75. On April 1, 1997, the Company acquired Pacific Telesis Group ("PTG") and thereupon became the sponsor of the Pacific Telesis Group Cash Balance Pension Plan for

[10] The Company amended the Plan to provide to provided that the pay base would be updated each year (with a one-year lag) to keep the old plan design benefits more current. For example, benefits for separations occurring between 4/1/97 and 12/31/97 will use a 1991 to 1995 pay base; between 1/1/98 and 12/31/98, a 1992 to 1996 pay base; between 1/1/99 and 12/31/99, a 1993 to 1997 pay base, and so on.

Salaried Employees (the "PTG Plan"). The PTG Plan since July 1, 1996 had a cash balance formula substantially similar to the Cash Balance Benefit under the AT&T Plan. *See Introducing Cash Balance* at 1.

76. Initially, the PTG Plan was maintained by the Company as a separate plan. Effective January 1, 1999, SBC merged the PTG Plan into the AT&T Plan. Following the plan merger, former participants in the PTG Plan became participants in the AT&T Plan and began to accrue benefits under the basic AT&T cash balance formula. However, participants eligible for an Accelerated Transition Benefit ("ATB"), who were still employed as of January 1, 1999, became entitled to a "Special ATB" that preserved the value of the ATB accrued as of

January 1, 1999 for up to an additional two years.[11] Upon retirement, these participants would receive the Special ATB or ATB *plus* their Cash Balance Benefit.

D. <u>November 2000: The EPR and the Enhanced Grandfathered Benefit</u>.

77. On September 29, 2000, as part of a company-wide downsizing, the Company added an Enhanced Pension and Retirement Program ("EPR") to the Plan by means of a Plan amendment. *See* 2002 Plan, Supp. 10.

78. The EPR was designed to encourage thousands of Company employees to take early retirement by offering them a larger retirement benefit than they would have received

[11] Under the PTG Plan, each employee with an accrued benefit at the time of the 1996 cash balance conversion was credited with an opening cash balance amount approximately equal to the balance the employee would have earned had the cash balance formula been in place since the employee's date of hire by PTG. *See* SBC Summary Plan Description dated March 1999 ("1999 SPD") at PB 10; PTG SPD at 10. But each PTG employee who had been a participant in the PTG Plan between March 22, 1996 and June 30, 1996 also was promised an Accelerated Transition Benefit ("ATB"). The ATB was a traditional pension benefit payable monthly at age 65 equal to 2% of each eligible employee's average monthly compensation from July 1, 1991 to June 30, 1996 *times* the employee's years of service with PTG as of June 30, 1996.

absent the EPR. Under EPR, the last day of work for most "EPR Terminees" -- *i.e.*, those who were eligible for, and who elected and were selected to receive, EPR benefits -- was November 15, 2000.

79. The EPR provided that an EPR Terminee would receive the largest of several alternate benefits offered by the EPR. *See* 2002 Plan, S10.4.

80. For Grandfathered Employees, the largest benefit under the EPR was typically the "Enhanced Grandfathered Benefit."

81. The Enhanced Grandfathered Benefit was to be calculated in the same manner as the Plan's "Grandfathered Benefit" as of November 15, 2000 (under the non-EPR provisions of the Plan) except that Adjusted Career Income was to be: the participant's Average Annual Compensation for the period from January 1, 1995, through December 31, 1999 (instead of from January 1, 1994 through December 31, 1998) *multiplied by* Pension Calculation Service as of December 31, 1999, plus five years, *plus* "EPR pay" (instead of Pension Compensation) earned after the end of the applicable averaging period. *Id.*, S10.4.2. The EPR also added five years to the employee's age for the purposes of determining his early retirement factor and service pension eligibility. *Id.*

82. Each of the named Plaintiffs elected to participate in the EPR and was entitled to the Enhanced Grandfathered Benefit. Defendants, however, refuse to pay them the full value of that benefit, contending that the actual base pay amendments require that Plaintiffs' claim for benefits be denied.

E. The Actual Base Pay Amendments.

(1) The November 17, 1997 Actual Base Pay Amendment and the Failure of the Administrator to Give Any 204(h) Notice.

83. The first of the actual base pay amendments was adopted on November 17, 1997, to become effective as of January 1, 1998 as to employees of two "wireless" companies: Southwestern Bell Mobile Systems, Inc. and Southwestern Bell Wireless, Inc. *See* Ex. 1.[12]

84. As the Company and the Plan claim to have interpreted and applied the November 17, 1997 amendment, it would have significantly reduced the rate of future benefit accruals of affected participants in two ways as to both their Cash Balance Benefit and the Grandfathered Benefit.

85. First, the amendment provided "that for purposes of determining the Basic Compensation portion of the[se employees'] Pension Compensation . . ., the Participant's *actual base pay shall be used in lieu of the Participant's Basic Rate of Pay,* effective for all Cash Balance Benefits and Grandfathered Benefits (including Disability Pension benefits, as applicable) that accrue on or after January 1, 1998." *Id.* (emphasis added).

86. Second, the November 17, 1997 amendment sought to "*exclude Differentials* from the calculation of th[ese employees'] Pension Compensation . . . effective for all Cash Balance Benefits and Grandfathered Benefits (including Disability Pension benefits, as applicable) that accrue on or after January 1, 1998."

87. As noted above, under the version of ERISA § 204(h), 29 U.S.C. § 1054(h)

[12] As references to exhibits are the exhibits attached to the original Complaint, which are incorporated herein by reference.

then in effect written notice had to be given to affected participants "after adoption of the plan amendment" – *i.e.*, sometime on or after November 17, 1997 – "and not less than 15 days before the effective date of the plan amendment" – *i.e.*, no later than December 16, 1997. However, *no such notice was given to any of the affected participants*. The result is that the amendment was and is not effective and cannot be applied against the affected participants. *See* Temp. Treas. Reg., 1.411(d)-6T, 60 FR 64320-01, 1995 WL 17001210, Q&A 13 (Dec. 12, 1995).[13] Those participants should be entitled to get their participants' benefits recalculated and paid based on the terms of the unamended Plan.

(2) The January 19, 1999 Actual Base Pay Amendment and the Failure to Give Affected Participants Any 204(h) Notice.

88. The second actual base pay amendment was enacted on January 19, 1999. Ex. 2. This amendment was intended to become effective as to all affected participants as of January 1, 1999. Again, however, *the Company, as Plan Administrator, did not give any of the affected participants notice of the amendments*. Indeed, under ERISA § 204(h) it is not even possible to give effective notice retroactively because written notice has to be given "*after* adoption of the plan amendment" but not less than 15 days "*before* [its] effective date."

89. The January 19, 1999 amendment sought to accomplish a number of things, including the merger of the PTG Plan into the Plan. (Plaintiffs do not here challenge the merger of these two Plans *per se*). As the Company and the Plan claims to have interpreted and applied the January 19, 1999 amendment, the amendment would have reduced the rate of future benefit accruals of affected participants -- both new Plan participants/former PTG Plan

[13] The temporary Treasury regulations, substantially identical to the final regulations, were in effect from December 1995 until December 1998. The final regulations apply to amendments adopted on or after December 12, 1998.

participants and existing Plan participants -- in several ways, none of which ever became effective as to those participants because of the Administrator's failure to comply with ERISA § 204(h).

90. First, the January 19, 1999 amendment, as the Company and the Plan claim to have interpreted and applied it significantly reduced the future benefit accruals of employees of the below-listed Participating Companies[14] by providing that their actual base pay would be used instead of their Basic Ray of Pay in calculating their Cash Balance Benefit. Ex. 2, No. 4. As the Company and the Plan claim to have interpreted and applied the January 19, 1999 Amendment, this caused the rate of participants' benefit accruals to be significantly reduced by delaying the crediting of interest to participants' cash balance accounts for an entire pay period, a loss that could be quite substantial over time. As the Company and the Plan claim to have interpreted and applied it, the amendment also reduced the future cash balance benefit accruals of the employees of those Companies by excluding their differentials from the calculation of their Cash Balance Benefit. *Id.*, No. 8. Finally, as the Company and the Plan claim to have interpreted and applied it, the amendment reduced the Basic Benefit credit received by a participant each pay period for participants who actually received base pay in an amount less than their full time monthly rate of pay would have provided them had they in fact worked full time without absences.

91. Second, the January 19, 1999 amendment as the Company and the Plan claim to have interpreted and applied it would have significantly reduced the future benefit accruals

[14] Pacific Telesis Group, Pacific Bell Directory, Pacific Bell Extras, Pacific Bell Information Services, Pacific Bell Internet Services, Pacific Bell Mobile Services, Pacific Telesis Electronic Publishing Services, Pacific Telesis Shared Services, PacTel Finance, SBC Interactive (formerly known as Pacific Bell Interactive Media).

of Grandfathered Employees of the below-listed Participating "wireless" Companies[15] by providing that their actual base pay would be used in lieu of Basic Ray of Pay in calculating their Cash Balance Transition Benefit Credits and their Grandfathered Benefit. Ex. 2, No. 7. That would have caused a significant reduction in the rate of future benefit accruals in two ways.[16]

92. One, the amendment, as the Company and the Plan claim to have interpreted and applied it, would have reduced participants' accrued benefit by diminishing their Cash Balance accruals as set forth above by among other things, delaying the crediting of interest to their cash balance accounts, which, as noted above, could lead to considerable losses especially over time. Two, as set forth more fully below, the amendment as the Company and the Plan claim to have interpreted and applied it, would have also reduced participants' accrued benefit by causing or authorizing the exclusion of one entire pay period from the averaging period used to calculate their Grandfathered Benefit[17], and by reducing Pension Compensation both during and after the Participant's Averaging Period, for participants who actually received base pay in an amount less than their full time monthly base pay, i.e. their rate of pay, resulting in the loss of thousands of dollars.

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[15] Southwestern Bell Wireless Inc., Southwestern Bell Mobile Systems, Inc., and Washington/Baltimore Cellular Limited Partnership.

[16] For determining whether a reduction in future benefit accruals was a "significant" one, the two Benefits should be aggregated because Grandfathered Employees had the right under the Plan to simultaneously accrue both Cash Balance and Grandfathered Benefits and paid the "greater of" the two upon retirement but at the time of adoption of the amendment it will not be known which of the two benefits will be greater for a particular employee.

[17] Plaintiffs do not necessarily agree that an interpretation or application of this amendment to eliminate pay for an entire pay period from the Averaging Period is a legally correct or reasonable interpretation or application of the Plan. This interpretation is currently being challenged in *Wagener v. SBC Pension Benefit Plan-Nonbargained Program*, Civ. Action No. 03-769 (RCL) on file in the United States District Court for the District of Columbia.

93. Third, the amendment, as the Company and the Plan claim to have interpreted and applied it, also would have reduced the future benefit accruals of part-time employees by providing that their Cash Balance Transition Benefits and their Grandfathered Benefits as to the listed Participating Companies,[18] and their Cash Balance Basic Benefit Credits, as to Pacific Bell and Nevada Bell, would no longer be calculated using their Basic Rate of Pay as if they had been working full-time. *Id.*, Nos. 9-12. Instead, as the Company and the Plan claim to have interpreted and applied the amendment those benefits would accrue on a less favorable basis -- either on a pro-rata Basic Rate of Pay basis or actual base pay basis. *Id.*

(3) The April 13, 1999 Actual Base Pay Amendment and the Failure to Give Effective Notice.

94. The third actual base pay amendment was adopted on April 13, 1999 and purported to have two different effective dates – May 1, 1999 or July 1, 1999 -- depending on benefits and employees affected. Ex. 3.

95. As the Company and the Plan claim to have interpreted and applied it, the amendment would have, effective May 1, 1999, reduced the future rate of benefit accruals of Pacific Bell, Nevada Bell and California Celcom Communications Corporation employees by no longer using Basic Rate of Pay for purposes of determining their Pension Compensation used in calculating participants' Cash Balance Basic Benefit Credits or Grandfathered

[18] Pacific Bell, Nevada Bell, SBC Asset Management, Inc. SBC Management Services, Inc. SBC Management Services USA, Inc. SBC International, Inc. SBC International - Management Services, Inc. Southwestern Bell Internet Services, Inc. Southwestern Bell Communications Services, Inc. Southwestern Bell Mobile Systems, Inc. California Celcom Communications Corporation Washington/Baltimore Cellular Limited Partnership Southwestern Bell Telecommunications, Inc. SBC Technology Resources, Inc. Southwestern Bell Video Services, Inc. Southwestern Bell Yellow Pages, Inc. Southwestern Bell Advertising L.P. Southwestern Bell Advertising Group, Inc. Worldwide Directory Products Sales, Inc. Southwestern Bell Messaging Services, Inc. SBC Operations, Inc. Southwestern Bell Telephone Company, Southwestern Bell Wireless Inc. Southwestern Bell Mobile Systems, Inc., and Washington/Baltimore Cellular Limited Partnership.

Benefits. *Id.*, No. 1. As the Company and the Plan claim to have interpreted and applied the amendment, it also would have, effective May 1, 1999, reduced the future benefit accruals of part-time employees by using actual base pay in lieu of full-time Basic Rate of Pay for purposes of determining those employees' Cash Balance Basic Benefit Credits or Grandfathered Benefits. *Id.*, No. 2.

96. However, the notices that issued with respect to these Pacific Bell, Nevada Bell and California Celcom Communications Corporation employees were ineffective for at least two separate reasons. First, notice was given *before* the April 13, 1999 amendment was signed in violation of one of ERISA § 204(h)'s most explicit and important requirements. the Company distributed the purported notices – which were *dated* April 14, 1999 -- to almost all affected participants *on April 9, 1999*, well before the amendment was actually adopted. The notices therefore failed to comply with the statute and the amendments were and are ineffective as to all participants to whom notice was given before the amendment was signed on April 13, 1999.

97. Second, the notice was also ineffective because, by the Company's own admission (see below), its summary of the plan amendment in question was not written in a manner calculated to be understood by the average plan participant. Treas. Reg. § 1.411(d)-6, Q&A 10. The notice read as follows:

> The SBC Pension Benefit Plan - Nonbargained Program is being amended effective May 1, 1999, to change the method that is used to calculate your pension compensation, which may affect the amount of your benefit. *The Basic Rate of Pay portion of Pension Compensation is being replaced by Actual Base Pay*. Your benefit will never be less than your accrued (accumulated) benefit on the date of the change. For certain participants and beneficiaries, your benefit accrual under the amendment for future service may be lower than it would have been under the old benefit formula.

Ex. 4 (emphasis added).

98. The notice did not define or explain Basic Rate of Pay, Pension Compensation or Actual Base Pay or how any of these terms or concepts, when altered, might affect the amount of a participant's benefit. The notice also did not mention or identify even indirectly which benefits were or were not potentially impacted by the change. The notice, in other words, could not possibly have been written "in a manner calculated to be understood by the average plan participant."[19]

99. The Company acknowledged in internal communications that, in fact, the notice was not written in a manner calculated to be understood by the average plan participant. Soon after participants received the notice, many of them called the Pension Benefit Plan Service Center, precisely because they had little or no idea what the notice meant. The Service Center reported this to the Company which responded, eventually, by drafting a brief explanation that Service Center operators could read to participants who called and inquired.[20] As news of participants' confusion was arriving at the Company, one of the officials responsible for drafting the notice sent his colleagues an email saying:

> The PacBell and Nevada Bell 204(h) notices have hit the streets and the questions are rolling in. I've included two example emails below. How much should we provide in the way of explanation? **If we *wanted* to say it in laymans[']s terms, *we would have done so in the notice*.**

[19] In fact, the average plan actuary or ERISA lawyer would have still required some explanation to have understood the impending change.

[20] Those talking point read as follows: "Explaining Actual Base Pay - The "old" way - Your Basic Benefit Credit of 5% was based on your Pay rate which was, in general, your Full time monthly Base pay, usually whether you worked it or not. The "new" way - Your 5% Basic Benefit Credit will be applied to what you are actually getting paid. The two main areas that are changing would be if you have any time off without pay or you are on disability. If you have time off without pay, your 5 % basic benefit credit will not be applied to this time. If you are on Short Term Disability and getting paid, your 5% basic benefit credit will be based on the amount paid, rather than the 100% of your base rate of pay." Ex. 5.

Ex. 6 (emphasis added).[21]

(4) The April 13, 1999 Actual Base Pay Amendment and Associated Failures of Notice.

100. The April 13th amendment as the Company and the Plan claim to have interpreted and applied it also would have adversely affected the benefit accruals of a large number of other Participating Companies' employees effective July 1, 1999 in the same ways it would have adversely affected Pacific Bell, Nevada Bell and California Celcom employees effective May 1, 1999. Ex. 3. On information and belief, however, the Company provided no notice of the April 13th amendment's provisions to 16 of the 17 Participating Companies identified in the amendment.[22]

101. But even if notice of the April 13, 1999 amendment was provided to employees of these Participating Companies, it was never made effective as to them, as it was rescinded in a November 12, 1999 amendment which purported also to *re-enact* the April 13th

[21] Even in the talking points, the Company still did not seem to want the average participant to really understand what the amendment did. It therefore ended its instructions to the Service Center operators by indicating that they should only make further disclosure grudgingly and if specifically asked and even then be as brief as possible: "Note: If a participant inquires as to whether anything else has changed regarding what the Basic Benefit credits are applied to, the definition of Pension compensation can be shared." Ex. 5.

[22] The 16 Participating Companies, employees of which received no notice whatsoever of the April 13th amendment, were: SBC Asset Management, Inc., SBC Management Services USA, Inc., SBC International, Inc., SBC International - Management Services, Inc., Southwestern Bell Internet Services, Inc., Southwestern Bell Communications Services, Inc., Southwestern Bell Telecommunications, Inc., SBC Technology Resources, Inc., Southwestern Bell Video Services, Inc., Southwestern Bell Yellow Pages, Inc., Southwestern Bell Advertising L.P., Southwestern Bell Advertising Group, Inc., Worldwide Directory Products Sales, Inc., Southwestern Bell Messaging Services, Inc., SBC Operations, Inc., Southwestern Bell Telephone Company.

amendment's pertinent provisions as to those Companies, but with a later effective date.[23] This November 12, 1999 amendment "rescinded" the April 13th amendment for the 16 Participating Companies referred to in the preceding paragraph, "retain[ing]" it only for SBC Management Services, Inc ("SBC-MSI").[24]

102. The April 13th amendment's provisions that were intended to be effective July 1, 1999 might otherwise have been fully effective as to the employees of SBC-MSI (who appear to have received timely notice of the amendment) were it not for the fact that the notice that was issued cannot be said to have been reasonably calculated to be understood by the average participant.

103. As the Company and the Plan claim to have interpreted and applied it, the April 13th amendment would have, effective July 1, 1999, reduced the future rate of benefit accruals of SBC-MSI employees by: (i) no longer using Basic Rate of Pay for purposes of determining their Pension Compensation used in calculating participants' Cash Balance Basic Benefit Credits or Grandfathered Benefits, instead using actual base pay, including participants on disability leave and working part-time; (ii) for part-time employees, by using actual base pay instead of full-time Basic Rate of Pay for purposes of determining those part-time employees' Cash Balance Basic Benefit Credits or Grandfathered Benefits; and (iii) by excluding differentials from the determination of participants' Pension Compensation used in

[23]The Company's intent was that this November 1999 re-enactment would take effect December 1, 1999. However, the Company's second attempt to validly adopt the actual base pay amendment's terms to those 16 Participating Companies was only partially successful, as shown below.

[24] Of course, strictly speaking, there was no effective April 13th amendment to "rescind" by November 12, 1999 by operation of ERISA § 204(h),

calculating their cash balance account Basic Benefit Credits and Grandfathered Benefits. Ex. 3.

104. The Company did distribute a notice to SBC-MSI employees regarding the April 13th amendment. That notice stated, in pertinent part:

> The SBC Pension Benefit Plan-Nonbargained Program is being amended effective July 1, 1999, to change the method that is used to calculate your pension compensation, which may affect the amount of your benefit. Two changes will be made as of July 1:
>
> 1) The Basic Rate of Pay portion of Pension Compensation will be replaced by Actual Base Pay. The Basic Rate of Pay is your full time monthly Base Pay, whether you worked it or not The Actual Base Pay is the base pay you actually receive.
>
> 2) Differentials will be excluded from the calculation of the pension compensation.
>
> Your benefit will never be less than your accrued (accumulated) benefit on the date of the change. For certain participants and beneficiaries, your benefit accrual under the amendment for future service may be lower than it would have been under the old benefit formula.

See Ex. 7.

105. This Notice was an improvement over the purposefully obscure "April 14th" notice. But it is nevertheless void because and to the extent that it does not communicate nor could it have reasonably been calculated to communicate to Grandfathered Employees (whom the notice does not in any way single out) the most crucial "fact" about the April 13th amendment as regards the way the Company claims to have interpreted and applied the amendment to their Benefit: namely, that for Grandfathered Employees, the switch to the use of actual base pay in lieu of Basic Rate of Pay, for the purpose of calculating their Pension Compensation as directed by the actual base pay amendments, *required the exclusion of an entire pay period from the calculation of their pension compensation.* This, in turn, resulted

in the loss to their anticipated accrued benefit of several thousand dollars apiece, notwithstanding the Plan's Special Rules governing the determination of Average Annual Compensation during periods where a participant received no Pension Compensation or no Pension Calculation Service. *See* Plan, § 4.2.2(b)(1) and (2). The Notice is also fatally deficient because it does not disclose that for the Grandfathered Employees who would be on disability leave during a portion of their Averaging Period that their pay would be based only on the disability pay they *received*, notwithstanding the Plan's Special Rule governing the calculation of Pension Compensation those on disability leave. *See* Plan, § 4.2.2(c). Likewise, the Notice fails the statutory test because it does not disclose that for periods of part-time employment during a Grandfathered Employee's Averaging Period such employee's Pension Compensation for his period of part-time employment would not be considered to be the Pension Compensation he would have received if he had been employed on a full-time basis during his period of part time employment, notwithstanding the Plan's Special Rules for Part Time Employment. *See* Plan, § 4.2.2(e)(1)-(3).

106. While the June 14, 1999 notice may have made reasonably clear to the average Grandfathered participant that a person working less than full time during his Averaging Period who had not been designated part-time by the Participant's employing Participating Company (see Plan, § 4.2.2) or working less than full time after his Averaging Period would accrue lower benefits under an actual pay formula than they would have under the prior regime under a rate of pay formula, there is nothing in the notice that suggests that the five-year Grandfathered averaging period Grandfathered Employees had been promised just two

years earlier was being partially revoked and that participants would suffer *the loss of an entire pay period* for the purposes of the calculation of their Pension Compensation.

107. In the Notice, the language defining "actual base pay" as "the base pay you *actually* receive" is in contradistinction to the immediately preceding explanation of "Basic Rate of Pay," under which credits are earned "*whether you worked for it or not*." Thus, the Notice gave fair notice as to the new method (actual pay) by which credits would be earned under the new regime and that it would be less favorable for those who did not actually work the entirety of the applicable pay period; it did not even indirectly suggest that there would be any change from the existing practice of crediting pay (whether on an "actual" or "Rate of Pay" basis) for the period and year in which it was earned (as logic and common sense would suggest should be the case). Certainly nothing in the notice remotely hinted that a new method of crediting pay for pension calculation purposes would also be accompanied by a change in accounting methodology that would in turn *necessitate* the exclusion from the calculation of an entire pay period for work performed in 1999, as the Company and the Plan now claim, due to a switch from an accrual method of accounting to a cash method tied to the date the participant received their pay, because payment for the final pay period of 1999 would not be received by the participant until early 2000.

108. Moreover, nothing in the Notice remotely suggests that the April 13, 1999 amendment repealed or altered the Plan's Special Rules contained in Sections 4.2.2(b)(1)(and (2), 4.2.2(c) and 4.2.2(e). Indeed, Plaintiffs contend, apart from considerations of ERISA § 204(h) compliance, that neither the April 13th amendment or any of the actual base pay amendments were intended to affect or did affect any of the Special Rules, which none of the

actual base pay amendments even reference. (The Special Rules were carried forward unchanged into the 2002 Restated Plan from the 1995 Plan, confirming neither the actual base pay amendments nor any other amendment impacted or purported to impact them). But even if the Company and the Plan contend that the April 13, 1999 actual base pay amendment or any other such amendment would otherwise have altered the Special Rules, those amendments would be without force or effect absent compliance with ERISA § 204(h), and there was no such compliance here.

109. The Special Rules, at all times effective due in part to the absence of any valid ERISA § 204(h) notice communicating that they have been amended or repealed effective no earlier than 15 days hence, provide in part as follows:

> **4.2.2 (b) Special Rules for Determining Average Annual Compensation**
>
> 4.2.2(b)(1) If the Participant received no Pension Compensation during a portion of the Averaging Period for which he received Pension Calculation Service, he shall be deemed to have received Pension Compensation for that period of no Pension Compensation (A) at the same Basic Rate or Rates of Pay, as applicable, that applied immediately prior to such period of no Pension Compensation, and (B) in the same amount of Group Incentive Compensation, Nondiscretionary Incentive Compensation, Differentials, Bellcore Buy Out and Rotational Compensation as he earned for the last period of equal length during which he earned Pension Compensation immediately prior to such period of no Pension Compensation.
>
> 4.2.2(b)(2) If the Participant received no Pension Calculation Service during a portion of the Averaging Period, he shall be deemed to have received Pension Compensation for that period of no Pension Compensation Service (A) at the same Basic Rate or Rates of Pay, as applicable, that applied immediately prior to such Averaging Period, and (B) in the same amount of Group Incentive Compensation, Nondiscretionary Incentive Compensation, Differentials, Bellcore Buy Out and Rotational Compensation as he earned for the last period of equal length during which he earned Pension Calculation Service immediately prior to such Averaging Period.
>
> **********
>
> **4.2.2(c) Disability or Military Leave**

If during or after the Averaging Period a Participant receives disability benefits under a Participating Company's disability plan (or any predecessor of such plan) or receives Pension Calculation Service for military service under the Rules, for purposes of determining the Participant's Pension Compensation:

(1) his Base Pay on any day during such period of disability benefits or Pension Calculation Service shall be considered as an amount which bears the same relationship to the Basic Rate of Pay for the Participant's job for such day, as the Participant's Basic Rate of Pay immediately prior to such period bears to the Basic Rate of Pay for the Participant's job immediately prior to such period;

(2) his Group Incentive Compensation, if any;

(3) in the event the Participant was earning or entitled to earn Nondiscretionary Incentive Compensation at the time he began receiving such disability benefits or such Pension Calculation Service, during such period of disability benefits or Pension Calculation Service he shall be deemed to have received Nondiscretionary Incentive Compensation during such period of disability benefits or Pension Calculation Service at a rate equal to the rate of Nondiscretionary Incentive Compensation paid to the participant during the equivalent period of employment immediately preceding such period of disability benefits or Pension Calculation Service; and

(4) in the event the Participant was earning Differentials at the time he began receiving such disability benefits or such Pension Calculation Service, during such period of disability benefits or Pension Calculation Service he shall be deemed to have received Differentials of the same type and at the same rate he was earning immediately prior to such period.

****

4.2.2(e) Special Rules for Part-time Employment

4.2.2(e)(1) Notwithstanding any preceding provision of this Subsection 4.2, if at any time during the Averaging Period a Participant was employed on a part-time basis, his Pension Compensation for his period of part-time employment shall be considered to be the Pension Compensation he would have received if he had been employed on a full-time basis during his period of part-time employment.

4.2.2(e)(1) The Pension Calculation Service of a Participant who was employed on a part-time basis for any period during or prior to the Averaging Period shall be prorated for his period of part-time employment, based on a ratio which shall be determined by dividing the number of his regular scheduled work hours, excluding

any overtime hours, by the number of hours he would have worked if he had been a regular full-time Employee during his period of part-time employment.

4.2.2(e)(3) For purposes of this Subparagraph 4.2.2(e), the designation of a Participant's employment on a part-time basis or a full-time basis shall be as determined by the Participant's employing Participating Company.

4.2.2(e)(4) In no event shall the Participant's Average Annual Compensation be less than the amount determined without reference to this Subparagraph 4.2.2(e).

(5) The November 12, 1999 Actual Base Pay Amendment and the Failure of Notice.

110. The fourth actual base pay amendment was the amendment enacted on November 12, 1999 in which the Company tried a second time to have the actual base pay changes take effect as to the 16 Participating Companies listed in the April 13th amendment as to which that amendment was subsequently rescinded. Ex. 8.

111. As the Company and the Plan claims to have interpreted and applied the amendment, the November 12, 1999 amendment would have, effective December 1, 1999, reduced the future rate of benefit accruals of employees of those 16 Participating Companies by: (i) no longer using Basic Rate of Pay for purposes of determining their Pension Compensation used in calculating participants' Cash Balance Account Basic Benefit Credits or Grandfathered Benefits, instead using actual base pay; (ii) for part-time employees, by using actual base pay instead of full-time Basic Rate of Pay for purposes of determining those part-time employees' Cash Balance Account Basic Benefit Credits or Grandfathered Benefits; and (iii) by excluding differentials from the determination of participants' Pension Compensation used in calculating their cash balance account Basic Benefit Credits and Grandfathered Benefits.

112. However, the Company failed to give participants any ERISA § 204(h) for all but one very limited aspect of the November 12, 1999 amendment. In an email dated November 15, 1999 email, the Company did tell participants that the amendment would or could reduce the rate of their future *Cash Balance Basic Benefit* accruals but the email was completely silent about the separate aspects of the amendment -- really, separate amendments in and of themselves -- that would as the Company and the Plan claims to have applied them, reduced the rate of future *Grandfathered Benefit* accruals by, among other things, excluding an entire pay period in the calculation of Pension Compensation for that benefit.

113. Thus, the November 15, 1999 notice stated:

> IMPORTANT LEGAL NOTICE ON PENSIONS
>
> We will begin using actual pay for pension purposes
>
> Basic Benefits [which are exclusively *Cash Balance* Benefits] for all nonbargained employees with the companies listed below have traditionally been credited to your cash balance pension account based on your basic rate of pay. Your basic rate of pay is what you are paid for a 40 hour work week if you are a full-time employee. If you are a part-time employee your basic rate of pay is based on the hours you are scheduled to work.
>
> Beginning Dec. 1, 1999, we will be using actual pay to calculate your Basic Benefits. As a result of this change, your Basic Benefits could be reduced if you are either a part-time employee or on short-term disability.
>
> * Part-time employees As an example of how this change could affect part-time employees, let's assume you are a part- time employee scheduled to work 20 hours a week but you are working only 18 hours a week.
>
> Currently, your Basic Benefits are calculated as if you work and are paid for 20 hours. Beginning Dec. 1, 1999, your Basic Benefits will be calculated based on your actual hours and pay, which in this example would be 18 hours, not 20 hours.
>
> * Employees on short-term disability If you're currently on short-term disability, your Basic Benefits are calculated based on the rate of pay you received as an active employee.

> Beginning Dec. 1, 1999, your Basic Benefits will be calculated based on the actual pay you receive while on short-term disability, not the pay you were receiving as an active employee. Typically, short-term disability pay is less than the pay you receive as an active employee.

Ex. 9.

114. It simply cannot be said that this notice, which focuses exclusively on the basic Cash Balance Benefit, in anyway suggests that the amendment operates other than on the Cash Balance benefit, and says nothing at all about the Grandfathered Benefit, is any notice at all as to the purported amendments to that Benefit. It is neither an accurate summary of the amendment, omitting any reference whatsoever to the amendment's other provisions, nor could it possibly have been written in a manner calculated to be understood by the average participant. Because no notice was given regarding the November 12, 1999 amendments other than with respect to their effect on the Cash Balance Benefit, the amendments are ineffective apart from whatever effect they may have had on the calculation of affected participants' Cash Balance Benefit. No notice was given regarding the November 12, 1999 amendments that provided any information suggesting that the Special Rules contained in Plan § 4.2.2 governing the determination of Average Annual Compensation during periods where a participant received no Pension Compensation or no Pension Calculation Service. *See* Plan, § 4.2.2(b)(1) and (2). Additionally, no Notice was given for the Grandfathered Employees addressed by the November 12, 1999 amendment who would be on disability leave during a portion of their Averaging Period, that their pay would be based on the disability pay they receive, notwithstanding the Plan's Special Rule governing the calculation of Pension Compensation those on disability leave. *See* Plan, § 4.2.2(c). Likewise, no notice

communicated that for periods of part-time employment during a Grandfathered Employee's Averaging Period such employee's Pension Compensation for his period of part-time employment would not be considered to be the Pension Compensation he would have received if he had been employed on a full-time basis during his period of part time employment, notwithstanding the Plan's Special Rules for Part Time Employment. *See* Plan, § 4.2.2(e)(1)-(3).

(6) The January 4, 2000 Actual Base Pay Amendment and the Failure of Notice.

115. The fifth and final actual base pay amendment was adopted on January 4, 2000, to be effective retroactively on January 1, 2000. On that day (January 4, 2000), the Company adopted an amendment that purported to amend the Plan to include an "updated" definition of "Pension Compensation" and, for the first time, a definition of "Actual Base Pay." (The term "actual base pay" had until then been used in the actual base pay amendments without ever having been specifically defined).

116. The January 4, 2000 amendment read as follows with respect to the updated definition of Pension Compensation:

> Effective January 1, 2000, the Program is hereby amended: The Program's definition of "Pension Compensation" shall be amended to read in its entirety as follows: "Pension Compensation" shall mean the total of a Participant's *Actual Base Pay*, Group Incentive Compensation, Nondiscretionary Incentive Compensation, and effective January 1, 2000, Individual Discretionary Award for Individual Discretionary Awards payable on or after January 1, 2000, provided, however, that the amount of Compensation taken into account under the Program for any Plan year shall not exceed the maximum Section 401(a)(17) compensation limit. Notwithstanding the foregoing, Pension Compensation shall not include compensation which constitutes a signing bonus, retention pay, severance pay, a recognition award, a spot bonus, a premium paid in connection with highly marketable skills, foreign service or other geographic differentials, a relocation allowance or housing allowance, a tax equalizing gross-up, replacement compensation paid in lieu of benefits, awards for contests, sales

> promotions or market blitzes, a stock option, income generated from the exercise of a long term incentive award, or a benefit payable under the Short Term Incentive Plan.

Ex. 10, No.1.

117. As noted, the amendment also purported to amend the Plan to include for the first time a definition of Actual Base Pay and purported to amend the definition of Actual Base Pay for employees of the recently merged Southeastern New England Telephone ("SNET") companies, whose cash balance pension plan had merged into the Plan effective January 1, 2000. Specifically, for Participating Companies other than SNET, the amendment provided that:

> "Actual Base Pay" shall mean a Participant's compensation that has actually been paid out by a Participating Company on such Participant's behalf and that has been identified by such Participating Company as base pay.

Id., No. 4.

For the SNET companies, the amendment provided that:

> "Actual Base Pay" shall mean a Participant's compensation that has actually been paid out by a Participating Company on such Participant's behalf and that has been identified by such Participating Company as base pay. For a Participant on short term disability, Actual Base Pay shall be the amount of payment such Participant is entitled to under any short term disability plan which covers such Participant as an employee of a Participating Company determined before reductions for workers' compensation, social security disability payments, and other payments made under law.

Id.

118. As the Company and the Plan claim to have interpreted and applied them, these amendments would have significantly reduced all participants' future benefit accruals in the manners set forth above (at least to the extent that the earlier amendments by their terms or because of lack of notice had not already had that effect), but were ineffective as to all Plan

participants because the Administrator did not give any affected participants any ERISA § 204(h) notice of the amendments. Indeed, it would not have been possible to do so timely because in order to be effective, an ERISA § 204(h) notice has to be given "*after* adoption of the plan amendment" but not less than 15 days "*before* [its] effective date." Thus, excepting SBC-MSI employees as to whom the April 13, 1999 amendment had become partially effective and the employees of the 16 Participating Companies as to whom the November 12, 1999 became effective, but only as to the calculation of their Cash Balance Benefit, the Plan's definition of Pension Compensation continues in effect as to all other affected participants who were and are entitled to have their benefits calculated using Basic Rate of Pay and not Actual Base Pay for purposes of determining their Pension Compensation.

G. Plaintiff Calder and Vaughn-Smith's Exhaustion of Their Administrative Remedies.

119. As noted, Plaintiffs have each been denied thousands of dollars of pension benefits which they are owed under the terms of the (unamended) Plan based solely on Defendants' assertion that such denials were required by the actual base pay amendments. Without agreeing such exhaustion was necessary, Plaintiffs each pursued and exhausted such administrative remedies as were available to them under the Plan before filing suit.

120. On November 6, 2000, Plaintiff Leslie J. Vaughn-Smith, who worked during the relevant time for SBC-MSI and retired under EPR in November 2000 with the Enhanced Grandfathered Benefit as her most valuable benefit, filed a claim challenging the methodology the Plan indicated it would be using to calculate her Enhanced Grandfathered

Benefit.[25] The Plan, through the Service Center, denied her claim on May 2, 2001. Ms. Vaughn-Smith appealed the denial on May 16, 2001. Her appeal was denied on September 25, 2001. In the denial, the Plan relied on the April 13, 1999 actual base pay amendment and the June 14, 1999 notice as the sole bases to justify the exclusion of one of Ms. Vaughn-Smith's pay periods from the calculation of her annual average compensation.

121. On March 18, 2001, Plaintiff Charles V. Calder, who worked for SWBT during the relevant time and retired under EPR in November 2000 with the Enhanced Grandfathered Benefit as his most valuable benefit, filed a claim for benefits, challenging the calculation of his benefit. His claim was denied on 19, 2001. He appealed the denial on June 29, 2001 and October 25, 2001. On December 7, 2001 and March 19, 2002, the Plan denied his appeal, based solely on the purported existence of an applicable actual base pay amendment to the Plan.

THE TIMELINESS OF THIS ACTION

122. Defendants have asserted a statute of limitations defense based on ERISA § 413, 29 U.S.C. § 1113 to the ERISA § 204(h) claims asserted in this action. Plaintiffs dispute the applicability of ERISA § 413 which, by its terms, applies only to claims brought pursuant to Part 4 of ERISA, and none of which are asserted here.

123. However, even if the Court concludes that one of the limitations periods of ERISA § 413 apply or may apply to Count I of the Complaint, Defendants' assertion that Plaintiffs had actual knowledge of a violation of ERISA § 204(h) more than three years prior

[25] The complete administrative records pertaining to Plaintiff Calder and Vaughn-Smith's claims and any other participant to whom the Plan, the Company , the Plan's Benefit Plan Committee or the Plan's Service Center cited any ERISA § 204(h) notice as a basis for denial of the participant's claim or appeal are hereby incorporated by reference.

to the filing of suit is contrary to the facts. The facts are that Plaintiffs had no knowledge, actual or constructive, of any such violations until earlier this year. The principal reason for that is because Defendants fraudulently concealed from Plaintiffs and all other similarly situated participants the Company's violations of ERISA § 204(h) precisely to avoid paying the benefits due sought through this action, and to conceal from him and all others similarly situated the existence of the causes of action asserted here.

124. This fraudulent concealment means that even if ERISA § 413 is applicable here, the limitations period does not expire until six years after discovery of the breach, which occurred just recently, making this action indisputably timely.[26]

125. The Company (the Plan's Administrator) and the Plan knew that the Company had not sent an ERISA § 204(h) notice to Plaintiff Calder or other similarly situated participants other than some SBC-MSI Plan participants on June 14, 1999.[27] These Defendants also knew that the Administrator had not sent Plaintiff Calder or his similarly situated colleagues any ERISA § 204(h) with respect to any amendment to the Grandfathered benefit at any time. Nevertheless, Defendants intentionally concealed from Plaintiff Calder that they knew that the Company had failed to provide him and all other similarly situated participants with any notice of the actual base pay amendments as regarded the calculation of his benefit under the Plan. They did so in order to conceal that their unsupportable failure to

[26] Those facts are also relevant to the accrual of the limitations period in the event that the Court agrees with Plaintiffs that the applicable limitations period is to be borrowed from the most analogous state law cause of action. However, Defendants make no claim, nor could they, that any of the claims for relief asserted herein are time-barred if the applicable limitations period is derived from the closest state law analogue.

[27] Because the Company was the Plan Administrator and a Named Fiduciary of the Plan, its knowledge is imputed to the Plan.

calculate his and other similarly situated participants' benefits in accordance with the unamended Plan.

126. Thus, in denying Plaintiff Calder's appeal, Defendants misrepresented to him that his claim for benefits had to be denied due to the *April 13*, 1999 actual base pay amendment when they knew that the Company *"rescinded"* that amendment as to him, employees of his Participating Employer (SWBT) and numerous other Participating Employers. Defendants also misrepresented to Plaintiff Calder that the Administrator had sent him the June 14, 1999 ERISA § 204(h) notice when they knew that that too was false. That misrepresentation was made in order to conceal from Plaintiff Calder that the Administrator had failed to send out any valid ERISA § 204(h) notice regarding the purported amendment to the Grandfathered formula made pursuant to the November 12, 1999 amendment – the amendment that Defendants knew, but concealed from Plaintiff Calder, had been improperly applied against him and all others similarly situated to reduce his future rate of benefit accruals.

127. These acts of concealment were not isolated incidents but part of a pattern of fraudulent concealment found in other communications with Plan participants. For example, the same misrepresentations made to Plaintiff Calder were made to Plan participant MCP who also worked during the relevant time for SWBT and filed a claim for benefits on December 29, 2000 when he too noticed that his benefit had not been calculated in accordance with the terms of the Plan as those terms had been communicated to him. After MCP's claim was denied on April 3, 2001, he appealed on April 30, 2001. On September 25, 2001, the Plan denied his appeal, misleadingly saying he had been sent the June 14, 1999 notice,

intentionally concealing that no notice whatsoever regarding any amendment to his Grandfathered benefit had ever been sent to him or anyone similarly situated, and intentionally concealing that the April 13, 1999 actual base pay amendment that the Plan invoked as the basis for the denial of his claim had in fact been "rescinded" by the Company.

128. Further evidence of fraudulent concealment can be seen by the way Defendants handled a good faith inquiry by Plan participant RJN, sent initially to a former colleague who was a lawyer in SBC's Legal Department on October 27, 2001, into why his benefit and those of thousands of others were not calculated according to the terms of the Plan as those terms had been communicated to him. RJN's inquiry not only identified the problem with the calculation of EPR retirees' benefits in careful, precise detail but showed in a professional and respectful manner how the Company was failing to deal with a problem in a way that could harm the Company as well as all underpaid retirees. Thus, after RJN documented his own unsuccessful efforts to obtain the full benefit to which he was entitled under the Plan, RJN concluded:

> It is . . .clear the company has erred, yet no one will listen or look into the situation. If my guess is correct, the error has shorted the post- 11/15/2000 retirees by as much as $39.0M (assuming the average retiree lump sum shortage is around $4800 and about 8000 employee retirements since 11/15/2000), not to mention future retirees. This is too big to ignore and requires some attention. This is why I am asking you for your help. [I was told by the Service Center that] all future retirees will have their lump sum calculated the same way. If this is true, and there is an error on the company's part, and the error is not corrected now, it will greatly compound itself with the downsizing just around the corner. Correcting the problem now will avoid a much bigger mess in the future. If non-management are included in the downsizing, this could also effect them as well and may trigger union intervention.

129. Bradley Hickman, Director, Retirement Plan Operations, responded to RJN in a letter dated November 9, 2001. In that letter, Mr. Hickman made at least two misleading statements including a version of the one just referenced above, clearly intended to conceal from RJN the Company's violations of ERISA § 204(h) violations in connection with the actual base pay amendments.

130. Although Mr. Hickman and Defendants well knew that not all Plan participants were notified and that most who received some notification received no notice whatsoever as to any amendment to their Grandfathered Benefit, Mr. Hickman's letter to RJN nevertheless flatly and unqualifiedly asserted: "Plan participants were notified when the change took place and were further notified that, in some circumstances, there would be a decrease in future benefit accruals. . . ."

131. Suspecting this might not be true, RJN decided to investigate. When his investigation yielded more questions than answers he responded to Mr. Hickman on December 17, 2001 as follows:

> Your letter references a notification, provided to plan participants . . . . After thorough research into several sources, I am unable to locate any such notification(s). . . .
>
> I have attempted to secure a copy of the document(s) you reference; however, they have proven all but impossible to locate. When contacted, the SBC Pension Plan Service Center was unable to provide copies of the documents you reference, for SBC Management Services or SWBT. Moreover, no document(s) could be found in SBC's <access.sbc.com> web site, which contain any reference to 'pension calculation accounting changes' (Note, the Pension Benefit Plan SPD, dated 3/99, found on the web site, does not include any reference to an "accounting change") After having exhausted all other known information sources, I shall make my request to you.
>
> This letter shall serve as my request that the company provide me with paper copies of any and all documents which communicated or otherwise reference

> and/or explained the 1999 EPR pension calculation (accounting) changes (as required under ERISA §204(h)). This would include any and all employee notification(s); plan updates or briefs, or any other bulletins, via any media, which were, or were not provided to the plan participants during the period January, 1999, through November 15, 2000, then to present, with reference to this topic.
>
> I look forward to your response. . . . (emphasis added).

132. That response, dated January 9, 2002, was intentionally misleading. In that January 9, 2002 letter, Mr. Hickman referenced an enclosed a copy of the June 1999 notice provided solely to SBC-MSI employees. He then made two, related misleading statements.

133. First, Mr. Hickman told RJN that "[a] similar notice was provided to employees of SWBT" when Mr. Hickman and Defendants knew this was not true: SWBT employees did not receive any remotely similar to the June 1999 notice. At best they receive a notice that was solely concerned with the Cash Balance benefit.

134. Second, Mr. Hickman told RJN that the June 1999 notice "was the only notice provided to participants regarding this change [from Basic Rate of Pay to Actual Base Pay]" when Mr. Hickman and Defendants were well aware that the June 1999 notice was not provided to SWBT employees, that no notice whatsoever was provided to SWBT employees in June 1999, and that *other* notice, in November 1999, was given to SWBT employees (and the vast majority of other affected participants) that said absolutely nothing about any amendment to the Grandfathered Benefit, which Defendants knew to be RJN's focus.

135. These were not negligent misstatements. They were calculated efforts to conceal. On these facts, and such other facts as Plaintiffs may be permitted to develop in discovery, the Court should conclude that Defendants are guilty of fraudulent concealment within the meaning of ERISA § 413 and/or the case law governing the accrual of the

limitations period applicable to the causes of action asserted herein. Under any measure, this action is timely.

COUNT ONE
(VIOLATIONS OF ERISA § 204(h), 29 U.S.C. § 1054(h))

136. Plaintiffs repeat and re-allege the allegations contained in all foregoing paragraphs herein.

137. With respect to the actual base pay amendments adopted on November 17, 1997, January 12, 1999, April 13, 1999, November 12, 1999 and January 4, 2000, with the limited exceptions set forth above, the Plan administrator failed to provide the notice required by ERISA § 204(h), 29 U.S.C. § 1054(h) and/or the applicable Treasury regulations, the timely provision of which was a condition of making these amendments effective to the extent that they provided for a significant reduction of future accruals.

138. As the Company and the Plan claim to interpret and apply these amendments, they each provided for a significant reduction in the rate of future accruals under the Plan.

139. As a result, subject to the limited exceptions set forth above, the actual base pay amendments adopted on November 17, 1997, January 12, 1999, April 13, 1999, November 12, 1999 and January 4, 2000 were not and are not effective as to Plaintiffs or any otherwise affected participants to the extent that they are interpreted to provide for a significant reduction in the rate of future accruals under the Plan.

140. By failing to provide the notice required by ERISA § 204(h) and by implementing the amendments at issue so as to provide for a significant reduction in the rate of future accruals under the Plan, the Company (with respect to notice and implementation) and the Plan (with respect to implementation) have violated ERISA § 204(h).

141. The EPR benefit adopted on September 29, 2000 required that "[f]or any EPR terminee who is eligible for the Grandfathered Benefit, the Enhanced Grandfathered Benefit shall be a benefit calculated in the same manner as the Grandfathered Benefit would be calculated as of the EPR Calculation Date under the current Nonbargained Program Provisions…" with certain specified enhancements applicable only to EPR terminees. Accordingly, the Plan, by its terms required that the EPR terminees, including Plaintiffs, should have had their benefits calculated without regard to any provision of the Plan governing the calculation of the Grandfathered Benefit which never became effective as a result of the Plan Administrator's failure to provide a timely and valid § 204(h) Notice. Thus, the Company and the Plan have violated ERISA § 204(h) to the extent that they implemented Plan amendments in the administration of the Enhanced Grandfathered Benefit which, pursuant to ERISA § 204(h), never became effective.

COUNT TWO
(CLAIM FOR BENEFITS)

142. Plaintiffs repeat and re-allege the allegations contained in all foregoing paragraphs herein.

143. As to the affected participants, due to the ineffectiveness under ERISA § 204(h) of the actual base pay amendments adopted on November 17, 1997, January 12, 1999, April 13, 1999, November 12, 1999 and January 4, 2000, Plan benefits should not have been calculated with reference to them nor in the future should those benefits be calculated with reference to those amendments, subject to the limited exceptions set forth herein.

144. Plaintiffs and the Class are entitled to a recalculation of the Basic Compensation, Pension Compensation and/or Annual Average Compensation portion of their

Cash Balance, Grandfathered, Cash Balance Transition Benefit, Enhanced Grandfathered Benefit benefits based on the terms of the Plan as they existed without regard to the November 17, 1997, January 12, 1999, April 13, 1999, November 12, 1999 and January 4, 2000 amendments, subject to the limited exceptions set forth above.

CLASS ACTION ALLEGATIONS

145. Plaintiffs bring suit on behalf of themselves and on behalf of all other participants and beneficiaries similarly situated under the provisions of Rule 23 of the Federal Rules of Civil Procedure with respect to violations alleged herein.

146. The proposed Class is defined as follows:

> All persons who participated in the AT&T Pension Benefit Plan (formerly known as the SBC Pension Benefit Plan) (the "Plan") at any time after November 1997 as to whom one or more provisions of the actual base pay amendments adopted November 17, 1997 (effective January 1, 1998), January 12, 1999 (effective January 1, 1999), April 13, 1999 (effective July 1, 1999), November 12, 1999 (effective December 1, 1999) and January 4, 2000 (effective January 1, 2000) were or would otherwise be applied for purposes of calculating the Basic Compensation, Pension Compensation and/or Annual Average Compensation portion of their Cash Balance, Grandfathered, Cash Balance Transition Benefit, and/or Enhanced Grandfathered Benefit; and the beneficiaries and estates of such persons.

147. The requirements for maintaining this action as a class action under Fed. R. Civ. P. 23(a)(1) are satisfied in that there are too many Class members for joinder of all of them to be practicable. There are tens of thousands of members of the proposed Class dispersed among many states.

148. The claims of the Class members raise numerous common questions of fact and law, thereby satisfying the requirements of Fed. R. Civ. P. 23(a)(2). Many issues concerning liability are common to all Class members because such issues concern their

entitlement to benefits calculated in a manner other than that calculated thus far and their entitlement to relief from harm caused by the violations of law, rather than any action taken by Plaintiffs or any Class member. In addition, most issues concerning relief are also common to the Class. By way of example, common issues include: (a) whether the actual base pay amendments provided for a significant reduction in the rate of future benefit accruals within the meaning of ERISA § 204(h); (b) whether the Plan Administrator gave affected participants timely and sufficient notice of any of the actual base pay amendments; and (c) the effect of a finding that one or more of such notices were untimely or insufficient under ERISA § 204(h).

149. Plaintiffs' claims are typical of the claims of Class members, and therefore satisfy the requirements of Fed. R. Civ. P. 23(a)(3). They do not assert any claims relating to the Plan in addition to or different than those of the Class.

150. Plaintiffs are adequate representatives of the class, and therefore satisfy the requirements of Fed. R. Civ. P. 23(a)(4). The interests of Plaintiffs are identical to those of the class. The Plan has no unique defenses against them that would interfere with their representation of the class. Plaintiffs have engaged counsel with extensive ERISA class action litigation experience and expertise.

151. Additionally, all of the requirements of Fed. R. Civ. P. 23(b)(1) are satisfied in that the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for defendants and individual adjudications present a risk of adjudications which, as a practical matter, would be dispositive of the interests of other members who are not parties.

152. All of the requirements of Fed. R. Civ. P. 23(b)(2) also are satisfied in that the Plan's actions affected all Class members in the same manner making appropriate final declaratory and injunctive relief with respect to the Class as a whole.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that judgment be entered against Defendants and that the Court award the following relief:

A. Certification of this action as a class action for all purposes of liability and relief and appointment of undersigned counsel as class counsel pursuant to Fed. R. Civ. P. 23.

B. Judgment for Plaintiffs and the Class against Defendants on all claims expressly asserted and/or within the ambit of this Complaint.

C. An order awarding, declaring or otherwise providing Plaintiffs and the Class all other such relief to which Plaintiffs and the Class are or may be entitled whether or not specified herein.

The relief Plaintiffs seek includes but is not limited to:

D. An order declaring that that the Plan Administrator failed to comply with ERISA § 204(h), 29 U.S.C. § 1054(h) and/or the applicable Treasury regulations regarding the actual base pay Plan amendments adopted on November 17, 1997, January 12, 1999, April 13, 1999, November 12, 1999 and January 4, 2000, in the specific manners alleged in this Complaint and in such other manners as Plaintiffs shall demonstrate to the Court's satisfaction.

E. An order further declaring that the actual base pay amendments adopted November 17, 1997, January 12, 1999, April 13, 1999, November 12, 1999 and January 4,

2000 amendments were and are ineffective to alter the Plan's methodologies for calculating the Basic Compensation, Pension Compensation and/or Annual Average Compensation portion of their Cash Balance, Grandfathered, Cash Balance Transition Benefit, Enhanced Grandfathered Benefit and/or other applicable Benefit, subject to the limited exceptions set forth above, as to each of the participants whose Basic Compensation, Pension Compensation and/or Annual Average Compensation portion of their benefits would have otherwise been adversely affected by one or more such amendments at the time the amendment or amendments were to have become effective.

F. An order further declaring that Plaintiffs and all members of the Class are entitled to have their Pension Compensation correctly calculated for purposes of determining each of the benefits available to them or potential available under the Plan.

G. An order enjoining the Plan Administrator from continuing to violate the law and/or the terms of the Plan in the manners alleged or referenced in this Complaint or hereafter proven.

H. An order declaring that the Plan was never amended to include the terms of any of the actual base pay amendments and that the unamended Plan's terms have continued throughout the relevant time and until final judgment in this case to be in full force and effect, and a corresponding order compelling Defendants to bring the terms and administration of the Plan into compliance with ERISA, retroactive to the date the invalid Plan amendments were first applied to the calculation of any affected participant's benefit. Such order should require Defendants to re-calculate the benefit amounts due under the terms of the Plan in accordance with the requirements of ERISA (and in the manner which Defendants have never

disputed would be required in the absence of the actual base pay amendments), and for the Plan to pay the difference, plus interest, to or on behalf of all Class members who received less in benefits or benefit accruals than the amount to which they are entitled and/or to pay benefits to which Class members are entitled in all applicable optional forms (such as lump sum distributions).

I. A further order with respect to Plaintiffs and all Enhanced Grandfathered Employees affected by the April 13, 1999 and November 12, 1999 amendments requiring Defendants to include the compensation earned during the excluded pay period in calculating those participants' Annual Average Compensation (which Defendants have never disputed would be required in the absence of the actual base pay amendments).

J. An order awarding pre- and post-judgment interest.

K. An order awarding attorney's fees on the basis of the common fund doctrine (and/or other applicable law, at Plaintiffs' election), along with the reimbursement of the expenses incurred in connection with this action.

L. An order awarding, declaring or otherwise providing Plaintiffs all relief under ERISA § 502(a), 29 U.S.C. § 1132(a), or any other applicable law, that Plaintiffs may subsequently specify and/or that the Court may deem appropriate.

By:

Dated: May 11, 2006

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CERTIFICATE OF SERVICE

I hereby certify that I caused Defendants, through their first-listed counsel below, to be served on May 11, 2006, with a copy of the foregoing by causing the Electronic Filing System to send a Notice of Electronic Filing to them. I also caused first-listed counsel below to be served this day by hand with a hard-copy of this filing. I have additionally caused the other listed counsel, who do not appear to have registered with the ECF system, to be served via first-class mail with a copy of this filing. Courtesy copies of this filing will also be sent this day to all listed counsel below via their email addresses by counsel for the Plaintiffs.

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