Nos. 10-4147, 10-4279, 10-4791, & 10-4792

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RONALD SHAVER, WILLIAM WHITNEY, JOE FEDELE,
RALPH RIBERICH, and ANTHONY KATZ,
on behalf of themselves and others similarly situated

Appellees / Cross-Appellants,

– v. –

SIEMENS CORPORATION, SIEMENS WESTINGHOUSE
RETIREMENT PLAN FOR UNION EMPLOYEES, and SIEMENS
WESTINGHOUSE RETIREMENT PLAN,

Appellants / Cross-Appellees.

On Interlocutory Appeal from an Order and Appeal from a Final Judgment of the United States District Court for the Western District of Pennsylvania

Honorable Judge David S. Cercone, District Judge
Case No. 2:02-cv-01424

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Third Circuit Rule 26.1, Appellants/Cross-Appellees make the following disclosures:

(1) *For non-governmental corporate parties please list all parent corporations:*

Siemens Corporation is an affiliate of Siemens AG, a publicly-held company with no parent company (NYSE: SI).

(2) *For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:*

No publicly-held company holds 10% or more of the stock of Siemens Corporation or Siemens AG.

This is not a bankruptcy appeal.

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JURISDICTION

The plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e) and (f). The district court granted plaintiffs' motion for summary judgment and entered a revised final judgment order as to 20 class members on October 15, 2010. Defendants filed a notice of appeal from that order on October 25, 2010. This Court's jurisdiction over the grant of summary judgment rests on 28 U.S.C. § 1291.

Also on October 15, 2010, the district court certified for interlocutory appeal its order denying both plaintiffs' and defendants' motions for summary judgment as to the 207 remaining class members. This Court granted both petitions for interlocutory review on December 13, 2010; its jurisdiction over the denial of summary judgment rests on 28 U.S.C. § 1292(b).

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in determining that:

   a. plaintiffs are entitled to certain benefits under a pension plan established under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), even though they cannot satisfy the conditions for obtaining those benefits stated in the plan;

b. an asset purchase agreement between two unrelated corporate entities had the effect of transferring liabilities from one tax qualified pension plan to another tax qualified pension plan, in a manner that triggers ERISA's "spin-off rule," even though neither plan's terms ever provided for or permitted such a transfer; and

c. an employer created a thirteen-day ERISA "transition plan" by employing workers who remained covered by their former employer's pension plan during that period.

2. Whether the district court erred in denying summary judgment to defendants with respect to the plaintiffs who signed releases of their claims.

RELATED CASES

There are no other proceedings arising out of this same case pending before, or about to be presented to, this or any other court or agency. This case has not previously been before this Court.

Defendants draw the Court's attention to a related case from the Eleventh Circuit, in which that court affirmed a grant of summary judgment to defendants with respect to precisely the same claims, arising out of the same transaction, as those presented here. *See McCay v. Siemens Corp.*, 247 F. App'x 172 (11th Cir. 2007).

STATEMENT OF THE CASE

Plaintiffs filed the complaint against defendant Siemens[1] on August 15, 2002, alleging that they and a class of more than two hundred other employees had been denied benefits in violation of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq*. The case was referred to a magistrate judge.

Following discovery, the parties filed cross-motions for summary judgment. The magistrate judge recommended granting plaintiffs' motion as to the 20 plaintiffs who did not sign releases (the "Non-Release Plaintiffs") and granting defendants' motion as to the 207 plaintiffs who did (the "Release Plaintiffs"). The parties filed cross-objections to the report and recommendation, and on March 30, 2007, the district court granted the plaintiffs' motion with respect to the Non-Release Plaintiffs but denied summary judgment with respect to the Release Plaintiffs. The court entered a final judgment on October 15, 2010, awarding the Non-Release Plaintiffs approximately $2 million in damages; it simultaneously certified

[1] We here use "Siemens" to refer collectively to defendants Siemens Corporation, Siemens Westinghouse Retirement Plan for Union Employees, and Siemens Westinghouse Retirement Plan (the latter two of which were merged into the Siemens Pension Plan and the Siemens Pension Plan for Union Employees, respectively), as well as to Siemens Energy & Automation, Inc., and Siemens Energy, Inc.

its denial of summary judgment as to the Release Plaintiffs for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). These appeals followed.

STATEMENT OF FACTS

The plaintiffs' former employer, the Westinghouse Electric Corporation ("Westinghouse"), offered "permanent job separation" ("PJS") benefits – essentially, enhanced severance benefits – under the Westinghouse Pension Plan to employees satisfying certain requirements who were terminated by Westinghouse for reasons other than cause. Defendant Siemens, which became plaintiffs' employer when it purchased Westinghouse's power generation business, has never offered *its* employees PJS benefits under any of its pension plans. Invoking ERISA, plaintiffs nevertheless claimed entitlement to PJS benefits from Siemens when Siemens closed the plants where they were employed. In the decision below, the district court agreed with plaintiffs that ERISA entitled them to the claimed benefits.

This exceedingly peculiar holding – that an employer may be held liable for PJS benefits under a pension plan even though its plan does not now, and has never, offered such benefits to *any* employee – should be set aside. The district court's decision either disregarded or misread the plain language of both employers' pension plans and of the Asset Purchase Agreement between Westinghouse and Siemens that effectuated their

transaction. And that ruling stands on its head a fundamental principle of ERISA: the statute "is not a direction to employers as to what benefits to grant their employees." *Dade v. N. Am. Philips Corp.*, 68 F.3d 1558, 1561 (3d Cir. 1995) (quoting *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988)). While ERISA protects pension benefits promised to employees according to the terms under which they are promised, it does *not* "foreclose employers from circumscribing the availability of such optional benefits when they are bring created." *Id.* at 1562. The district court's decision disregarded that principle.

The district court also committed a second basic error: the great majority of the plaintiffs here – 207 of the 227 class members – expressly released Siemens from liability for any claims related to or arising out of their employment or termination. In return, these employees received substantial severance payments, in some cases amounting to hundreds of thousands of dollars. These releases are an absolute bar to recovery in this action and, wholly apart from the district court's misapplication of ERISA, the court erred in denying summary judgment as to the plaintiffs who signed them.

A. Statutory Background

1. Enacted in 1974, ERISA was designed "to provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*,

542 U.S. 200, 208 (2004). There is no doubt that a central goal of the statute is "protecting employees' justified expectations of receiving the benefits their employers promise them." *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004). But ERISA does not tell employers *what* to promise employees: to the contrary, it is fundamental that "[n]othing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Thus, this Court has emphasized repeatedly that

> ERISA does not mandate the creation of pension plans. Nor, with exceptions not here relevant, does it dictate the benefits to be afforded once a decision is made to create one. … "ERISA is not a direction to employers on what benefits to grant their employees."

Dade, 68 F.3d at 1561 (quoting *Hlinka*, 863 F.2d at 283). *Accord*, *e.g.*, *Smith v. Contini*, 205 F.3d 597, 602 (3d Cir. 2000).

2. This case involves the meaning of two provisions of ERISA that were invoked by plaintiffs and relied upon by the district court. The first is ERISA Section 204(g), 29 U.S.C. § 1054(g),[2] which provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an

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[2] Courts variously describe this provision as "Section 204(g)" and "§ 1054(g)," referring respectively to its location within the Act and within Title 29 of the U.S. Code. For consistency's sake, we refer in text to all ERISA provisions by their location within the Act.

amendment of the plan." This "anti-cutback rule … prohibits any amendment of a pension plan that would reduce a participant's accrued benefit." *Heinz*, 541 U.S. at 741 (internal quotation marks omitted). Although "accrued benefits" are those that "commenc[e] at normal retirement age" (29 U.S.C. § 1002(23)(A)) and therefore ordinarily do not include early retirement or contingent benefits (like PJS benefits) (*see*, *e.g.*, *Tilley v. Mead Corp.*, 927 F.2d 756, 759-760 (4th Cir. 1991)), Congress amended ERISA in 1984 to provide that, for purposes of Section 204(g)'s anti-cutback rule, "a plan amendment which has the effect of ... eliminating or reducing an early retirement benefit or a retirement-type subsidy … shall be treated as reducing accrued benefits" with respect to any participant "who satisfies (either before or after the amendment) the preamendment conditions for the subsidy." Retirement Equity Act of 1984 § 301, 29 U.S.C. § 1054(g)(2). In *Bellas v. CBS, Inc.*, 221 F.3d 517, 532 (3d Cir. 2000), this Court determined that contingent PJS benefits, identical to those claimed by plaintiffs here, must be treated as "accrued" for anti-cutback purposes because they are "retirement-type subsidies" within the meaning of Section 204(g)(2).

The other provision addressed below is ERISA § 208, 29 U.S.C. § 1058, which concerns circumstances when there is, "[i]n the vernacular of the trade, … a[n ERISA] plan spin-off." *Dade*, 68 F.3d at 1563. This rule assures that employees are not disadvantaged by a diminution in plan

funding when one ERISA plan merges with, or transfers its assets and liabilities to, another plan. Section 208 accordingly provides in relevant part that

> [a] pension plan may not merge or consolidate with, or transfer its assets or liabilities to any other plan … unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the … transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the … transfer (if the plan had then terminated).

Thus, as this Court has explained, "a plan spin-off is permissible only if the participants would receive no less on a hypothetical termination of the plan just after the spin-off than they would have received on a hypothetical termination just before the spin-off." *Dade*, 68 F.3d at 1563.

B. Factual Background

Both before and after the transaction that underlies this litigation, Westinghouse sponsored, funded, and administered its own tax-qualified defined benefit pension plan (the "Westinghouse Plan"). JA105. Section 19 of the Westinghouse Plan offered PJS benefits. To qualify for those benefits, the Plan required that a participant (1) satisfy stated age and service requirements, (2) not qualify for normal retirement benefits, and (3) be terminated by an "Employer, an Affiliated Entity, or Excluded Unit because of job movement or product line relocation, or location closedown." JA292, 345. An "[e]mployer, an Affiliated Entity, or Excluded Unit" was

defined, in turn, as Westinghouse or any Westinghouse subsidiary or joint venture participating in the Westinghouse Plan. JA284, 288, 292. The Westinghouse Plan also contained two express limits on the availability of PJS benefits: (1) "in no event shall a Permanent Job Separation occur if an Employee is offered continued employment by … a successor employer" (JA293); and (2) "[i]n no event shall a Permanent Job Separation occur after August 31, 1998" (the "sunset" provision). *Id.*[3]

In November 1997, Westinghouse agreed to sell its Power Generation Business Unit ("PGBU") to Siemens. JA117. After consummation of the deal was delayed for the better part of a year, Siemens and Westinghouse executed an Asset Purchase Agreement (the "APA") on August 19, 1998. JA143. As part of the transaction, Siemens hired all active Westinghouse PGBU employees (the "legacy employees"). JA104-105.

Of particular importance here, the APA expressly provided that Westinghouse would "retain liability" for all of the legacy employees' "accrued benefit[s] calculated as of" the closing date. JA138-139. The APA al-

[3] As initially adopted, the Westinghouse Plan did not include the sunset provision, which was added to the Plan in 1994. *See Bellas*, 221 F.3d at 520-21. After completion of the transaction at issue here, this Court held in *Bellas* that the sunset provision was invalid as applied by Westinghouse to its own employees because the amendment adopting the provision improperly cut back on Westinghouse employees' pre-existing entitlement to qualify for PJS benefits. *Id.* at 523.

so stated that the Siemens plan "shall be solely responsible for … any benefits pursuant to Section 19 [the PJS provision] of the [Westinghouse] Pension Plan and the corresponding provision of the [Siemens] Pension Plan … with respect to a Business Employee who retires or terminates employment with [Siemens] and its affiliates after the Closing Date." JA139-140. At the time this language was drafted, in the fall of 1997, it was anticipated that the transaction would close long before the Westinghouse PJS provision was to sunset on August 31, 1998.

In fact, however, there were lengthy delays before the transaction was completed, and, as noted, the sale did not take place until August 19, 1998, less than two weeks before the PJS sunset date. In part to avoid the administrative burdens of switching employees to new retirement plans eighteen days into a month, Siemens and Westinghouse amended the APA, providing that Westinghouse would amend *its* Plan to offer employees (for benefit accrual purposes only) credit for service and compensation during the period from August 19 through August 31, 1998, even though they would be employed by Siemens during that time. Given this arrangement, and because the Westinghouse PJS provision was to sunset the day *before* legacy employees became covered by Siemens' pension plans, Siemens never had occasion to, and in fact never did, include in its plans a provision "corresponding" to the Westinghouse Plan's PJS provi-

sion. Instead, Siemens agreed not to terminate any legacy employees "other than for cause before September 1, 1998 and in the event it does, to reimburse [Westinghouse] for any actuarial pension loss caused by such termination." JA156; *see also* JA105.

Siemens also agreed in the APA to offer pension benefits to the legacy employees on "terms and conditions … substantially identical … to those of the Westinghouse Plan in effect as of the Closing Date." JA138. Siemens fulfilled this commitment, creating separate but virtually identical defined benefit plans for the union and non-union legacy employees (collectively, the "Siemens Plans") that became effective on September 1, 1998, which was deemed the APA's closing date for pension purposes. Hewitt Associates LLC subsequently "certified that Siemens's benefits were 'in the aggregate comparable' to those provided by [Westinghouse], and thus compliant with the APA." *McCay*, 247 F. App'x at 174. At the same time, the APA provided that it did not "confer upon any Person other than the parties hereto … any rights or remedies hereunder." JA142.

After September 1, 1998, the legacy employees became participants in one of the Siemens Plans. JA105-106. The Westinghouse Plan continues to exist and to provide former Westinghouse employees pension benefits accrued under that plan. JA105. Legacy employees who later qualified for benefits received two pension checks: one from the Westinghouse Plan for

benefits accrued prior to September 1, 1998; and another from the Siemens Plans for benefits accrued after that date. *Id.*

At no time has *any* Siemens Plan or plan document provided for PJS benefits. JA106. Upon closing, Siemens recognized the unions that represented the legacy employees, but notified them that it would not assume their collective bargaining agreements with Westinghouse. JA107. Union members subsequently ratified a new collective bargaining agreement with Siemens that did not provide PJS benefits to covered legacy employees. JA107-108.

Siemens later shut down some PGBU facilities and terminated plaintiffs' employment for lack of work with no expectation of recall. JA112. Upon leaving their employment with Siemens, the great majority of the terminated legacy employees signed releases in which they promised not to sue Siemens for any claims related to or arising out of their employment or termination. JA108-112. In exchange for these releases and promises not to sue, Siemens paid the terminated employees severance amounts of between $10,000 and over $200,000. JA112.

C. Procedural Background

In March 2002 plaintiffs submitted claims for PJS benefits to the Siemens Plans. When the Plans' administrative committees denied the claims on the ground that the Plans never provided for such benefits

(JA117-142), the named plaintiffs sued Siemens, alleging that they and a class of more than two hundred other legacy employees had been denied PJS benefits in violation of ERISA §§ 204(g) and 208.

1. The magistrate judge's report and recommendation

Following discovery, the parties filed cross-motions for summary judgment before the magistrate judge, who recommended granting plaintiffs' motion as to the Non-Release Plaintiffs and granting Siemens' motion as to the Release Plaintiffs. JA49.

a. The magistrate judge began by deciding that all plaintiffs who did not sign releases were entitled to summary judgment, although she acknowledged that her ruling addressed a "complex issue of first impression." JA82. While the magistrate judge's reasoning was unclear in significant respects, it appears to have had two primary bases.

First, the magistrate judge opined that Westinghouse transferred plan liabilities to Siemens through execution of the APA; that this transfer made the Siemens Plans spin-offs of the Westinghouse Plan within the meaning of ERISA § 208; that the creation of the spin-off plan functioned as an amendment of the Westinghouse Plan, triggering the anti-cutback rule of ERISA § 204(g); and that this amendment worked an impermissible cutback by eliminating PJS benefits that had been offered by the Westinghouse Plan. JA58-80. In finding that a transfer of liabilities between

plans occurred, the magistrate judge reasoned without elaboration that Siemens' promise in the APA "to provide substantially identical benefits to the transferring employees can be construed to be a transfer of Plan liability." JA61. The magistrate judge also opined that "[t]he pension plan liabilities of Westinghouse were reduced in the APA" by Siemens' assumption of "responsibility for specific post-closing benefits." JA62 (citing APA §§ 2.3(a)(vii), 5.5(d)(iv), JA135, 139-40). For these reasons, the magistrate judge concluded that the Siemens Plans were spin-offs of, and therefore must be treated as an amendment of, the Westinghouse Plan, and that this amendment was invalid because it cut back on the PJS benefits provided by the Westinghouse Plan. JA63-66.

Second, although rejecting plaintiffs' argument that the APA was itself an ERISA plan document (JA67-69), the magistrate judge read the APA as evidence that "Siemens provided its new employees with pension benefits through the Westinghouse Plan until its [own] Plans were effective." JA72. This, she reasoned, created a Siemens "transition plan" (*id.*), the "source of financing" for which "was split between" Siemens and Westinghouse according to the indemnity provision in the August 18 amendment to the APA. JA70. Because "Plaintiffs had accrued PJS benefits" under this "transition plan," the magistrate judge concluded, "the newly hired employees' benefits were reduced" in violation of Section 204(g)

"when the Siemens Plans became effective, and the Siemens Plans did not offer PJS benefits." JA75; *see also* JA74 ("[T]he adoption of the Siemens Plans was a plan amendment.").

b. The magistrate judge next turned to the question of the Release Plaintiffs' releases. She determined at the outset that "ERISA benefits [may] be waived by execution of a release" (JA86), and concluded that by producing the waivers signed by the Release Plaintiffs, Siemens had satisfied its initial burden of proof to establish the waivers' validity. JA87-88. The burden accordingly shifted to plaintiffs to prove that the releases were not knowing and voluntary. JA88.

The magistrate judge concluded that plaintiffs failed to meet this burden. In reaching this decision, she relied on three uncontroverted facts: *first*, plaintiffs failed to produce any evidence calling their knowledge of, or willingness to accept, the releases into question (JA88); *second*, plaintiffs failed to raise any arguments concerning "any of [the] factors" bearing on knowledge or voluntariness (JA89); and *third*, plaintiffs admitted both that they had consulted attorneys "about the meaning and intent" of the releases and that they had "entered into the agreement[s] voluntarily." JA90. After evaluating the language of the releases and concluding that their meaning was not ambiguous, the magistrate judge recommended

granting summary judgment to defendants "as to each of the class members who signed a release." JA91.

2. The district court's opinion

After the parties filed cross-objections to the report and recommendation, the district court granted summary judgment to plaintiffs with respect to the 20 Non-Release Plaintiffs, but denied summary judgment with respect to the 207 Release Plaintiffs.

a. On the underlying merits, the district court adopted and "augmented" the report and recommendation. JA35.[4] Like the magistrate judge, the court found that Siemens' agreement in the APA to provide benefits to the legacy employees that were "substantially identical" to those offered by Westinghouse constituted "a transfer [of liabilities] within Section 208's ambit … notwithstanding the manner in which the accrued liability at purchase was being funded/satisfied." JA28. The district court also agreed that the clause of the APA that placed "responsib[ility]" on Siemens for "specific post-closing benefits that were not captured within the retained liability of the Westinghouse Plan" effected a transfer of liabilities from the Westinghouse to the Siemens Plans. *Id*. In the district

[4] Because the district court adopted the report and recommendation on the merits, we cite throughout the remainder of this brief to the report and recommendation's analysis of the merits as the opinion of the district court.

court's view, this "clear and unequivocal" transfer of liabilities under the APA "implicat[ed] Section 208 and thus trigger[er] the floor protections which Congress mandated thereunder." JA30.

Concerning the "transition plan," the district court agreed with the magistrate judge that "all the prerequisites needed to recognize the existence of an ERISA plan attributable to [Siemens] were present and carried out" between August 19 and August 31 "through the implementation of the APA." JA32-34. Concluding further that "a reasonable employee would perceive an ongoing commitment by Siemens to provide credit toward accruing pension benefits during the [transition period]," the district court ultimately held that "plaintiffs are entitled to summary judgment on defendants' liability as to those class members who did not sign a release." JA34-35.

b. As to the releases, the district court "part[ed] paths with the report and recommendation and chart[ed] a different course." JA35. The court agreed that releases of pension claims may be valid. JA35-41 (citing *Lynn v. CSX Transp., Inc.*, 84 F.3d 970 (7th Cir. 1996)). But it concluded that additional procedures were necessary to determine whether the plaintiffs had, in fact, knowingly and voluntarily released their claims. For this inquiry, the district court adopted the six-factor standard set forth in *Finz v. Schlesinger*, 957 F.2d 78, 82 (2d Cir. 1992). JA45-46. The court de-

scribed the *Finz* test as entailing a "fact-intensive exercise" and, as a result, held that summary judgment was categorically inappropriate on the waiver question. JA47.

Recognizing there were "substantial grounds for difference of opinion" concerning its decision to override the magistrate judge and deny summary judgment to defendants as against the Release Plaintiffs (JA3), the district court subsequently certified its denial of summary judgment for interlocutory appeal.

SUMMARY OF ARGUMENT

The district court committed several fundamental errors, each of which requires reversal of the decision below. The court believed that Siemens became liable for PJS benefits due under the Westinghouse Plan. But the simple fact is that *no* ERISA plan has ever offered PJS benefits to employees *terminated by Siemens*; that is enough to resolve this case. And even if that were not so, nothing in either the agreement between the two companies or in ERISA itself made Siemens liable for Westinghouse's pension obligations.

A. Even if the Siemens Plans were a "continuation" of the Westinghouse Plan, as the district court believed, plaintiffs would be entitled to benefits from Siemens only if they were eligible for PJS benefits under the terms of the Westinghouse Plan. But they manifestly were not. The Wes-

tinghouse Plan made PJS benefits available only to employees who were terminated by Westinghouse, who were not hired by a "successor employer," *and* who were terminated before September 1, 1998; plaintiffs did not satisfy *any* of those conditions. Yet the anti-cutback rule has no application to employees who fail to satisfy pre-amendment conditions for the requested benefits. Plaintiffs cannot escape this principle by arguing that Siemens should be treated as the "employer" under the Westinghouse Plan; both this and other courts have rejected precisely that argument in circumstances identical to those here.

B. Moreover, even if that were not so, the district court's theory of liability would be wrong. The court deemed the Siemens Plans spins-off of the Westinghouse Plan because, the court believed, the Westinghouse Plan transferred plan liabilities to the Siemens Plans through the APA. But the APA did no such thing. The Westinghouse Plan did not in fact take any steps to transfer liabilities; the Siemens Plans did not accept liabilities; and by its plain terms, the APA did not purport to effectuate such a transfer of liabilities. ERISA Section 208 has never been applied in such circumstances.

C. The district court also was wrong in its alternative theory that Siemens operated a thirteen-day "transition plan" during the brief period that legacy employees worked for Siemens but remained covered by the

Westinghouse Plan. There simply is no such thing as a "transition plan"; by definition, an ERISA plan is a permanent, long-term program. And if there could be such a "transition plan," Siemens did not establish one here. During those thirteen days, it was Westinghouse, not Siemens, that undertook *all* of the myriad obligations of a plan sponsor.

D. Finally, wholly apart from the merits, Siemens is entitled to summary judgment as to the many plaintiffs who released the company from liability for claims relating to their employment. There is no reason to doubt the effectiveness of the releases: Plaintiffs failed to produce evidence calling their knowledge of the releases into question, failed to raise arguments relating to the factors that bear on voluntariness, and admitted that they had consulted attorneys about the releases. The district court nevertheless held summary judgment unavailable because the inquiry into voluntariness is "fact intensive." But that conclusion was wrong. If there is no genuine factual dispute – and there is none here as to voluntariness of the releases – Fed. R. Civ. P. 56(c) *mandates* entry of summary judgment.

STANDARD OF REVIEW

This Court reviews *de novo* questions of statutory interpretation (*United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008)) and contract construction (*Metropolitan Life Ins. Co. v. Price*, 501 F.3d 271, 282 (3d Cir. 2007)).

ARGUMENT

I. SIEMENS IS NOT OBLIGATED UNDER ERISA TO PROVIDE PERMANENT JOB SEPARATION BENEFITS TO THE LEGACY EMPLOYEES.

For all the dizzying complexity and baroque features of the opinions below, several simple and inarguable propositions are enough to dispose of this case. The *Westinghouse* Plan provided for PJS benefits, and this Court accordingly held in *Bellas* that *Westinghouse* could not cut back on those benefits as to *its* employees. But it is undeniable that no *Siemens* Plan does, or ever did, provide PJS benefits; Siemens and Westinghouse offer their own separate plans, with Westinghouse remaining liable for all benefits accrued under its plan through August 31, 1998; and no Siemens ERISA plan document – or any document of any kind, for that matter – states that PJS benefits are triggered by termination of employment *from Siemens*. In these circumstances, and given the fundamental principle that ERISA does not dictate what benefits employers must provide in their plans, plaintiffs cannot prevail.

In nevertheless holding Siemens liable, the opaque reasoning of the magistrate and district judges calls to mind Alice's response to "Jabberwocky": "Somehow it seems to fill my head with ideas – only I don't exactly know what they are!" Lewis Carroll, *Through the Looking Glass and What Alice Found There* 30-31 (1871). But it appears the court below had two

theories. The first is that Westinghouse transferred plan liabilities to Siemens through execution of the APA; that this transfer made the Siemens Plans spin-offs of the Westinghouse Plan within the meaning of ERISA Section 208; that the creation of the spin-off Siemens Plans functioned as an amendment of the Westinghouse Plan, triggering the ERISA Section 204(g) anti-cutback rule; and that this amendment worked a cutback by eliminating PJS benefits. The second theory is that Siemens created a thirteen-day "transition plan" by employing legacy employees who remained covered by the Westinghouse plan during the period between the closing date of the acquisition and the initiation of the real Siemens Plans on September 1, 1998; this "transition plan" borrowed the terms of the Westinghouse Plan, including its offer of PJS benefits; and Siemens amended its "transition plan," in violation of the anti-cutback rule, when it adopted permanent plans that did not include PJS benefits.

These Rube Goldberg theories are wrong at every level. They misread the APA and the relevant plan language. They are premised on a basic misunderstanding of ERISA. They undermine fundamental ERISA policies, in a manner that both is unfair to employers and will disadvantage employees. And they lead to a perverse result: having paid most of the plaintiffs substantial severance awards in lieu of PJS benefits, Siemens now nevertheless finds itself saddled with PJS liability that is not pro-

vided for in its Plans, that it never voluntarily assumed, and that it could not have anticipated. For all of these reasons, the decision below should be set aside.

A. Plaintiffs Are Not Entitled To PJS Benefits Because No Plan Provision Provides For Such Benefits After Termination Of Employment By Siemens.

1. At the outset, plaintiffs' claim fails for a fundamental reason: even assuming that the court below were correct in its reading of both ERISA and the APA, plaintiffs are not entitled to PJS benefits because *no* plan provides for the payment of such benefits to persons in plaintiffs' circumstances. Plaintiffs concede, as they must, that the Siemens' Plans never provided for PJS benefits. The district court therefore premised its ruling on the view that Siemens somehow became obligated to offer benefits promised to plaintiffs by the *Westinghouse* Plan, on the theory that the Siemens Plans were a "continuation" of the Westinghouse Plan (either as spin-offs or as an amendment of a "transition plan" that borrowed the terms of the Westinghouse Plan). *See*, *e.g.*, JA80. But even if this improbable theory regarding the transfer of Westinghouse's obligations to Siemens were correct – and it is not, as we show below – plaintiffs would be eligible to recover only if they are entitled to PJS benefits under the terms of the Westinghouse Plan. And they manifestly are not.

The principle that governs here is clear. As this Court has explained, the rule that employers may not cut back on vested benefits "'does not mean that Congress intend[ed] to foreclose employers from circumscribing the availability of … optional benefits when they are created.'" *Dade*, 68 F.3d at 1562 (quoting *Ashenbaugh v. Crucible, Inc.* 854 F.2d 1516, 1527 (3d Cir. 1988)). Indeed, "[t]he IRS formally takes the position that the anti-cutback rule does not keep employers from specifying in advance of accrual that 'the availability of [26 U.S.C.] section 411(d)(6) protected benefits [is] limited to employees who satisfy certain objective conditions … .'" *Heinz*, 541 U.S. at 747 (quoting 26 C.F.R. § 1.411(d)-4)); *cf. id.* at 745-746 ("conditions set before a benefit accrues can survive the anti-cutback rule, even though their sanction is a suspension of benefits").[5] That rule is grounded in Section 204(g)'s express language, which provides that the anti-cutback provision "appl[ies] only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy." *See Dade*, 68 F.3d at 1562.

[5] Because compliance with ERISA has tax consequences for plan sponsors, provisions substantively identical to ERISA appear in the tax code; 26 U.S.C. § 411(d)(6) corresponds to ERISA Section 204(g). The Treasury Department accordingly has responsibility for issuing regulations implementing certain ERISA provisions, including Sections 204(g) and 208. *See Heinz*, 541 U.S. at 747; *Malia*, 23 F.3d at 932 n.4.

2. That principle is dispositive here because plaintiffs have not, and cannot ever, satisfy the "preamendment conditions" for receiving PJS benefits set by the Westinghouse Plan – and therefore also cannot satisfy the terms of any "transition" or "continuation" plan that is thought to have borrowed the terms of that plan. Insofar as is relevant here, the terms of the Westinghouse Plan are unambiguous: they provide that PJS benefits are payable only if an employee is "terminated" from "employment with" Westinghouse itself or a designated Westinghouse affiliate. JA292-293. They also provide that "[i]n no event shall a Permanent Job Separation occur," entitling an employee to PJS benefits, if the employee "continu[es] employment" with "a successor employer which is neither" Westinghouse nor an affiliate. JA292.

And that should be the end of the matter, because plaintiffs' claims are barred by both of these elements of the Westinghouse PJS provision. Plaintiffs plainly were *not* terminated by Westinghouse or an affiliate; as plaintiffs concede, they were terminated by Siemens. *See* JA108. By definition, a permanent job separation therefore did not occur under the terms of the Westinghouse Plan. And plaintiffs likewise concede that Siemens is a successor employer as that term is defined by the Westinghouse Plan (*see id.*), which means that plaintiffs' continued employment by Siemens after they left Westinghouse *also* establishes that no permanent job sepa-

ration occurred under the terms of the Westinghouse Plan. The plan language is determinative: in the circumstances here, "this court is required to enforce the Plan as written" (*Bellas*, 221 F.3d at 522 (brackets omitted)), and plaintiffs have not "fulfilled [the] conditions … required to obtain a vested benefit" by the governing plan. *Spink*, 517 U.S. at 887.

There is no ambiguity in the proper application of this principle to this case. Courts repeatedly have considered cases like this one and – with the exception of the decision below – have uniformly held benefits unavailable.

Indeed, the Eleventh Circuit addressed precisely this question, in a case identical to this one, involving the very same transaction and pension plans as are at issue here. The court there rejected the claim for PJS benefits because "Siemens, the company that terminated the employees here, does not qualify as an 'Employer' under the express terms of the Westinghouse Plan that defines 'Employer' as 'Westinghouse Electric Corporation.'" *McCay*, 247 F. App'x at 177. The court added that "Siemens was a 'successor employer' that offered 'continued employment' to the terminated employees. It thus follows that the ending of the terminated employees' employment with [Westinghouse] in August of 1998 was not a qualifying event because they had accepted an offer of 'continued employment' with

Siemens." *Id.*[6]

Relying on a decision of this Court, the Eleventh Circuit accordingly held: "'Because the terminated employees had 'continued employment' with and were terminated by Siemens, a 'successor employer,' they do not qualify for PJS benefits from the Westinghouse Plan. Section [204](g) does not override conditions originally imposed by the [pension] [p]lan.'" *McCay*, 247 F. App'x at 177 (quoting *Dade*, 68 F.3d at 1562). The same conclusion applies in the identical circumstances of this case.[7]

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[6] Although the claim in *McCay* was brought directly against Westinghouse under the terms of its Plan (*see* 247 F. App'x at 176-77), the Eleventh Circuit's analysis applies directly to the circumstances here, insofar as plaintiffs' claim rests on the proposition that Siemens' obligations are derivative of those created by the Westinghouse Plan. As for claims brought directly against Siemens, the Eleventh Circuit found them even more obviously insubstantial: "To the extent the terminated employees do assert a § [204(g)] violation as to Siemens, such an argument fails, as it is undisputed that the Siemens plans only became effective 1 September 1998 and never provided PJS benefits that could conceivably be cutback." *Id.* at 177.

[7] After Siemens called the decision in *McCay* to the district court's attention, the court summarily dismissed the Eleventh Circuit's decision, without discussion, as an "*ipse dixit*" that "is inconsistent with the guiding precedent utilized in the Memorandum Order." JA5 n.2. But that is not so: The Eleventh Circuit's analysis was well-considered, relying on not one, but two holdings of this Court. *See McCay*, 147 F. App'x at 177 (citing *Dade* and *Gritzer v. CBS, Inc.*, 275 F.3d 291 (3d Cir. 2002)). The court below did not even attempt to engage either the Eleventh Circuit's reasoning or the precedent of this Court upon which that reasoning relied. And the Eleventh Circuit's analysis could hardly have been inconsistent with the "guiding precedent" applied in the district court's original Memorandum Order; the district court's initial decision did not address this issue *at all*.

This Court reached the same conclusion in *Gritzer v. CBS, Inc.*, 275 F.3d 291 (3d Cir. 2002), a decision upon which the Eleventh Circuit relied in *McCay*. There, too, the plaintiffs had been employed by Westinghouse; they accepted work with a successor employer (Ceramics) when Westinghouse sold the ceramics plant where they worked. *Id.* at 293. Under the terms of the sale, Westinghouse continued to credit the transferred employees' service to Ceramics under its own pension plan (which included a PJS provision substantially identical to the one at issue here). *Id.* at 293-294. When the plaintiffs in that case were later terminated by Ceramics, they sought PJS benefits from Westinghouse.

Both the district court and this court squarely rejected the plaintiffs' claim. This Court explained:

> [t]he critical question … was whether [plaintiffs] satisfied the permanent job separation requirement, which required the "Employer" to terminate the employee because of a plant close-down or some similar "non-fault" termination. "Employer" simply means Westinghouse. It is undisputed that Ceramics, or any other successor company for that matter, does not qualify as an "Employer" under the express terms of the Plan.

Gritzer, 275 F.3d at 297. Observing that an employee thus "must … suffer a permanent job separation" to qualify for PJS benefits under the terms of the Westinghouse Plan, and that the definition of a "permanent job separation … required [Westinghouse itself] to terminate the employee," this Court concluded that the plaintiffs' termination by the successor employer

was a "fatal flaw in their case" and affirmed summary judgment to the defendants. *Id*. The Eleventh Circuit subsequently described *Gritzer* as "determining that discharge by [a] company not defined as [an] 'employer' is 'fatal' to [a] claim [for] PJS benefits." *McCay*, 247 F. App'x at 177.[8]

And this Court used a similar analysis in *Dade*. In that case, where the employer (North American Philips) sold its business but retained its ERISA plan, the question was whether Philips was required to credit service to the successor employer in determining the availability of an early retirement subsidy under the plan. 68 F.3d at 1560. The plan defined "Employer" as Philips and any entity that adopted the Philips plan, which the purchaser had not done. *Id*. at 1561. In those circumstances, this Court held the benefits unavailable.

[8] The district court considered *Gritzer* distinguishable because the plaintiffs' claim there arose under the Westinghouse Plan itself, rather than under a supposed "transition plan" created by "contractual agreement." JA81-82. But that is a distinction without a difference. By the district court's own reasoning, Siemens' transition plan was identical to the Westinghouse Plan. JA70. Plaintiffs' suit here – like the suit in *Gritzer* – thus is predicated exclusively upon the terms of the Westinghouse Plan and *its* PJS provision. The district court also noted this Court's observation in *Gritzer* that it was not asked to determine whether the agreement between Westinghouse and Ceramics extended the PJS benefits by contract. JA81 (citing *Gritzer*, 275 F.3d at 298). But such a contract claim also is not before this Court now; it hardly could be, as the APA expressly provides that it does not create rights in third parties. JA142.

Noting that ERISA "does not dictate the benefits to be offered once a decision is made to create" a plan, the Court observed that "Philips was thus at liberty to define the early retirement benefits in any way it chose, including a stipulation that only service to Philips or an affiliate would be credited toward the requirement." *Dade*, 68 F.3d at 1561. Given that principle, the Court explained:

> Section 204(g) is not applicable under the facts of this case because there has been no amendment of the Plan that reduced a benefit, accrued or otherwise. ... The denial resulted from the fact that plaintiffs could not satisfy the pre-amendment, presale conditions for the … retirement-type subsidy as originally written.

Id. The Court added: "Congress sought 'to protect *contractually defined benefits*.' The early retirement benefits plaintiffs seek were neither *promised* nor *contractually defined*." *Id*. (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989)) (both emphases added by the Court).

That same rationale applies here. The district court concluded below that Siemens was bound by the PJS provision of the Westinghouse Plan, either because the Siemens Plans were spin-offs of the Westinghouse Plan or because Siemens adopted the Westinghouse Plan as its own "transition plan." JA70. But whatever the theory, as employees of a successor company who were not terminated by Westinghouse, the legacy employees were by definition incapable of experiencing a "permanent job separation" under

the terms of the plan now attributed to Siemens. Thus, even imagining that the district court were correct that Siemens somehow promised PJS benefits to the legacy employees on the terms set by Westinghouse, the requirements for those benefits have not been, and never could be, satisfied. And because Siemens never promised PJS benefits to employees it terminated, there was nothing that could have been cut back when Siemens adopted its Plans.[9]

3. Plaintiffs also cannot satisfy the requirements of the Westinghouse Plan for another reason: at the time of the transaction at issue here, when Siemens assertedly adopted the terms of the Westinghouse Plan as

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[9] The district court was wrong when it found support for its contrary conclusion in *Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137 (3d Cir. 1993). JA81-82. The district court read *Gillis* to hold that "satisfaction of pre-amendment conditions does not have to occur until separation from service" and that "no separation from service occurred [in this case] until Siemens terminated the transferred employees." *Id*. But whether or not that is so, plaintiffs here *never* satisfied the conditions for PJS benefits stated in the Westinghouse Plan, before *or* after separation from service. And if the district court read *Gillis* to hold that, by operation of law, Siemens is deemed to have substituted itself for Westinghouse as the "employer" in the PJS provision, that reading – which is flatly inconsistent with *Gritzer* and *Dade* – also is wrong. In fact, *Gillis* simply did not address the issue presented here: "[i]n *Gillis*, the original plan sponsor transferred *all* of the plan's liabilities and assets to the purchaser," which "agreed to provide *all* the same early retirement benefits as the previous plan. There was no dispute about whether the plaintiffs, following the spin-off, would be entitled to credit for service with the employer. They would be." *Dade*, 68 F.3d at 1563 (emphasis added). But that is the essence of the dispute here.

its own, that Plan provided unequivocally in the sunset provision that "[i]n no event shall a Permanent Job Separation occur after August 31, 1998." JA293. Plaintiffs all were terminated after that date. They therefore necessarily are ineligible for PJS benefits.

To be sure, *after* the deal at issue here was consummated, this Court held in *Bellas* that PJS benefits are protected by the anti-cutback rule; "[c]onsequently, to the extent [Westinghouse] amended the Westinghouse Plan in 1994 to eliminate certain plan participants from eligibility for PJS benefits [through addition of the sunset provision], it violated section 204(g)." 221 F.3d at 538. But the Court's reasoning in reaching that holding was that *Westinghouse*, which initially promised PJS benefits to all *Westinghouse* employees who met specified age and service requirements, could not later cut back on that promise by amending its plan to add the PJS sunset provision. *Id*. at 519-21. Such a change was "a plan amendment that retroactively reduced benefits promised to plaintiffs." *Id*. at 522.

That conclusion, however, has no bearing on Siemens. Siemens never promised anyone PJS benefits, never included such benefits in its Plans, and therefore, as the Eleventh Circuit explained, "never provided PJS benefits that could conceivably [have been] 'cutback.'" *McCay*, 247 F. App'x at 177. Even if Siemens is thought to have adopted the terms of the Westinghouse Plan into a "transition" or spin-off plan, as the court below

believed, those terms – *at the time they were adopted by Siemens* – already provided expressly that a permanent job separation could not occur after August 31, 1998. Unlike Westinghouse, Siemens accordingly did not cut back on any PJS benefits it previously had offered in its plans by applying the sunset clause; from their inceptions, the Siemens Plans (however they might be conceived) never provided for PJS benefits after August 31, 1998. As we have noted, the anti-cutback rule does not "foreclose employers from circumscribing the availability of … optional benefits when they are being created." *Dade*, 68 F.3d at 1562 (internal quotation marks omitted). That is the most Siemens could be said to have done here.

In ruling to the contrary, the district court, evidently referring to the APA, opined that "Siemens committed itself to provide substantially identical benefits to the transferring employees and … unequivocally agreed to accept all future liability that came with that commitment." JA31. But if the district court meant by this reasoning that Siemens accepted liability identical to any *subsequently* imposed upon Westinghouse, even if that liability was not stated in the terms of Siemens' own plan, it was wrong, for several reasons. Most obviously, the APA is not a Siemens Plan. And the *plan* language plaintiffs seek to apply against Siemens provides, expressly, that PJS benefits are unavailable to employees whose employment is terminated after August 31, 1998.

In any event, even if the district court were correct to focus on the APA, its declaration that Siemens "unequivocally agreed to accept all future liability" paralleling that ultimately borne by Westinghouse is wholly unsupported. The plain terms of the APA suggest otherwise: they provide that Siemens is committed to include "terms and conditions" in its Plans that are "substantially identical … to those of the Westinghouse Plan in effect as of the Closing Date." JA138. The express language of the Westinghouse Plan as of that date provided for the sunset of the PJS benefits. There is no reason to believe that Siemens nevertheless intended to act as an insurer against defects in the Westinghouse Plan, exposing itself to future liability that did not appear in the Westinghouse Plan's "terms and conditions" and, indeed, was unknowable at the time. No reasonable purchaser would agree to subject itself to such open-ended liability.[10]

Unsurprisingly, there is compelling contemporaneous evidence that Siemens had no such intent. Siemens bargained with its unions and obtained their agreement to adopt pension plans that omitted PJS benefits

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[10] In fact, as Westinghouse warranted to Siemens in the APA, its Plan – including the sunset provision – "was the subject of a favorable unrevoked determination letter issued by the IRS as to its qualified status under the [Internal Revenue] Code … and to the knowledge of the sellers no circumstances have occurred that would adversely affect the tax qualified status of the" Plan. APA § 4.1(m)(ii)(C). Indeed, on October 28, 1997, immediately prior to the signing of the APA, Westinghouse received another favorable determination letter from the IRS.

(JA107-108), did not in fact include PJS provisions in its Plans, and instead offered severance benefits with no PJS off-set. In this context, Siemens cannot be thought voluntarily to have agreed in the APA to assume PJS liabilities parallel to any that a court might impose against Westinghouse *in the future*.

4. Finally, it bears emphasis that the rule requiring application of plan terms as written – and limiting benefits to those expressly provided by plans – is not one that is narrow or technical, or that may be regarded by a court as optional; it is central to the policy of ERISA. In enacting ERISA, Congress intended not just "to offer employees enhanced protection for their benefits" (*Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)), but also to "induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of [remedies]," that would forestall crushing "litigation expenses" that might otherwise "unduly discourage employers from offering ERISA plans in the first place." *Conkright v. Frommert*, 130 S. Ct. 1640, 1649 (2010) (alterations omitted) (quoting *Varity Corp.*, 516 U.S. at 497; *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)). These policies require courts to engage in "'careful balancing'" so that a goal of expanding the availability of benefits does not override the interest in "en-

courag[ing] … the creation of … plans." *Id.* (quoting *Aetna Health*, 542 U.S. at 215 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987))).

The rules that Congress chose to encourage the creation of plans are apparent: employers may select "what kind of benefits" they will provide and the "conditions … required to obtain" those benefits. *Spink*, 517 U.S. at 887. Plainly, applying as written the plain plan terms that define those benefits and set those conditions is essential if employers are to be willing to create ERISA plans. And just as plainly, "the harm to the interest in predictability" (*Conkright*, 130 S. Ct. at 1650) that would follow from the district court's disregard of the limits written into a plan – by Westinghouse when it offered PJS benefits only to employees terminated by Westinghouse, and by Siemens when (in the district court's view) it adopted new plans that borrowed the terms of the Westinghouse Plan – is clear. An approach that makes it impossible for employers to rely on express limits governing the availability of benefits that they wrote into their plans "'might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.'" *Id.* at 1649 (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)). A faithful effort to undertake the "'careful balancing'" required by ERISA (*id.*) counsels strongly against such an approach.

The district court's approach also leads to a second, related problem: precisely because there is no written Siemens plan that provides for PJS benefits, the court assigned itself the task of choosing, and drafting, the relevant terms of the Siemens Plans. The matter is very different in a case like *Bellas*, where the question is whether an amendment to the sponsor's written plan is valid; if it is not, the court can simply strike the amendment, leaving the plan with the terms that the sponsor originally put in place. Here, in sharp contrast, the court is departing from the Westinghouse Plan's original terms, substituting Siemens for Westinghouse in the definition of "employer" and applying the new plan to Siemens. Taking that step, in turn, requires the court to resolve a host of uncertainties about the terms of the rewritten plan: to name just two, the court must determine exactly *what* entities qualify as an "employer" under the plan (the Westinghouse Plan includes affiliates or joint ventures designated to participate in the Plan by "the Administrative Managers"); and whether there are temporal limits on the availability of PJS benefits (the APA stated that Siemens would provide benefits "comparable" to those offered by Siemens only for a period of "not less than two years." JA137-138.

These are the sorts of choices that Congress intended a sponsor to make when setting the terms of its plan. And Congress likewise expected plan administrators to exercise discretion when determining, in the first

instance, how those terms should be applied, subject to deferential judicial review when the plan grants the administrator broad authority to make plan-related decisions. *See*, *e.g.*, *Conkright*, 130 S. Ct. at 1646. But by departing from the plain terms of the Westinghouse Plan's PJS provision, the district court improperly assigned itself both of those roles. And that, too, is a reason that the decision below is insupportable.

B. ERISA Section 208 Has No Bearing Here Because The Siemens Plans Did Not Assume The Westinghouse Plan's Liabilities.

For the reasons just addressed, plaintiffs cannot prevail whatever the validity of the district court's analysis of ERISA Sections 204(g) and 208; plaintiffs may not demand benefits to which they are not entitled under the terms of *any* plan. But even if that were not so and it is assumed that Siemens can be treated as an "Employer" within the meaning of the Westinghouse Plan (and assumed further that plaintiffs suffered permanent job separations within the meaning of that Plan), plaintiffs still could not overcome the manifold flaws in the district court's theories of liability.

As we have noted, one of those theories is that the Siemens Plans were "spin-offs" of the Westinghouse Plan under ERISA Section 208, that all spin-offs are "amendments" of the plan from which the spin-off was spun-off, and that the Siemens' Plans' status as spin-offs means that Siemens amended and "cut back" the Westinghouse Plan within the meaning

of ERISA Section 204(g) by failing to offer PJS benefits. The necessary first step in this analysis is the proposition that the Siemens Plans were in fact spin-offs within the meaning of Section 208, which provides that a "pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan" unless plan participants would, if the second plan were then terminated, receive a benefit immediately after the "merger, consolidation, or transfer" equal to or greater than the benefit they would have received if the first plan had been terminated immediately before the merger. 29 U.S.C. § 1058.

Plaintiffs concede that in this case there was no plan consolidation or merger, and no transfer of plan assets. They nevertheless argue, and the district court held, that a spin-off occurred because, through operation of the APA, the Westinghouse Plan transferred plan *liabilities* to the Siemens Plans. But that contention is wrong, in two respects: there was no transfer of *anything* between the Plans; and had something been transferred, it would not have been a "liability" within the meaning of Section 208. The Eleventh Circuit held exactly that when it rejected precisely the same argument that plaintiffs present here, involving these same Plans: "§ [208] is inapplicable here, as no transfer of assets *or* liabilities occurred between the Westinghouse Plan and [the] Siemen[s] Plan." *McCay*, 247 F. App'x at 177-178 (emphasis added). That holding was correct. And because

there was no transfer, and thus no spin-off, the rest of the district court's cutback theory collapses.[11]

1. No liabilities were transferred from the Westinghouse Plan to the Siemens Plans.

a. To begin, we note that Section 208 was not designed to address circumstances even remotely like those presented here. That provision was intended to "protect[] plan beneficiaries from losing benefits through the merger or consolidation of plans." *Malia v. Gen. Elec. Co.*, 23 F.3d 828, 831 (3d Cir. 1994). It does not require that the terms of the pre- and post-transfer plans be identical; Section 208 is violated only if the assets of the post-transfer plan are insufficient to pay the benefits that would have

[11] We also note that the second step in the district court's chain of reasoning – that a transfer of liabilities within the meaning of Section 208 must be treated as an "amendment" of the initial plan under ERISA Section 204(g), so that the anti-cutback rule is violated if the second plan's terms are less generous than those of the first plan – is itself highly dubious. As a matter of the plain statutory text, "an amendment of the plan" (Section 204(g)) is simply not the same thing as a "transfer of assets or liabilities" from one "pension plan" to "[an]other plan" (Section 208). An amendment of "the plan" is a change to the terms of a single plan (here, for example, a modification by Westinghouse of its own plan) and not a second plan's receipt of additional assets or liabilities from the first plan.

Although certain Treasury regulations interpreting the anti-cutback rule appear to support the district court's understanding of the relationship between Sections 204(g) and 208 (*e.g.*, 26 C.F.R. §1.411(d)-3(a)), the Court must "give effect to the statute as written." *In re Visteon Corp.*, 612 F.3d 210, 219 (3d Cir. 2010). But because there assuredly was no spin-off here, it is unnecessary for the Court to determine whether a spin-off in fact works a plan amendment under Section 204(g).

been owing had the pre-transfer plan been terminated immediately prior to the transfer. *Id.* at 832.

Although there is little explanatory background on Section 208 in ERISA's legislative or regulatory history, the common sense of the provision is that it assures employees are not disadvantaged when one company divides its plan in two, or takes over another company's plan. Thus, the regulatory examples of the provision's application offered by the Treasury Department *all* address plan mergers,[12] while the term "spin-off" is defined as "the splitting of a single plan into two or more plans." 26 C.F.R. § 1.414(*l*)-1(b)(4). The decisions of this Court addressing Section 208 likewise involve plan mergers (as in *Malia*) or circumstances where one company takes over another's plan (as in *Gillis*); we are not aware of any case addressing a Section 208 spin-off when, as here, there has been an asserted transfer of a subset of plan liabilities, and nothing more.

Moreover, it is obvious why there are no decisions finding that a transfer of liabilities, standing alone, effectuates a spin-off. It would make no sense for one plan to accept another's liabilities, but not its assets. And more than that, such a transfer would leave both plans out of compliance with statutory and regulatory requirements. Here, a transfer of plan lia-

[12] *See* 26 C.F.R. § 1.414(*l*)-1(c)(1)(ii) (example), (j)(2) (illustration), (k) (examples 1, 2); 26 C.F.R. §1.411(d)-3(a)(3)(i) (Example 4(i)(B)).

bilities with no corresponding transfer of assets would have left the Siemens Plans underfunded at the moment they were created. *See* 26 C.F.R. §1.414(*l*)-1(4); *Gillis*, 4 F.3d at 1147 (citing 29 U.S.C. § 1344(a)(6) and stating, "to transfer their liability for early retirement benefits, [the transferor] must transfer assets ... to fund those benefits"). Tellingly, plaintiffs do not argue that the Siemens Plans were underfunded. There accordingly is no need to apply Section 208 to invalidate such an improbable characterization of the transaction at issue here.

b. It therefore is no surprise that, on examination, no transfer of liabilities between plans took place here, through the APA or otherwise. Most obviously, Section 208 is triggered by transactions between plans; insofar as is relevant here, it comes into play when a "pension plan … transfer[s] its … liabilities to any other plan." But there was, very simply, no such transfer here. Although the court below found the transfer of liabilities effectuated by the APA, the court recognized that the APA is not itself a plan or plan document. Moreover, Westinghouse never amended its Plan to transfer, and Siemens never provided in its Plans that they would accept, any Westinghouse Plan liabilities. Naturally, then, the Westinghouse Plan in fact at no time purported to transfer, and the Siemens Plans did not in fact accept, any Westinghouse Plan liabilities. Accordingly, there could not have been a transfer: a transfer "occurs when there is a diminu-

tion of assets or liabilities with respect to one plan and the acquisition of these assets or the assumption of these liabilities by another plan." 26 C.F.R. § 1.414(*l*)-1(b)(3). That simply did not occur here.

In addition, even if the APA itself could have transferred liabilities absent any accompanying change in the Plans, it manifestly did not do so. To the contrary, APA § 5.5(d)(iii) provides expressly that the Westinghouse Plan "shall *retain liability* with respect to Business Employees for their accrued benefit calculated as of the Closing Date." JA138-139 (emphasis added). That is enough to dispose of plaintiffs' transfer argument. After all, it is central to plaintiffs' position that PJS benefits *are* "accrued benefits" within the meaning of Section 204(g); it is that proposition, plaintiffs say, that triggers application of the anti-cutback rule on which they rely. And if that is so, there is no reason to doubt that PJS benefits also are accrued benefits for APA purposes – liability for which expressly is retained by the Westinghouse Plan. The district court offers no contrary reading of APA § 5.5(d)(iii).

Instead, the court pointed to other provisions of the APA that it believed transferred the Westinghouse Plan's liability for PJS benefits, notwithstanding APA § 5.5(d)(iii). *First*, it found a transfer accomplished by the APA language providing that, "[e]ffective as of the Closing Date," Siemens agreed to offer pension benefits to the legacy employees on "terms

and conditions … substantially identical … to those of the Westinghouse Plan in effect as of the Closing Date. " JA138; *see also* JA28, 60-61. But that conclusion is surely wrong.

As we have noted, a transfer of liabilities requires one plan to "assume[] liabilities *from* another plan." 26 C.F.R. § 1.414(*l*)-1(c)(i) (emphasis added). On the face of it, such a transfer was not accomplished by APA § 5.5(d)(i). The APA language stating that Siemens would create a plan "substantially identical" to that of the Westinghouse Plan as of the closing date promised simply that Siemens would establish its own plan that, going forward, would offer legacy employees (now employed by Siemens) benefits equivalent to those they previously had been offered by Westinghouse; by its terms, the provision did not transfer the Westinghouse Plan's pre-closing liabilities to the Siemens Plans.[13] Moreover, Siemens' commitment to Westinghouse to offer the legacy employees similar benefits in the future, after the sale of the PGBU had closed, obviously could not have shifted present liabilities corresponding to accrued benefits under the Westinghouse Plan to the Siemens Plans. Any benefits that might accrue to the legacy employees under the terms of the *Siemens Plans* in the *future*

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[13] Of course, Siemens *did* provide benefits substantially identical to those offered by Westinghouse as of the closing date because PJS benefits sunsetted under the Westinghouse Plan prior to that date.

as a consequence of their service *to Siemens* were never the Westinghouse Plan's liabilities to transfer in the first place.

Second, the district court opined that liabilities were transferred by APA § 5.5(d)(iv) (JA139-140), which provides as to PJS benefits that the Siemens Plans

> shall be solely responsible for (and the [Westinghouse] Pension Plan shall not provide for) … (B) any benefits pursuant to Section 19 of the [Westinghouse] Pension Plan [*i.e.*, the PJS provision] and the corresponding provision of the [Siemens] Pension Plan … with respect to a Business Employee who retires or terminates employment with [Siemens] … after the Closing Date."

See JA28, 62. But this, too, is wrong. By its plain terms, the provision does not transfer liabilities; it states only that certain liabilities for PJS benefits that attach *after* the closing date – contingent liabilities that, by definition, have not yet attached, and therefore could not be "transferred" – will be borne in the first instance by Siemens rather than Westinghouse. This is an allocation of future liabilities, not a transfer of existing liabilities between plans. By its plain terms Section 208 cannot come into play unless a "plan … transfer[s] its assets or liabilities to[] any other plan" (29 U.S.C. § 1058) – and that did not happen here.

In any event, as matters developed, there could have been no PJS benefits for which the Siemens Plans became responsible under APA § 5.5(d)(iv), and therefore no plan liabilities attributable to such benefits

that could have been transferred. As we have explained (at 9-10, *supra*), there were lengthy delays between the signing of the APA and the closing of the PGBU acquisition on August 18, 1998. On that date, Siemens and Westinghouse amended the APA to provide that, for pension purposes, the closing date of the transaction was September 1, 1998 – the day after the sunset of the PJS provision. Pursuant to this amendment, Westinghouse was to amend *its* plan to cover the legacy employees during "the period [from August 19] through August 31, 1998. JA156; *see also* JA105. Siemens agreed not to terminate any legacy employees "other than for cause before September 1, 1998 and in the event it does, to reimburse [Westinghouse] for any actuarial pension loss caused by such termination." JA156. The Westinghouse Plan thus remained liable for any PJS benefits that came due prior to the sunset of the PJS provision. And there could be, by definition, no post-closing PJS benefits to be assumed by Siemens because, after closing, the employees could no longer be terminated by Westinghouse, the PJS sunset date had passed, and Siemens did not include in its Plan provisions "corresponding" to the Westinghouse PJS provision.

Third, the district court also seemed to have it in mind that liabilities were transferred by APA language indicating that Siemens would be "solely responsible" for certain early retirement supplements that became payable to employees who retired *after* the closing date. JA139-140; *see al-*

so JA12, 62-63. But this view rests on a plain misreading of the APA. The APA provision cited by the district court addressed only a tiny subset of retirement benefits offered by Westinghouse – those providing special early retirement supplements for certain employees who retired prior to age 62 – that are not claimed by plaintiffs here and are not at issue in this case. The district court offered no basis for its conclusion that the APA's treatment of these supplements, which are wholly unrelated to the benefits claimed here, made the Siemens Plans a continuation of the Westinghouse Plan for all purposes.

In contrast, Westinghouse retained liability for early retirement benefits generally accrued as of the closing date. Indeed, in APA § 5.5(d)(iii) (JA138-139), Westinghouse agreed that, for the purposes of vesting certain early retirement benefits, its Plan would credit service provided to Siemens even *after* September 1, 1998; at its most restrictive, Westinghouse here assumed liability for the portion of those benefits attributable to years of service to Westinghouse. *See* JA139. And in APA § 5.5(d)(v) (JA140), Siemens agreed to indemnify Westinghouse for any actuarial losses to its Plan caused by certain actions of Siemens that resulted in the payment of early retirement benefits. That Siemens would have to indemnify Westinghouse for these losses makes clear that the latter remained liable: had a transfer of liability occurred, there would have

been no need for an indemnity. *See Caldwell Trucking PRP v. Rexon Tech. Corp.*, 421 F.3d 234, 243 (3d Cir. 2005) ("one who assumes a liability" must be "distinguished from one who agrees to indemnify against it"); *see also Black's Law Dictionary* 784 (8th ed. 2004) (defining "indemnity" as "[a] duty to make good any loss, damage, or liability incurred by another").[14]

c. The language of the Plans and the APA thus establishes that there was no transfer of liabilities. But if the APA were thought to be ambiguous on this point, it would be appropriate to consider extrinsic evidence to ascertain the intent of the contracting parties. *See Gritzer*, 275 F.3d at 298; *Stoner v. Bellow*, 196 F.2d 918, 921 (3d Cir. 1952). And on this, there can be no doubt: both Siemens and Westinghouse plainly understood that there was no transfer of liabilities between the two.

As we have explained, had the Siemens Plans accepted liabilities but not assets, they would have had negative values from their inception and therefore violated ERISA; the parties could hardly have intended such a result. *See Walsh v. Schlecht*, 429 U.S. 401, 408 (1977) ("ambiguously worded contracts should not be interpreted to render them illegal and un-

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[14] The district court also relied on APA § 2.3(a)(vii) (JA134), under which Siemens assumed all liabilities "arising under or in connection with any Plan or Benefit Arrangement." JA60, 63. But the APA expressly excluded from these assumed liabilities "those retained by [Westinghouse] under [APA] Section 5.5." JA135. And under that provision, Westinghouse retained all liabilities accrued before the closing date.

enforceable"). And they manifestly did not. Although Westinghouse had every incentive to assert that it had transferred its liabilities, it instead acknowledged unreservedly that that it made no such transfer. JA398. That reality was confirmed by Westinghouse's actions. Had there been a transfer, Westinghouse would have been required to file a Form 5310A ("Notice of Plan Merger, or Consolidation, Spinoff, or Transfer of Plan Assets or Liabilities") with the IRS, but it made no such filing.

Siemens, meanwhile, filed Form 5500s ("Annual Return/Report of Employee Benefit Plan") in the years following the transaction stating that its Plans had not assumed liabilities from the Westinghouse Plan. JA371-396. And although the APA explicitly provides for the transfer of assets and liabilities from the Westinghouse 401(k) Plan and the Westinghouse *Canadian* Pension Plan to the corresponding Siemens plan,[15] it contains no such language transferring assets *or* liabilities from the Westing-

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[15] As to the 401(k) plan, the APA provided that Westinghouse "shall cause to be transferred from the [Westinghouse] Savings Program to purchaser's 401(k) Plan assets having fair market value equal to the aggregate value of the account balances in the [Westinghouse] Savings Program as of the date of transfer … and Purchaser shall cause the Purchaser's 401(k) Plan to accept the receipt of such transfers and the liabilities relating thereto." APA § 5.5(e)(iii). Regarding the Canadian plan, the APA provided that "the accrued pension benefits of the Canadian Plans attributable to the Canadian Business Participants, shall be transferred, in accordance with applicable law, to a pension plan (or plans) maintained by the Purchaser." APA § 5.5(o)(ii).

house Plan to the Siemens Plans for U.S. employees at issue in this case. In the face of this showing – which was simply disregarded by the district court – it cannot plausibly be thought that Westinghouse's Plan effected a transfer of liabilities to the Siemens Plans.

2. *Contingent liabilities are not "liabilities" within the meaning of Section 208.*

The district court's Section 208 analysis also is wrong for an additional reason: even if Westinghouse transferred *something* to Siemens, the contingent and inchoate responsibility for PJS benefits and early retirement supplements upon which the district court focused were not "liabilities" within the meaning of Section 208. When, as here, a word "[is] not statutorily defined," it is "usually ascribed [its] 'ordinary or natural meaning.'" *Lozano v. City of Hazleton*, 620 F.3d 170, 208 (3d Cir. 2010) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)) *petition for cert. filed,* 79 U.S.L.W. 3370 (U.S. Dec. 8, 2010). The ordinary meaning of "liability" is "[t]he quality or state of being legally obligated or accountable." *Black's Law Dictionary* 997 (8th ed. 2004). By connoting a *presently* binding legal obligation, a "liability" is distinguishable from a "contingent liability," which is a liability that *may* "occur" in the *future*, "if a specific event happens." *Id.*; *see also* Int'l Accounting Standard No. 37.10 (defining a "liability" as a "*present* obligation as a result of *past* events," and a "contingent

liability" as "a *possible* obligation depending on whether some uncertain *future* event occurs") (emphasis added), *available at* http://www.iasplus.-com/standard/ias37.htm.

The consequence of the everyday meaning of the word "liability," as distinguished from a mere "contingency," is clear: because a plan incurs a liability corresponding to a contingent PJS benefit only after a participant meets the conditions for receiving the benefit, there is no "liability" to transfer within the meaning of Section 208 prior to the satisfaction of those conditions.[16]

This understanding of the word "liability" is confirmed by ERISA § 4044, 29 U.S.C. § 1344, which dictates the measurement and allocation of plan benefits following a plan termination. *See Mead Corp. v. Tilley*¸490 U.S. 714, 717 (1989). The courts, together with the agencies responsible for interpreting ERISA, have held that Section 4044 does not protect contingent benefits. *Id*. at 722-723; *Malia*, 23 F.3d at 831; PBGC Opinion Letter

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[16] Consistent with this understanding, IRC Section 412(*l*)(7) provided prior to 2006 that "unpredictable contingent event benefit[s] shall not be taken into account" as "liabilities" of a plan "until the event on which the benefit is contingent occurs." 26 U.S.C. § 412(*l*)(7)(B) (2000). For reasons that are not clear from the legislative history, Congress eliminated that and substantial other portions of Section 412 in 2006. *See* Pension Protection Act of 2006, Pub. L. 109-280, § 111(a), 120 Stat. 780, 820 (2006). There is no indication that Congress intended its elimination of IRC Section 412(*l*)(7) to imply that unpredictable contingent event benefits now should be treated as present plan liabilities.

86-1, 1986 WL 38780, at *1 (Jan. 15, 1986). When distributing the post-termination residual assets of a plan, employers thus need not provide compensation for unaccrued contingent benefits, and instead may recoup the assets for themselves. *E.g.*, *Malia*, 23 F.3d at 832. Section 4044(d) provides, however, that the "residual assets of a single-employer plan" may be retained by the employer only after "all *liabilities* of the plan to participants and their beneficiaries have been satisfied." 29 U.S.C. § 1344(d)(1) (emphasis added). Congress in Section 4044 therefore excluded contingent benefits from the understanding of ERISA "liabilities."[17]

As a consequence, even assuming that APA § 5.5(d) transferred the Westinghouse Plan's responsibility for certain then-unaccrued contingent

[17] 26 C.F.R. § 1.401-2(b)(2) does not require a contrary conclusion. Although that regulation suggests that the term "liabilities" appearing in IRC § 401(a)(2) "includes both fixed and contingent obligations to employees," other authoritative Treasury pronouncements concerning the same provision have explained that a "[c]ontingent" obligation must correspond to "benefit credits accrued [at] the time of termination" to constitute a "liability." Revenue Ruling 65-178, 1965-2 C.B. 94, pt. 3(a); *see also supra* note 18. Other courts have agreed with this understanding of the term "liability." The Southern District of New York has recognized, for example, that a "liability" under ERISA "is incurred" only once "the employee benefits" corresponding to the liability "become nonforfeitable." *In re Chateaugay Corp.*, 87 B.R. 779, 799 (S.D.N.Y. 1988). Section 4001(a)(8) of ERISA defines "nonforfeitable benefit" to mean, in relevant part, "a benefit for which a participant has satisfied the conditions for entitlement under the plan." 29 U.S.C. § 1301(a)(8).

benefits to the Siemens Plans, that transfer could not have been a transfer of "liabilities" within the meaning of Section 208.

C. Siemens Did Not Create A "Transition Plan."

The district court's alternative theory of liability was its belief that Siemens adopted an ERISA-protected "transition plan" to cover the legacy employees during the thirteen days from August 19, 1998, through August 31, 1998 – the period when those employees remained covered by the Westinghouse Plan while working for Siemens, prior to the effective date of the Siemens Plans on September 1, 1998. In the district court's view, "Siemens provided its new employees with pension benefits through the Westinghouse Plan until its Plans were effective." JA72. And because under this "transition plan" "the intended benefits were those provided by the Westinghouse Plan" (JA70), and because the Westinghouse Plan offered PJS benefits, the court concluded Siemens cut back on the terms of this "transition plan," in violation of ERISA Section 204(g), when it omitted PJS benefits from its Plans. JA32-34, 74. But this holding is wholly insupportable: there was no "transition plan" that could be subject to Section 204(g).

First, there simply is no such thing as an ERISA "transition plan." Sponsoring an ERISA-qualified pension plan entails "a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit

payments, and keeping appropriate records in order to comply with applicable reporting requirements." *Fort Halifax*, 482 U.S. at 9. These obligations must be performed indefinitely, over a period of years; as this Court has explained, "the crucial factor in determining whether a 'plan' has been established is whether [the employer has expressed an intention] to provide benefits on a regular and long-term basis." *Deibler v. United Food & Commercial Workers' Local Union 23*, 973 F.2d 206, 209 (3d Cir. 1992). For precisely this reason, Treasury regulations provide that "[t]he term 'plan,'" within the meaning of ERISA and the IRC, "implies a *permanent* as distinguished from a *temporary* program." 26 C.F.R. § 1.401-1(b)(2) (emphasis added). A thirteen-day program obviously is not permanent. For this reason alone, the district court's analysis is wrong.

Second, even if there could be a "transition plan," Siemens did not establish one here. Nothing in either the APA itself, or in the August 19, 1998 amendment to the APA that obligated Westinghouse to amend *its* Plan to cover the legacy employees until August 31, 1998, suggests that Siemens took on *any* of the myriad obligations required to sponsor an ERISA-protected pension plan during that same transition period. To the contrary, if the APA makes anything clear, it is that the *Westinghouse Plan*, not Siemens, provided the legacy employees benefits during that time.

The APA amendment obligated Westinghouse, not Siemens, to amend its Plan to cover the legacy employees during this period (JA143); Westinghouse Plan administrators were responsible for keeping track of employee service for pension purposes during those thirteen days; it is those administrators who would have determined the availability and amount of benefits due had a legacy employee been laid off during the interim period; and Westinghouse would have had to pay any benefits that came due. The plaintiffs have admitted as much: they acknowledged in their motion for summary judgment that the legacy employees were "covered under the Westinghouse Plan until August 31, 1998, even though they were Siemens employees after [August 18, 1998]." Dist. Dkt. 61, at 14 n.7. Because Westinghouse counted these thirteen days as credited service under *its* Plan, deeming there to have been a Siemens "transition plan" in effect at the same time would mean that plaintiffs were receiving an accrued benefit for the same period under two separate plans.

That Siemens employed the legacy employees while they were being credited for service under the Westinghouse Plan did not transform Siemens into a co-sponsor of that plan. Siemens had *no* pension obligation to the legacy employees during the period that they remained covered by the Westinghouse Plan. As the Eleventh Circuit concluded in *McCay*, "Siemens did not become a sponsor of the Westinghouse Plan when Westing-

house agreed to provide eligibility credit, vesting credit, and limited pension service credit" during the transition period. 247 F. App'x at 178. Instead, "the Westinghouse Plan alone created and provided for such liabilities." *Id.* Siemens never funded the Westinghouse Plan, kept pension records corresponding to the legacy employees for the period that they were covered by the Westinghouse Plan, or made any decisions about the legacy employees' benefits eligibility corresponding to their service during that period. *See Fort Halifax*, 482 U.S. at 9.

Third, in reaching the contrary conclusion, the district court evidently reasoned that, under the APA, "the source of financing [for the 'transition plan'] was split between the employers." JA70. But the APA accomplished no such thing. Nothing in the APA made Siemens liable to the legacy employees for pension or PJS benefits accrued during the thirteen-day interim period. Siemens' only obligation for events occurring during that time was to indemnify Westinghouse for actuarial losses were Siemens to terminate an employee without cause.[18] But as noted above (at 48), an agreement to indemnify presupposes that there has *not* been an assumption of the underlying liability. Siemens simply agreed to compensate Westinghouse for certain possible pension losses that could have been caused

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[18] In fact, no legacy employees were terminated during this period.

by Siemens' actions – and it is settled that a promise "[t]o do little more than write a check" does not "constitute[] the operation of a benefit plan." *Fort Halifax*, 482 U.S. at 12; *accord O'Connor v. Commonwealth Gas Co.*, 251 F.3d 262, 267 (1st Cir. 2001); *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254, 258 (8th Cir. 1994); *Angst v. Mack Truck, Inc.*, 969 F.2d 1530, 1538-39 (3d Cir. 1992).

Fourth, this aspect of the decision below also will have significant and unfortunate effects that undermine ERISA's policies. Transitional arrangements of the sort at issue in this case are hardly unusual. But under the rule announced below, when such an arrangement is put in place the acquiring employer is deemed to have adopted the selling employer's plan as its "transitional plan," requiring the acquiring employer to include in its own permanent plan going forward terms that are at least as generous as those in the selling employer's plan. Indeed, as this approach was applied by the court below, the acquiring employer also assumes the risk that there are hidden defects in the seller's plan (like the invalidity of the Westinghouse Plan's sunset provision) that the purchaser will have to cure in its own plan many years later. The consequence is that using the seller's plan to provide the purchaser's new employees pension coverage for even a brief period prior to the initiation of the purchaser's plan will expose the purchaser to the prospect of substantial, unpredictable, and unanticipated

pension liability. And that will likely discourage employers from providing interim coverage in such circumstances at all. ERISA does not countenance such a result.

II. THE DISTRICT COURT ERRED IN DENYING SUMMARY JUDGMENT TO SIEMENS AGAINST THE RELEASE PLAINTIFFS.

Even if all of that we have said so far were wrong, Siemens *still* would be entitled to summary judgment as to the vast majority of the plaintiffs in this case. That is because 207 of the 227 class members released Siemens from liability for any claims related to or arising out of their employment or termination. JA108-112. In exchange for these releases and promises not to sue, Siemens paid very substantial severance amounts to each Release Plaintiff. JA112. The Release Plaintiffs have already eaten their cake; they cannot have it too.

The magistrate judge and district court both properly concluded that ERISA permitted plaintiffs to release their claims to PJS benefits, and that the releases here unambiguously covered the claims raised in this lawsuit. JA45-46, 90-91. They also correctly agreed that once Siemens produced the releases and demonstrated that they covered the claims raised, the burden shifted to the Release Plaintiffs to prove that the releases were "not voluntarily and knowingly enter[ed] into." JA46-47, 88. Where the magistrate judge and district court disagreed – and where the

latter erred – was in the district court's sweeping conclusion that "[s]ummary judgment is not an appropriate vehicle for such a fact-intensive inquiry." JA47.

The summary judgment standard is familiar: it turns not on whether a factual dispute is "intensive," but on whether it is *genuine*. Fed. R. Civ. P. 56(c). When there is no genuine dispute to be resolved by further proceedings, Rule 56(c) "*mandates* the entry of summary judgment" for the moving party, without regard for the potential complexity of any of the undisputed issues. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (emphasis added).

Here, plaintiffs simply failed to produce any evidence calling the validity of their releases into question. They never argued that their releases were entered into unknowingly or involuntarily, and their trial court submissions all but admitted that the were *not*. As the magistrate judge observed, plaintiffs readily acknowledged both that they had "consulted … attorney[s] about the meaning" of the releases and that they had "entered into the agreement[s] voluntarily with the intent to be legally bound by [their] terms." JA90. There was, in short, no genuine dispute concerning the validity of the releases.

The district court accordingly erred in denying summary judgment vis-à-vis the Release Plaintiffs. Siemens "demonstrate[d] the absence of a

genuine issue of material fact," and Rule 56 accordingly "mandated" that the district court grant Siemens' motion. *Celotex*, 477 U.S. at 323.

CONCLUSION

The district court's final judgment with respect to the Non-Release Plaintiffs and its order denying summary judgment to Siemens with respect to the Release Plaintiffs both should be reversed, and the case should be remanded with instructions to grant summary judgment to Siemens with respect to all plaintiffs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Third Circuit Rule 31.1(c), the undersigned counsel for Appellants/Cross-Appellees certifies that this electronic brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 13,948 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii);

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it was prepared using Microsoft Office Word 2007 and is set in 14-point sized Century School-book font;

(iii) is identical to the ten hard copies sent to the Clerk of the Court on May 27, 2011 via overnight courier service; and

(iv) has been scanned with a virus detection program and no virus was detected.

/s/ *Michael B. Kimberly*

THIRD CIRCUIT RULE 28.3(d) CERTIFICATION

Pursuant to Third Circuit Rule 28.3(d), the undersigned counsel for Appellants/Cross-Appellees certifies that Charles A. Rothfeld and Michael B. Kimberly both are members of the bar of this court.

/s/ *Michael B. Kimberly*

CERTIFICATE OF SERVICE

The undersigned counsel for Appellants/Cross-Appellees certifies that the foregoing brief was served upon all counsel of record via the Court's electronic CM/ECF system on May 27, 2011.

The undersigned counsel further certifies that, on May 27, 2011, ten identical hard copies of the foregoing brief, together with four hard copies of the Joint Appendix, were provided to a third-party courier for overnight delivery to the Clerk of the Court; and that, on May 27, 2011, one identical hard copy of the foregoing brief, together with one hard copy of the Joint Appendix, was provided to a third-party courier for overnight delivery upon each of the following:

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