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

THIRD-STEP BRIEF FOR APPELLANTS/CROSS-APPELLEES

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MISCELLANEOUS

INTRODUCTION

We showed in our opening brief that (1) Siemens has no liability for PJS benefits and (2) if Siemens ever did have such liability, it has been waived by the Release Plaintiffs. In arguing to the contrary, plaintiffs make a great many conclusory assertions – but they wholly fail to address the substance of our arguments. In doing so, plaintiffs ignore the controlling terms of the Siemens Plans, misread the language and legal import of the APA, and misstate the requirements of ERISA. They offer no reasonable arguments in support of their claims.

ARGUMENT

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

Plaintiffs do not dispute the background of the case as stated in our opening brief. As we there showed, Westinghouse and Siemens at all times had separate ERISA plans; by their express and unambiguous terms, the Siemens Plans never provided PJS benefits; and the evidence showed that, as a result of the delayed closing date under the APA and the APA amendment providing that the *Westinghouse Plan* was to credit legacy employees for service through September 31, 1998 (when the PJS benefit under the Westinghouse Plan was scheduled to subset), Siemens never *intended* to offer PJS benefits under any of its plans or to have any of its plans assume the liabilities for those benefits from the Westinghouse Plan.

In nevertheless insisting that Siemens is obligated to provide PJS benefits, plaintiffs' theory is obscure. But plaintiffs appear to argue that Siemens agreed in the APA to provide PJS benefits, notwithstanding the absence of any PJS guarantee in Siemens' written plans. This theory, however, is wrong in every respect. The APA is not a plan document, and therefore cannot be a basis for liability; even were that not so, the APA itself expressly disclaims the creation of any private rights; and the APA's language does not, in any event, suggest any commitment on Siemens' part to pay PJS benefits. Siemens is not obligated to pay such benefits, either by the terms of its ERISA plans or by ERISA itself, and that should be the end of plaintiffs' claims in this case.

A. No Plan Makes Siemens Liable To Pay Plaintiffs PJS Benefits.

1. To begin with, we showed in our opening brief that that the district court's theory of liability – that Siemens is liable for PJS benefits because the Siemens Plans are a "continuation" of the Westinghouse Plan – is wrong. Even if the Siemens Plans were a continuation of the Westinghouse Plan (and, as we also showed, they are not), plaintiffs are not entitled to PJS benefits under the terms of the Westinghouse Plan; among other things, an employee is entitled to PJS benefits under the Westinghouse Plan only if terminated by an "employer," that plan defines "em-

ployer" to mean Westinghouse, and plaintiffs were *not* terminated by Westinghouse. Siemens First-Step Br. 23-35.[1] Plaintiffs evidently agree. They make no attempt to defend the district court's "continuation" analysis or to reconcile that analysis with the holdings of *McCay v. Siemens Corp.,* 247 F. App'x 172 (11th Cir. 2007), *Gritzer v. CBS, Inc.,* 275 F.3d 291 (3d Cir. 2002), or *Dade v. North American Phillips Corp.,* 68 F.3d 1558 (3d Cir. 1995). Accordingly, it should be treated as settled that, had Siemens adopted the terms of the Westinghouse Plan as its own (as the district court believed it did), Siemens would not be liable for PJS benefits now.

To avoid this conclusion, plaintiffs observe that the "employer" under the Siemens Plans is Siemens, not Westinghouse. Pls. Second-Step Br. 8-9. That surely is true, but it also is beside the point. The Siemens Plans do not provide for PJS benefits when Siemens employees are terminated by an "employer"; they do not provide for PJS benefits *at all*. And plaintiffs, having implicitly conceded that Siemens cannot be liable under the terms of the Westinghouse Plan, make no attempt to show how Siemens can be liable under the terms of *its* plans for benefits promised only by Westing-

[1] Plaintiff's contention that this "is an entirely new argument, never raised before the District Court" (Pls. Second-Step Br. 7-8), is mystifying. In fact, Siemens advanced the argument at length before both the magistrate and district judges. *See* Defs.' Obj. to Magistrate's Rep. & Recomm. on Summ. J. 17-18 (Dist. Ct. Dkt. No. 79, filed Feb. 14, 2006); Defs.' Mem. In Supp. of Mot. for Summ. J. 7-8, 13-17 (Dist. Dkt. No. 53, filed May 2, 2005).

house.[2] For this reason, the Eleventh Circuit in *McCay*, on facts identical to those here, found it obvious that an attempt to hold Siemens liable for PJS benefits "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.'" 247 F. App'x at 177.

2. In arguing to the contrary, plaintiffs disregard the terms of the Siemens Plans – which, very notably, they nowhere quote, mention, or cite in their brief. Instead, they rely on the provisions of the APA. But the APA is not material here. It is not an ERISA plan document; the district court so held (JA67-69), and plaintiffs do not disagree with that conclusion. Yet only plan documents can be the source of liability under ERISA, as plaintiffs themselves recognize elsewhere in their brief. *See*, *e.g.*, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 129 S. Ct. 865, 875 (2009) (a claim "stands or falls by 'the terms of the plan,' 29 U.S.C. § 1132(a)(1)(B), a straightforward rule of hewing to the directives of the

[2] Plaintiffs rely on the Court's decision in *Gillis v. Hoechst Celanese Corp.,* 4 F.3d 1137 (3d Cir. 1993), for the proposition that "transferred employees may treat service for a successor employer as service for the plan sponsor for the purpose of qualifying for early retirement benefits." Pls. Second-Step Br. 9. But as we showed in our opening brief (at 31 n.9), *Gillis* cannot be read to hold that a new employer, by operation of law, becomes responsible for all of the old employer's obligations – and any such rule would be inconsistent with the Court's subsequent decisions in *Gritzer* and *Dade*. Plaintiffs make no response.

plan documents that lets employers establish a uniform administrative scheme, with a set of standard procedures to guide processing of claims and disbursement of benefits") (internal quotation marks & alterations omitted); *see also* Pls. Second-Step Br. 27, 28.

Moreover, the APA expressly provides that it does not "confer upon any Person other than the parties hereto [*i.e.*, Siemens and Westinghouse] … any rights or remedies hereunder" (JA142), which means that, even if the APA *could* be a source of liability, it expressly is not. Plaintiffs have nothing to say about this provision, and do not explain how a document with such a disclaimer can be a source of third-party rights.

In any event, plaintiffs' reading of the APA provisions on which they rely, even viewing those provisions in isolation and assuming that they are enforceable by plaintiffs, is wrong. *First*, plaintiffs say that "there would be no point in the APA assigning responsibility for PJS Benefits due to post-closing termination if termination by the new Employer would never trigger eligibility for a PJS benefit." Pls. Second-Step Br. 9. This assertion evidently refers to APA § 5.5(d)(iv), which provides that the Siemens Plans "shall be solely responsible for … any benefits pursuant to Section 19 of the [Westinghouse] Plan [the PJS provision] and the corresponding provision of the [Siemens] Plan … with respect to a [PBGU] employee who retires or terminates employment with [Siemens] and its affiliate after the

Closing date." JA139-140. But as we explained in our opening brief (at 45-46), this language was written when it was expected that the transaction would close well in advance of the Westinghouse Plan's PJS sunset date. Because closing was delayed, the Siemens Plans do not include a PJS provision "corresponding" to the Westinghouse Plan's Section 19; the APA was instead amended to provide that *Westinghouse* would remain liable for plaintiffs' pension benefits through the September 1, 1998, closing date, even though plaintiffs moved onto Siemens' payroll on August 19, 1998. *See* Siemens First-Step Br. 10-11, 46.[3] The clear understanding implemented by the revised APA thus was that Siemens would have no liability for PJS benefits at any time.

Second, plaintiffs note that the APA states that Siemens will provide benefits on "substantially identical terms" to those afforded by the Westinghouse Plan. Pls. Second-Step Br. 8-9. But as we showed in our opening brief (at 31-35), Siemens *did* include terms in its Plans that were substantially identical to those of the Westinghouse Plan. The APA provides, in particular, that Siemens will include "terms and conditions" in its Plans

[3] This same amendment also provided that Siemens (not the Siemens Plans) would indemnify Westinghouse for actuarial losses to its Plan resulting from termination of a legacy employee by Siemens prior to the closing date. As we showed in our opening brief (at 47-48, 56-57), this indemnification provision confirms that the Westinghouse Plan, and not Siemens, would be liable to the employees for any PJS benefits due.

that are "substantially identical … to those of the Westinghouse Pension Plan *in effect as of the Closing Date*." JA138 (emphasis added). And as of that date, the PJS provision had expired under the express language of the Westinghouse Plan.

Plaintiffs' only attempt to address this limitation on the availability of PJS benefits is the assertion that, because this Court's decision in *Bellas* (which was issued years after the closing of this the transaction at issue here) "established that as a matter of law, the PJS Benefits continued to exist through the closing of Siemens' acquisition of the PGBU, the [*Bellas*] decision affects Siemens and the Siemens Plans as the voluntary transferees of post-closing liability for those benefits." Pls. Second-Step Br. 10. As we explain below, however, neither Siemens not any Siemens Plan was the transferee of the Westinghouse Plan's PJS liabilities. And plaintiffs' argument is not, in any event, an answer to our demonstration that, whatever the effect of *Bellas* on Westinghouse, nothing in that decision makes Siemens an insurer against hidden defects in the Westinghouse Plan, exposing it to liability that does not appear in that plan's express "terms and conditions." *See* Siemens First-Step Br. 34-35. Plaintiffs make no response to this point.

Third, plaintiffs respond to our argument that the decision below frustrates ERISA's policy of letting employers choose benefit levels by ar-

guing that Siemens is simply being held to its agreement in the APA. Pls. Second-Step Br. 10. But this argument proves our point. Plaintiffs do not deny that Siemens did not actually intend to assume liability for PJS benefits under the amended and final version of the APA, a conclusion supported by compelling contemporaneous evidence: Siemens obtained the agreement of its unions to the creation of pension plans that omitted PJS provisions, and Siemens did not in fact include such provisions in its Plans. *See* Siemens First-Step Br. 34-35. And if our back-and-forth with plaintiffs on this issue shows nothing else, it demonstrates that the APA's language does not unambiguously commit Siemens to assume liability for PJS benefits. If that language nonetheless is held to support plaintiffs' claims, the danger that non-plan documents will be used in unpredictable ways to impose enormous liability will discourage employers from creating ERISA plans at all. *See id*. at 35-36.

B. The Westinghouse Plan Did Not Transfer Liabilities To The Siemens Plans.

Plaintiffs next take issue with our argument that there was no transfer of liabilities from the Westinghouse to the Siemens Plans. Pls. Second-Step Br. 11-17. Here, too, plaintiffs are incorrect.[4]

[4] Addressing our argument that a transfer of liabilities within the meaning of ERISA § 208 does not work a plan amendment within the meaning

1. At the outset, plaintiffs evidently agree with us that Siemens did not amend *its* plans to *accept* liabilities for PJS benefits or to provide for payment of such benefits. *See* Siemens First-Step Br. 42. And as we showed in our opening brief (at 42-43), that means there *could not* have been a transfer of liabilities; a transfer "occurs when there is a diminution 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). There was no such assumption of liabilities by the Siemens Plans here, and that should be the end of the matter.[5]

Plaintiffs nevertheless assert that Westinghouse amended *its* plan to transfer its PJS liabilities and that "Siemens agreed [in the APA] to create

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of ERISA § 204 (Siemens First-Step Br. 40 n.11), plaintiffs state only that their contrary reading is supported by Treasury regulations. Pls. Second-Step Br. 17. We recognized that was so in our opening brief, but explained that a transfer of liabilities from one plan to another simply cannot, as a matter of plain statutory text, equate to a plan amendment. Plaintiffs make no attempt to explain why our reading of the statutory language is wrong. But the Court need not reach this question if it holds that there was no transfer of plan liabilities here.

[5] There also could not have been a transfer of liabilities because there was no corresponding transfer of plan assets by Westinghouse. *See* Siemens First-Step Br. 40-42. Plaintiffs take issue with that proposition. Pls. Second-Step Br. 11-12. But it was this Court that said: "[T]o transfer their liability for early retirement benefits, [an employer] must transfer sufficient assets to the [acquiring company's plan] to fund those benefits." *Gillis*, 4 F.3d at 1147. As plaintiffs concede, there was no such transfer of assets by the Westinghouse Plan here; accordingly, there could not have been a transfer of liabilities.

a plan to which the liability would be transferred, and its constitutive undertaking as the Siemens Plans' sponsor gave rise to a *de jure* acceptance of the transferred liability by the Plans." Pls. Second-Step Br. 12. But this contention, too, is wrong. Absent a plan amendment, ERISA simply does not allow for this sort of informal expansion of plan liability, by "constitutive undertaking" or otherwise; plaintiffs point to no authority supporting their contrary contention.[6]

Moreover, even if that were not so and it were assumed (illogically) that an amendment of the Westinghouse Plan could make Siemens liable, plaintiffs still would be incorrect. The Westinghouse Plan amendment relied upon by plaintiffs provided that the Siemens Plans would be responsible for, and Westinghouse would not provide for, "any benefit pursuant to Section 19 of the [Westinghouse] Plan and the corresponding provision of the [Siemens] Pension Plan … with respect to any PGBU Employee who retires or terminated employment with [Siemens] and its Affiliates after the Closing Date." JA476. But as we have explained, there is no "corresponding" PJS provision of the Siemens Plans that could give rise to Sie-

[6] In fact, the law is clear that a plan amendment is effective only if implemented through use of the plan's amendment procedures. *See*, *e.g.*, *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 82-83 (1995). Here, it is undisputed that the Siemens Plans were not initially written to, and were never amended to, to provide for PJS benefits.

mens PJS liability. Westinghouse, meanwhile, could not be liable to plaintiffs whose employment was terminated after the closing date because such employees, by definition, would not have been terminated by Westinghouse. By its terms, then, this language did not purport to transfer any of the Westinghouse Plan's PJS liability to Siemens.

2. Plaintiffs also assert that APA § 5.5(d)(iv), which contains language identical to that of the Westinghouse Plan provision quoted above, transferred liabilities from the Westinghouse to the Siemens Plans. (Plaintiffs evidently have abandoned the district court's reliance on APA § 5.5(d)(i) to find such a transfer. *See* Siemens First-Step Br. 43-45; *cf.* Pls. Second-Step Br. 12-13. Again, this assertion is wrong because only plans may transfer liabilities to other plans. But even if that were not so, plaintiffs would find no support in APA § 5(d)(iv), for the reasons addressed in our opening brief (at 45-46). As we there explain, Section 5.5(d)(iv) states that Siemens will be responsible for any PJS benefits owing to employees who are terminated after the closing date. But this provision does not purport to *create* PJS liability not otherwise provided for in any ERISA plan and, as we also explained, delay in consummation of the PGBU transaction meant that neither the Siemens nor the Westinghouse Plans provide for payment of PJS benefits to plaintiffs. APA § 5(d)(iv) does not change that reality. And plaintiffs make *no* response to this point.

Plaintiffs get no further in arguing that APA § 5.5(d)(vi) "confirms that liability for Section 19 benefits, including PJS benefits, was transferred." Pls. Second-Step Br. 14. In relevant part, that provision states that Westinghouse will indemnify Siemens for certain costs to the Siemens Plans attributable to the termination of legacy employees *after* the transaction closing date "under the provision of the [Siemens] Plan comparable to Section 19 of the [Westinghouse] Plan." JA141. Plaintiffs doubtless are correct that this provision was premised on the assumption that Siemens would be liable in the first instance for PJS benefits owing to legacy employees under its own Plans, and that Westinghouse would compensate Siemens for some of those payments. But this could not have reflected a *transfer* of liabilities from the Westinghouse to the Siemens Plans; it meant that Westinghouse would compensate Siemens for certain PJS liabilities, arising from Siemens' *own* plans, stemming from the termination of employees by Siemens. And, of course, Siemens ultimately did not include such a PJS provision in its plans at all.

Finally, plaintiffs do not deny that overwhelming and unambiguous evidence shows that Siemens and its Plans did not mean to accept liabilities from Westinghouse, and that the Westinghouse Plan did not mean to transfer liabilities to Siemens. *See* Siemens First-Step Br. 48-50; *compare* Pls. Second-Step Br. 14. Instead, plaintiffs insist only that extrinsic evi-

dence may not be consulted because the APA unambiguously supports their argument that a transfer of liabilities took place. But that surely is not so. We have shown that the APA's language nowhere even arguably purports to transfer plan liabilities. *See* Siemens First-Step Br. 42-48. But if we are wrong on that score and the APA does not clearly favor Siemens' view, we submit that on any fair reading the APA is no worse than ambiguous on that question. In such circumstances, extrinsic evidence of the contracting parties' intent *is* highly relevant. *See id.* at 48. And here, that evidence leaves no doubt that the parties to the APA did not intend their agreement to transfer plan liabilities.

3. Moreover, we showed in our opening brief that, if anything was transferred here, it was contingent liabilities, which are not "liabilities" within the meaning of ERISA § 208. Siemens First-Step Br. 50-53. We explained (*id*. at 50-51) that this conclusion follows from ERISA's plain language; plaintiffs make no response.

Instead, plaintiffs assert that, under *Bellas*, PJS benefits are "accrued benefits." In fact, that is not so; in the statutory amendment construed in *Bellas*, Congress was careful to provide, not that contingent benefits like PJS payments *are* "accrued benefits," but rather that a plan amendment eliminating certain contingent benefits "shall be *treated* as reducing accrued benefits" for purposes of applying the anti-cutback rule.

Retirement Equity Act of 1984, § 301, 29 U.S.C. § 1054(g)(2) (emphasis added). For all other purposes, ERISA provisions addressing accrued benefits do not apply to PJS benefits at all. *See* Siemens First-Step Br. 7.

Beyond that, plaintiffs' argument answers apples with oranges. ERISA § 208, the provision plaintiffs rely upon for their transfer theory, refers in relevant part to the transfer of "liabilities," not to "accrued benefits." And as plaintiffs themselves recognize (at Pls. Second-Step Br. 12), *Bellas* explained that "unpredictable contingent event benefits [like PJS payments] are not taken into account in determining a plan's current liability and related funding obligations until after the contingent event occurs." 221 F.3d at 535. As a consequence, even if it is assumed (counterfactually) that Westinghouse transferred to the Siemens Plans responsibility for future PJS benefits, that would not have been a transfer of "liabilities" within the meaning of Section 208.[7]

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[7] In arguing to the contrary, plaintiffs rely on *Gillis*, which, they assert, "quoted with approval an IRS ruling that contingent early retirement benefits *are* liabilities which must be provided for in a plan termination." Pls. Second-Step Br. 15-16. In fact, *Gillis* interpreted Section 204, not Section 208, and therefore had no occasion to address the latter provision's use of the term "liability." In any event, the IRS Revenue Ruling addressed in *Gillis* actually states that an employer's failure to set aside funds to pay contingent benefits accrued in the future raises the risk that "'liabilities will not be satisfied … if the value of this retirement-type subsidy is not provided with respect to a participant who, after the date of the proposed termination [of an early retirement plan], satisfies the pretermination

C. There Was No Transition Plan.

Plaintiffs also contend that they were covered by a Siemens plan that was identical to the Westinghouse Plan "from the time of their transfer to Siemens" (Pls. Second-Step Br. 17 (capitalization omitted)), even though there is no doubt that they were expressly covered by the Westinghouse Plan for their service with Siemens during the period August 19 through August 31, 1998. Therefore, plaintiffs continue, omission of PJS benefits from Siemens' written plans was a cutback of protected benefits that had been provided by Siemens under that temporary plan. *Id.* at 19. It is unclear whether plaintiffs mean this argument to defend the district court's "transition plan" theory; the term "transition plan" does not appear in plaintiffs' brief. But if so, plaintiffs make no attempt to refute our demonstration that there simply is no such thing as an ERISA transition, or temporary, plan. Siemens First-Step Br. 53-54.

Ignoring that problem in their argument, plaintiffs argue that the APA, although not a plan document, sets the terms of a Siemens plan that was in effect prior to adoption of the *real* Siemens Plans as of September 1, 1998. Pls. Second-Step Br. 18. But even if it were permissible to look to the

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conditions necessary to receive such benefit.'" *Gillis*, 4 F.3d at 1145 (quoting Rev. Rul. 85-6, 1985-1 C.B. 133). The Ruling used the term "liability" to refer to amounts owing *after* satisfaction of the conditions for payment – that is, liabilities that are no longer contingent.

APA for the terms of a Siemens plan that governed prior to September 1, 1998, and even if such a temporary arrangement could create rights under ERISA, we showed in our opening brief that (1) the APA expressly made *Westinghouse*, not Siemens, responsible for benefits during this interim period; (2) plaintiffs' contrary view would mean that they accrued benefits under *both* the Siemens and Westinghouse Plans during this period; and (3) plaintiffs' approach would mean that an acquiring employer assumes indefinite responsibility for all the hidden defects in the seller's plan, and is required permanently to match the benefits provided in the seller's plan any time the seller's plan continued to cover legacy employees for even the briefest period after the employees went on the buyer's payroll. Siemens First-Step Br. 54-57. Each of these points is a reason that plaintiffs' theory cannot be right. Plaintiffs make no response to any of them.

Plaintiffs therefore have not established that they ever had a valid claim for PJS benefits against Siemens. The Siemens Plans, by their plain terms, do not provide for payment of such benefits. The APA could not, and did not purport to, create such an obligation on Siemens' part. And Siemens did not create a temporary plan providing for such benefits that forever froze in place its obligation to provide them. For these reasons, plaintiffs' claims should be dismissed.

II. THE DISTRICT COURT ERRED IN NOT GRANTING SUMMARY JUDGMENT TO SIEMENS WITH RESPECT TO THE RELEASE PLAINTIFFS.

Plaintiffs next contend that the district court correctly denied summary judgment to Siemens with respect to the Release Plaintiffs. Pls. Second-Step Br. 19-26. The Court need not reach this question if it agrees with our submission that Siemens never became liable for PJS benefits in the first place. But if it does address the issue, it should find that on this, too, plaintiffs are incorrect: Courts routinely uphold general releases of liability, substantially identical to those at issue in this case, with respect to claims under ERISA. This Court should do so here.[8]

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[8] Plaintiffs are wrong to assert that our contention that summary judgment should have been granted to Siemens with respect to the Release Plaintiffs "is not properly before this Court" because it was not certified by the district court. Pls. Second-Step Br. 19. "As the text of § 1292(b) indicates, appellate jurisdiction applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996). Thus, the "scope of review includes all issues material to the order in question." *Id.* (internal quotation marks & alterations omitted). Here, that includes the district court's denial of summary judgment with respect to the Release Plaintiffs. *See* JA35-47.

A. Waivers Of Claims To Benefits Are Enforceable Under ERISA.

1. ERISA claims may be waived by general releases in exchange for severance pay.

Although plaintiffs assert that various provisions of ERISA limit the effectiveness of employee waivers, they ultimately "do not contend that a claim for vested pension benefits can never be compromised." Pls. Second-Step Br. 21. They make that concession for good reason: It is almost universally recognized that, with respect to "claims under ERISA," general waivers should be given effect according to "[n]ormal principles of contract interpretation." *Howell v. Motorola, Inc.*, 633 F.3d 552, 560 (7th Cir. 2011), *petition for cert. filed,* 79 U.S.L.W. 3636 (U.S. Apr. 21, 2011) (No. 10-1318); *see also Chaplin v. Nations Credit Corp.*, 307 F.3d 368, 372 (5th Cir. 2002) ("Federal common law controls the interpretation of a release of federal claims."). Under these principles, courts should not "torture language in an attempt to force particular results the contracting parties never intended or imagined" and instead must interpret "straightforward language" according to "its natural meaning." *Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123, 126 (3d Cir. 1996); *see also, e.g.*, *Saltzman v. Independence Blue Cross*, 384 F. App'x 107, 114 (3d Cir. 2010) (observing that, under ERISA, "straightforward, unambiguous language should be given its natural meaning").

It thus comes as no surprise that courts repeatedly have held that claims arising under ERISA may be waived by general releases in exchange for severance pay. In *Chaplin*, for example, the Fifth Circuit addressed several plaintiffs' "claims under ERISA ... for wrongful denial of severance benefits." 307 F.3d at 371. The plaintiffs there each signed a general release in exchange for severance payments, releasing the defendant from liability for "any and all claims" arising under "any federal, state or municipal statute, or ordinance" that were "in any way connected with [their] employment relationship" with the defendant. *Id*. at 370. Attempting to avoid the force of the releases, the plaintiffs argued that the "the language of the releases [did not] cover[] [their] claim for ERISA benefits" because the release did not "specifically mention ERISA." *Id*. at 372. The Fifth Circuit rejected that argument, concluding that "a general release of 'any and all' claims applies to all possible causes of action," specifically including "plaintiffs' claims for ERISA benefits." *Id*. at 373. The court affirmed the grant of summary judgment to the defendant on that basis.

In *Halvorson v. Boy Scouts of America*, 215 F.3d 1326 (table), 2000 WL 571933, at *2 (6th Cir. 2000), the Sixth Circuit likewise considered the applicability of a general release to a claim under ERISA. There, the plaintiff had signed, "[a]s part of his resignation agreement," "a release waiving his claims against" the defendants for "any and all" liabilities aris-

ing out of his "employment relationship" with the defendants. 2000 WL 571933, at *2 & n.2. The court found the argument against enforcing this waiver so insubstantial that it declared, in an unpublished opinion, that unless there was evidence that the agreement was not "knowingly and voluntarily made," "th[e] release waives [the plaintiff's ERISA] claims against" the defendants. *Id*. at *2-*3. Finding no such evidence in the record, the court concluded that the plaintiff's "ERISA claims against [the defendants] are foreclosed." *Id*. at *3. *See also Howell*, 663 F.3d at 558-59, 561 (Seventh Circuit enforced release that, in return for "additional severance pay," waived claims arising out of "employment or separation from employment" from the defendant, including "ANY and ALL causes of action" arising "under any federal law (including but not limited to . . . the Employee Retirement Income Security Act)."[9]

2. The waivers here are enforceable.

Plaintiffs' hodge-podge of arguments that the waivers here nonetheless are unenforceable (Pls. Second-Step Br. 20-24) is meritless.

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[9] In *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585 (3d Cir. 2009), this Court held that ERISA § 410(a), 29 U.S.C. § 1110(a), does not preclude individuals from releasing claims of breach of fiduciary duty under ERISA. *Id*. at 593-94. Although not directly addressing the situation here, in which former employees are suing for benefits, the Court noted that a release may be thought to "bar[]" such claims. *Id*. at 599-600.

1. Plaintiffs first argue that ERISA's "anti-forfeiture" and "anti-alienation" rules, and certain regulations, prohibit waiver of their statutory claims to PJS benefits. Pls. Second-Step Br. 20-22. That is not so.

First, the Section 203 anti-forfeiture rule (29 U.S.C. § 1053(a)) is plainly inapplicable here: the Release Plaintiffs did not *forfeit*, but *waived*, their claims against Siemens. It is settled that "[w]aiver is different from forfeiture." *United States v. Olano*, 507 U.S. 725, 733 (1993). Thus, while a "forfeiture" is an involuntary and often punitive "deprivation or destruction of a right" "without compensation" (*Dobrek v. Phelan*, 419 F.3d 259, 263-264 (3d Cir. 2005)), a "waiver," is "an intentional and voluntary relinquishment of a known right" (*United States v. Goldberg*, 67 F.3d 1092, 1099 (3d Cir. 1995)), often in exchange for consideration (*Restatement (Second) of Contracts* § 84 cmt. b (1981)).

Here, it is undisputed that the Release Plaintiffs received substantial payments in exchange for intentional relinquishment of any legal claims they may have against Siemens arising out of their employment with or termination from Siemens. Putting aside whether the waivers should be understood to cover the specific claims at issue here, there accordingly is no question that the releases constitute waivers and not forfeitures: the Release Plaintiffs were not involuntarily deprived of their rights

without compensation. *Dobrek*, 419 F.3d at 263-264. Section 203's prohibition of forfeitures accordingly does not apply.[10]

Second, this also is not a case in which ERISA's Section 206(d)(1) anti-alienation rule applies. *See* Pls. Second-Step Br. 20-21. This point, too, is beyond serious doubt: as the Supreme Court recently explained in *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, prohibitions on "assign[ment]" and "alienat[ion]" (29 U.S.C. § 1056(d)(1)) do not apply to waivers.

Section 206(d)(1)'s language is unambiguous: "to 'assign' is to transfer; as to assign property, or some interest therein," and "to 'alienate' is to convey" or "to transfer the title to property." *Kennedy*, 129 S. Ct. at 870. Thus, a beneficiary who assigns or alienates his or her interest in pension benefits must *transfer* that interest to a third party, who in turn retains a claim against the plan. *Id.* Not so with respect to a "waiver," which involves not a *transfer*, but an *extinguishment* of an interest; a plan beneficiary who waives a claim "does not attempt to direct her interest in pension benefits to another person" and "no party acquires from [the] be-

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[10] The sole authority that plaintiffs cite for the contrary proposition, a 25-year-old district court decision, openly conflates "waiver" with "forfeiture." *See* Pls. Second-Step Br. 20 (citing *Bruchac v. Universal Cab Co.*, 580 F. Supp. 295, 304 (D. Ohio 1984)). That decision has never, to our knowledge, been cited favorably by any other court for its application of the anti-forfeiture rule in cases like this one.

neficiary a right or interest enforceable against the plan pursuant to [the] beneficiary's waiver of rights." *Id.* at 872 (quoting and according deference to Brief for United States as *Amicus Curiae*). Because it does not involve a transfer of any interest, a "waiver d[oes] not constitute an assignment or alienation rendered void under the terms of [the anti-alienation rule]." *Id.* at 873. In suggesting otherwise, plaintiffs simply ignore the Supreme Court's central holding in *Kennedy*.

Third, the regulations that plaintiffs cite are equally unhelpful to their case. *See* Pls. Second-Step Br. 21. In the first place, 26 C.F.R. § 1.411(d)-4 Q&A-3's waiver prohibition applies by its terms to waivers of benefits that occur only "by reason of a transfer of such benefits to a defined contribution plan pursuant to a participant election." 26 C.F.R. § 1.411(d)-4 Q&A-3(a)(3). Here, the Release Plaintiffs have not waived their claims to PJS benefits as part of a formal election attending a transfer of benefits. Instead, they agreed to waive any claims they may have as part of their severance agreements. The regulation, by its plain terms, thus does not apply here.

What is more, as plaintiffs themselves acknowledge (Pls. Second-Step Br. 21), Q&A-3's waiver prohibition is subject to "except[ion] as provided in paragraph (b)" of that regulation. Paragraph (b), in turn, permits the "elimination or reduction" of benefits any time the participant's waiver

election is "voluntary" and "fully-informed." 26 C.F.R. § 1.411(d)-4 Q&A-3(b)(i). Accordingly, the regulation reaffirms that knowing and voluntary waivers of claims to benefits, such as those at issue here, *are* permissible.

2. Plaintiffs argue next that, even if their claims to PJS benefits *could* be waived, the releases at issue in this case should not be construed as covering those claims. They offer two justifications for this conclusion: (i) the claims are not "contested claims," and therefore the waivers are invalid under *Lynn v. CSX Transportation, Inc.*, 84 F.3d 970 (7th Cir. 1996) (*see* Pls. Second-Step Br. 22); and (ii) the waivers are extrinsic to the Siemens Plans and thus violate the so-called "plan document rule" (*see id.* at 22-24). Once again, neither of these arguments has merit.

First, plaintiffs' reliance on *Lynn* is misplaced for two independent reasons. As an initial matter, that decision has been abrogated by *Kennedy*. In *Lynn*, the Seventh Circuit considered the same issue implicated here: whether a general "release from liability" as part of a severance agreement waives an employee's ERISA claims against his or her former employer, or instead is "void" with respect to such claims "in light of the anti-alienation provision." 84 F.3d at 972. The Seventh Circuit concluded that some such waivers are void under the anti-alienation rule, and some are not. But in *Kennedy*, the Supreme Court clarified that a "waiver" is neither an "alienation" nor an "assignment," and thus that ERISA's anti-

alienation provision *never* voids a waiver. 129 S. Ct. at 870-873. *Lynn*'s conclusion that a waiver may, under certain circumstances, be voided under that rule is therefore no longer good law.

But even if *Lynn* had survived *Kennedy*, it would counsel in favor of finding the waivers here valid. There, the Seventh Circuit explained that ERISA's anti-alienation provision applies only to "pension entitlement[s] aris[ing] under the terms of the pension plan itself," and *not* to "[c]ontested pension claims" predicated upon some other source of legal rights extrinsic to the plan (in that case "a settlement agreement"). 84 F.3d. at 975. Here, plaintiffs' claims manifestly do not arise under the terms of the Siemens Plans themselves; instead, they arise under some combination of the APA and ERISA Sections 204(g) and 208.[11] They accordingly are "contested claims" and not subject to the anti-alienation provision even under the discredited *Lynn* framework. *Id*. at 975-976 (whether a claim is "contested" turns on the source of the claim and not on "[w]hether the parties actually wrangled over a particular claim" prior to signing the release).

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[11] Plaintiffs suggest that a claim under ERISA is really a claim under the terms of a plan because "the requirements of ERISA are a part of every ERISA plan." Pls. Second-Step Br. 22. That claim is silly. Plans obviously do not incorporate by reference either ERISA or the full body of substantive law interpreting it simply because pension plans are enforced according to that body of law.

Second, plaintiffs' invocation of the "plan document rule" also is misplaced. According to this line of reasoning, the waivers are not enforceable "because they are not provided for or recognized under the terms of the Siemens Plans." Pls. Second-Step Br. 23. In plaintiffs' view, *Kennedy* means that "benefit waivers extrinsic to a plan are not cognizable in awarding plan benefits, even if they would be recognized as valid waivers under federal common law." *Id*. But that is not what *Kennedy* says at all.

In *Kennedy*, the employee had expressly designated – pursuant to the terms of his plan – his then-wife as his surviving beneficiary in the event of his death. 129 S. Ct. at 869. Later, he and his wife executed a divorce agreement in which she purported to waive her survivorship interest in her husband's pension benefits. *Id*. But the husband never altered his survivorship election under the plan. The Supreme Court held the divorce-agreement waiver invalid, not because it was "extrinsic" to the plan, as plaintiffs here suggest (at 22-24), but because it directly "conflict[ed] with the designation made by the former husband in accordance with plan documents." *Kennedy,* 129 S. Ct. at 868. Requiring the plan administrator to honor the extrinsic waiver in those circumstances would have required it to *disregard* "the directives of the plan documents." *Id*. at 875. The Supreme Court held simply that the plan administrator should give effect to the plan documents and not the contrary divorce agreement. That unsur-

prising holding has no application here: The waivers in this case are not irreconcilable with any express employee elections authorized by the terms of the Siemens Plans.[12]

B. The Plain Language Of The Releases Unambiguously Covers Plaintiffs' Claims For PJS Benefits.

Against this backdrop, there is little question that the Release Plaintiffs' waivers both are fully enforceable under ERISA and cover their claims for PJS benefits.

The waivers are clear and unambiguous: they expressly apply to all "claims, actions, and charges of every kind, nature and description, whenever they arise, whether known or unknown, arising out" of each Release Plaintiff's "employment with [Siemens] or the termination therefrom" and

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[12] Plaintiffs raise two additional reasons why the releases may not be construed as covering their claims for PJS benefits. Both are insubstantial. First, they assert that the releases do not cover the claims here because the releases "do not list the Siemens Plans ... as released entities." Pls. Second-Step Br. 26. But that is not so. Virtually all of the releases provide that Siemens entered into the agreement on behalf of, among other entities, its "benefit plans." (Exhibit A at 1). To our knowledge, only one of the releases omits the benefit plans as expressly released parties, but even that agreement includes Siemens' "agents," "affiliates," and "assigns" as among those released. (*See* Exhibit B at 3). Second, plaintiffs contend that Siemens itself "did not believe that the Releases had any effect on PJS benefits." Pls. Second-Step Br. 26. Even if that were so (and it most certainly is not the case that Siemens believed the releases inapplicable to claims for PJS benefits), it would be insufficient to overcome the plain language of the agreements.

arising under any "federal, state or local law[]." (Exhibit A at 1).[13] Plaintiffs' claims for PJS benefits indisputably are "claims ... arising out of" their "termination" from Siemens; those claims have been brought under ERISA, a "federal" law. The claims accordingly are covered by the plain language of the releases, and the Release Plaintiffs' causes of action and recovery are barred.

For their part, plaintiffs point to no particular phrase or term that they believe to be ambiguous. Instead, they insist that the "broad general language" of the releases cannot be interpreted as covering their claims here because "the Releases make no mention of PJS Benefits." Pls. Second-Step Br. 25. That argument fails on its face. It is the self-evident purpose of the releases' broadly inclusive language to relieve the parties of any obligation to enumerate individually each potential cause of action being released. As the Fifth Circuit explained in *Chaplin*, "a general release of 'any and all' claims" by its plain terms "applies to all possible causes of action," including any and all "claims for ERISA benefits." 307 F.3d at 373; *cf. Geraghty v. Ins. Servs. Office, Inc.*, 369 F. App'x 402, 406 (3d Cir. 2010) (rejecting, under New Jersey law, a plaintiff's attempt "to circumvent" a

[13] Pursuant to the Committee Comment to Local Rule 30.3, we have attached a release exemplar as Exhibit A to this brief.

broad general waiver by "arguing that the Release failed to specify" the particular cause of action asserted). Just so here.[14]

C. There Is No Genuine Dispute As To Whether The Releases Were Entered Into Knowingly And Voluntarily.

In a further effort to avoid the consequences of their bargain, the Release Plaintiffs also argue that Siemens has failed to demonstrate that their waivers were fully informed. Pls. Second-Step Br. 24-26. But that is incorrect: There is no genuine dispute that the releases were entered into both knowingly and voluntarily.

To be sure, if an ERISA plaintiff's release agreement was "not made knowingly and voluntarily," the release will not be enforceable. *Howell*, 633 F.3d at 559. And because "the issue of the release[s] is an affirmative defense, the burden of proving that [they were] knowingly accepted is on [Siemens]." *Jakimas v. Hoffmann-La Roche, Inc.*, 485 F.3d 770, 782 (3d Cir. 2007) (addressing releases under ERISA). But Siemens plainly met that burden.

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[14] Plaintiffs suggest that our interpretation of the general release "would apply equally to waive the releasors' entire pensions." Pls. Second-Step Br. 25. But that is not a question presented in this case: None of the plaintiffs has claimed in this lawsuit that he or she is not receiving the traditional pensions due them. Whether the releases could be read as applying should plaintiffs bring suit to enforce their standard pensions is therefore beside the point.

1. To determine whether a plaintiff knowingly and voluntarily accepted a release, courts ordinarily consider, among other things, "the clarity and specificity of the release language," "the amount of time plaintiff had for deliberation about the release before signing it," "whether Plaintiff knew or should have known his rights upon execution of the release," and "whether plaintiff was encouraged to seek, or in fact received benefit of counsel." *Gregory v. Derry Twp. School Dist.*, 418 F. App'x 148, 151 (3d Cir. 2011) (quoting *Cirillo v. Arco Chem. Co.*, 862 F.2d 448, 451 (3d Cir. 1988)); *see also Jakimas*, 485 F.3d at 781-782 (suggesting "totality of the circumstances" test applies to validity of ERISA waivers); *Howell*, 633 F.3d at 559 (same). Siemens therefore had the burden to produce evidence bearing on these factors to demonstrate that the releases were accepted knowingly and voluntarily.

And so it did. Siemens put into evidence nine signed sample releases, which the parties agree are representative in all material respects of each release signed by all 207 Release Plaintiffs. JA108. These documents demonstrate, first, that the general release language is clear: it covers "*all*" claims "of *every* kind, ... *whether known or unknown*," arising under *any* "federal, state or local laws." (Exhibit A at 1 (emphasis added)). The documents further establish that each Release Plaintiff had a period of 45 days to review the agreement and seven days after signing the release to

revoke it; that Siemens encouraged each signatory to consult an attorney; that each did so; and, perhaps most importantly, that each expressly acknowledged entering into the agreement "knowingly and voluntarily." (Exhibit A at 2, ¶¶ 8, 11). Siemens also put into evidence the separation program documents accompanying the agreements (JA595-621), which further confirm that the Release Plaintiffs had 45 days to consider the agreement before signing and seven days to revoke it afterward; and that Siemens advised the signatories to consult attorneys. JA608, 615. As the magistrate judge correctly concluded, this was prima facie evidence that the unambiguous waivers were entered into knowingly and voluntarily. JA88-91.

Other courts have found precisely this sort of evidence enough to satisfy a defendant's burden. In *Howell*, for example, the Seventh Circuit found it sufficient that the defendant produced the release, in which – just as in this case – the plaintiff "acknowledged ... that he had been advised to contact an attorney before signing it; that he was signing voluntarily; that he had been given at least 45 days in which to consider it; that he had a right to revoke within seven days of signing it; and that, in a sense, he was swapping any future claims he might have against [the defendant] for the additional severance benefits." 633 F.3d at 558-559.

2. Siemens having met its initial burden to produce evidence that the waiver agreements were entered into knowingly and voluntarily, the burden then shifted to the Release Plaintiffs to "present[] enough evidence" to "create a genuine issue of fact on the questions of knowledge and voluntariness." *Howell*, 633 F.3d at 559; *see also Centro Empresarial Cempresa S.A. v. America Movil*, S.A.B. de C.V., 2011 WL 2183293, slip op. at *8 (N.Y. June 7, 2011) ("Although a defendant has the initial burden of establishing that it has been released from any claims, a signed release [entered into evidence] shifts the burden of going forward to the plaintiff to show that there has been fraud, duress or some other fact which will be sufficient to void the release.") (alterations and quotation marks omitted).

Before explaining why plaintiffs have failed to meet their burden, we first note that the applicability of this burden-shifting approach is not subject to serious dispute. It is an integral feature of the federal summary judgment procedure: "When a party has submitted sufficient evidence to support its request for summary judgment," as here, "the burden shifts to the nonmoving party to show that there are genuine issues of material fact" for trial. *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008); *accord Williams v. School Dist. of Bethlehem, Pa.*, 998 F.2d 168, 180 (3d Cir. 1993); *Sears, Roebuck & Co. v. Jardel Co.*, 421 F.2d 1048, 1053 (3d Cir. 1970).

And equally integral to federal summary judgment practice is the rule that, to meet their burden of establishing a genuine dispute concerning the enforceability of the waivers, the Release Plaintiffs "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). They accordingly "may not rest upon ... mere allegations or denials" and must instead come forward with "sufficient *evidence* favoring [their claim] for a jury to return a verdict [in their favor]." *Saldana v. Kmart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001) (emphasis added).[15]

Plaintiffs have failed at that task. To call their informed willingness to enter into the release agreements into dispute, they would have had to offer evidence that Siemens exercised "undue influence" to compel them to sign the releases or that they were "misinformed" or "[de]fraud[ed]" into accepting the terms of the releases. *Jakimas*, 485 F.3d at 781-782; *see also*

[15] Although the summary judgment burden-shifting scheme is sufficient in its own right to put the onus on plaintiffs to offer evidence that the agreements were not knowing and voluntary, we note that this approach also conforms with the general rule that the "party attempting to avoid his contract must carry the burden of proving that he was entirely without understanding when he contracted." *First State Bank of Sinai v. Hyland*, 399 N.W.2d 894, 897 (S.D. 1987); *see also, e.g.*, *In re Paternity of M.F.*, 938 N.E.2d 1256, 1260 (Ind. Ct. App. 2010) ("[T]he party seeking to avoid a contract bears the burden of proving the means of avoidance."); *Clark v. Power Mktg. Direct, Inc.*, 192 S.W.3d 796, 800 (Tex. Ct. App. 2006) ("The burden is on the party seeking to avoid the contract to prove that the contract was fraudulently induced.").

Chaplin, 307 F.3d at 373 n.6 (releases may be unenforceable if the plaintiffs "signed the releases under duress"); *Howell*, 633 F.3d at 560 (releases may be unenforceable if the plaintiff had been "under heavy medication" or the defendant had "failed to disclose important information"). They could have come forward with affidavits, for example, suggesting that Siemens inappropriately pressured them to accept the agreements, that they were given insufficient time to deliberate, that Siemens deliberately withheld material information, or that they were prevented from consulting with attorneys. *See Cirillo*, 862 F.2d at 451; *Howell*, 633 F.3d at 559. But they offered *none* of that.

Instead, plaintiffs insist that the releases could not have been knowing or voluntary only because the Release Plaintiffs "had no occasion to consider the PJS Benefits to be in play at the time they signed the Releases." Pls. Second-Step Br. 26. That unadorned assertion provides no reason for declining to enforce the waivers.

As an initial matter, "[t]his is just an assumption" and "not evidence." *Howell*, 633 F.3d at 559. Plaintiffs provide no foundation in the record, whether through affidavits or otherwise, supporting the assertion that they lacked knowledge of their possible claims to PJS benefits at the time they signed their waivers. And that omission is unsurprising: As plaintiffs themselves admit, they "had systematically been told by Siemens

that [PJS] benefits were not continued by Siemens." Pls. Second-Step Br. 26. In waiving any and all causes of action arising from their employment and termination, the Release Plaintiffs thus must have understood that they were giving up any claim to the benefits that Siemens "repeatedly" informed them it would not pay.

In any event, whether the Release Plaintiffs had actual knowledge of potential PJS claims is beside the point: It is settled that a plaintiff may not avoid a general waiver with respect to a specific claim simply by observing that "neither party discussed or [actually] knew" of the claim "at the time" the release was signed. *Jardel*, 421 F.2d at 1051. All the law requires is that a waiving party "has reason to know the essential facts" of the transaction or occurrence to which the waiver relates. *Restatement (Second) of Contracts* § 84 cmt. b (1981). Thus, as the Eighth Circuit has explained, a release should be upheld as knowing and voluntary with respect to claims under ERISA when the plaintiff was familiar with his pension plan and "knew of the relevant facts underlying his ERISA claim when he signed the release." *Leavitt v. Nw. Bell Tel. Co.*, 921 F.2d 160, 163 (8th Cir. 1990). That is especially so in a case like this one, involving a waiver that expressly waives all claims "whether known *or unknown*." (Exhibit A at 1 (emphasis added)).

At bottom, a "general" release must "be given effect according to its terms," "absent a showing that the parties did not intend what they wrote." *Jardel*, 421 F.2d at 1051. Plaintiffs have not offered any evidence that they were coerced, defrauded, or misled; accordingly, there is no basis for refusing to enforce the waivers.[16]

* * *

The district court erred in denying summary judgment to Siemens with respect to the Release Plaintiffs. Siemens provided evidence to support its motion for summary judgment, and plaintiffs failed to respond with evidence to create any genuine issues for trial.

Tellingly, the district court did not find otherwise. Instead, it concluded only that the validity of the waivers was too "fact-intensive" for resolution on summary judgment. JA47. But as we explained in our opening brief (at 58-60), summary judgment turns on whether factual disputes are *genuine*, and not whether they are *intensive*. Fed. R. Civ. P. 56(c). And

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[16] With respect to voluntariness and knowledge, plaintiffs mount one additional attack: They observe that "the Releases did not include any expression of spousal consent," suggesting that such consent would have been required under ERISA § 205(c)(2). Pls. Second-Step Br. 26. This argument is an obvious red herring: Section 205(c)(2) applies only to waivers of "qualified joint and survivor annuit[ies]" and "qualified preretirement survivor annuit[ies]" executed under the terms of the plan "during the applicable election period." 29 U.S.C. § 1055(c)(1)(A)(i). PJS benefits are not such annuities, and the waivers here were not part of any plan elections. Section 205(c)(2) thus does not apply here by its plain terms.

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. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (emphasis added).

Plaintiffs offer no response to this critical point. Nor could they: This Court routinely has ordered or upheld the disposal of cases prior to trial on the basis of a general release where, as here, the nonmoving party has failed to call the relevant facts into dispute (*e.g.*, *Gregory*, *supra*; *Cuchara v. Gai-Tronics Corp.*, F. App'x 728 (3d Cir. 2005); *Jardel*, *supra*), as have other courts (*e.g.*, *Howell*, *supra*; *Chaplin*, *supra*; *Halvorson*, *supra*). It should do so here as well.

III. PLAINTIFFS ARE NOT ENTITLED TO AN AWARD OF FRINGE BENEFITS.

Finally, plaintiffs argue that, in the event this Court determines that Siemens may be liable for PJS benefits, it also should order an award of medical, life insurance, and other fringe benefits. Pls. Second-Step Br. 27-29. This is an issue the Court should not have to reach; but if it does, it should reject plaintiffs' arguments.

In proceedings before the district court, plaintiffs asserted that they were entitled to fringe benefits in addition to PJS benefits because fringe benefits "*always accompanied* the PJS pensions," although they declined to identify any source of such benefits. Dist. Ct. Dkt. No. 109, at 6 (filed

June 11, 2007). Before this Court, they add another, equally vague argument: that Siemens must "treat all retirees the same" under its "welfare plans," which are the presumed source of the fringe benefits they seek. Pls. Second-Step Br. 28.

Whatever the merit to plaintiffs' claims for fringe benefits, this is not the forum for resolving them. Plaintiffs have not yet filed claims for the relevant benefits under any Siemens welfare plan, and no such plan is a party to this lawsuit. The proper course of action, if plaintiffs are awarded PJS benefits in this case, would be for them to file claims for fringe benefits with the appropriate welfare plans at the appropriate time, allowing the plan administrators to make eligibility determinations in the first instance. *See D'Amico v. CBS Corp.*, 297 F.3d 287, 292 n.7 (3d Cir. 2002) (explaining that the question of an employee's "right[s]" under an ERISA-protected plan is "a question which should be addressed by the Plan administrator in the first instance"). Without such prior eligibility determinations, this Court has nothing to review. *E.g.*, *Diaz v. United Agric. Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1484 (9th Cir. 1995) (courts may review claims for benefits only following an "administrative resolution of those claims," and that review is limited to "whether the plan

administrators have construed" the plan documents and applicable statutes "in an appropriate manner").[17]

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.

[17] Plaintiffs' argument concerning damages set-offs for the severance amounts (Pls. Second-Step Br. 26-27) also is premature. Even supposing that the district court properly denied summary judgment on the waiver issue, it has not yet determined which of the Release Plaintiffs' waivers are enforceable or conducted fact-finding on damages with respect to those class members. The question of severance set-off is properly reserved until that time.

Respectfully submitted,

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Dated: September 1, 2011

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 9,394 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 September 1, 2011 via overnight courier service; and

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

/s/ *Michael B. Kimberly*

EXHIBIT A

Item 2

Separation Agreement, General Release & Promise Not to Sue

Please consult with a lawyer before signing this agreement and release. By signing this agreement, you give up and waive important legal rights.

This Separation Agreement, General Release and Promise Not to Sue ("Agreement") is made and entered into by and between Ronald L. Kendrick ("Employee") and Siemens Westinghouse Power Corporation, for and on behalf of itself, and any of its predecessors or successors and their respective current and former subsidiaries, benefit plans, affiliates, divisions, successors and assigns, joint ventures, owners, stockholders, agents, directors, officers, employees, representatives and attorneys (hereinafter jointly referred to as the "Company"), who, in consideration of the terms and conditions contained herein, and intending to be legally bound, mutually agree as follows.

1. In consideration for Employee's signing this Agreement, and his/her promise to be bound by the terms contained herein, the Company agrees to pay a Separation Amount in the amount of $144,329.54 under the Involuntary Separation Program for Non-Represented Employees of Siemens Westinghouse Power Corporation ("Involuntary Separation Program") and to provide certain other Transition Assistance Benefits as detailed in the Involuntary Separation Program, each as described more fully in the accompanying Summary of Benefits and communication material.

2. Employee understands and agrees that, except in consideration for the promises made herein and his/her execution of this Agreement, Employee would not be entitled to receive any moneys and/or services enumerated in Paragraph 1 above and the Involuntary Separation Program.

3. This Agreement does not constitute nor shall it be construed as an admission by the Company of any (a) violation of or non-compliance with any statute, law or regulation, (b) breach of contract, actual or implied; or (c) commission of any tort.

4. Employee agrees that his/her last day of employment with the Company was or will be June 30, 2000.

5. Employee has not filed any complaints or lawsuits, and no such actions have been filed on his/her behalf, against the Company with any governmental agency or court and he/she will not file any complaint or lawsuit at any time in the future with respect to claims released in this Agreement. Should any such complaint or lawsuit be filed, Employee agrees that he/she is not entitled to and will not accept any relief or recovery therefrom. However, this shall not limit Employee from pursuing claims for the sole purpose of enforcing rights under this Agreement.

6. In consideration of the benefits Employee is to receive from the Involuntary Separation Program, Employee, for him (her) self, his (her) legal representatives and assigns, agree not to sue the Company and to forever release the Company from all his/her claims, actions and charges of every kind, nature and description, whenever they arise, whether known or unknown, arising out of his/her employment with the Company or the termination therefrom any time prior to the date of the execution of this Agreement, including, but not limited to, claims under the Age Discrimination in Employment Act, as amended, 29 U.S.C. Section 621, et seq. ("ADEA"), the Older Workers Benefit Protection Act, Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. Section 2000e, et seq. ("Title VII"), the American with Disabilities Act, as amended 41 U.S.C. Section 12101, et seq. ("ADA"), other federal, state or local laws including but not limited to, those prohibiting discrimination in employment, claims of breach of express contract, breach of implied contract, detrimental reliance, fraud or misrepresentation, promissory estoppel, intentional or negligent infliction of emotional distress, breach of the covenant of good faith and fair dealing, and defamation.

7. Employee understands that this Agreement may not affect the rights and responsibilities of the Equal Employment Opportunity Commission ("Commission") to enforce ADEA or be used to justify interfering with the right of an employee to file a charge under ADEA or participate in any investigation or proceeding conducted by the Commission under ADEA.

8. Employee has had the opportunity to discuss this Agreement with his/her attorney and is entering into it knowingly and voluntarily. The Company has notified, in writing, Employee to seek counsel for his/her attorney prior to entering into this Agreement, and Employee acknowledges that he/she has been so notified by the Company.

9. Employee understands that he/she is releasing forever the Company from any and all claims, charges, liabilities, promises, causes of action, suits, damages, debts and expenses, including attorneys' fees and costs actually incurred, whether known or unknown, suspected or unsuspected arising out of his (her) employment with the Company and the termination therefrom.

10. Employee in entering into this Agreement has not relied upon any representation or statement made by the Company not set forth herein.

11. Employee agrees that he/she has been provided this Agreement and has had the opportunity to review it for forty-five (45) days prior to executing it, and that such was a reasonable period of time. Employee acknowledges that, at the commencement of this period, he/she was informed, in writing, by the Company as to (i) any class, unit or group of individuals covered by the Involuntary Separation Program, any eligibility factors for the Involuntary Separation Program, and any time limits applicable; and (ii) the job titles and ages of all individuals eligible or selected for the Involuntary Separation Program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program..

12. For a period of seven (7) days following the execution of this Agreement, Employee may revoke the Agreement. Said revocation must be in writing and must be delivered in person or by registered or certified mail, postmarked within seven (7) days of execution of this Agreement, to the human resources manager of Employee's former employment site. The Agreement shall not become effective or enforceable until the revocation period has expired.

13. Employee has not and will not assign, grant or transfer any right, claim or cause of action he/she may have against the Company.

14. This Agreement shall be in all respects interpreted, enforced and governed by and under the laws of the State of Florida, except to the extent preempted by federal law.

15. The provisions of this Agreement are severable. If any part of it is found to be unenforceable, the other paragraphs shall remain fully valid and enforceable.

16. This Agreement sets forth the entire agreement between the parties hereto and fully supersedes any and all prior agreements or understandings between the parties hereto pertaining to the subject matter hereof. It may not be modified or changed orally. However, nothing contained in this Agreement shall be deemed to in any way reduce the obligations of the Employee under any employee patent and secrecy agreement or confidentiality agreement which Employee has signed.

17. Any and all disputes, complaints, controversies, claims and grievances (excluding those specifically excepted herein) arising under, out of, in connection with, or in any manner related to this Agreement or the relation of the parties hereunder shall be submitted to final and binding arbitration to be conducted in accordance with the Voluntary Post-Dispute Arbitration Program of the CPR Employment Dispute Procedure. Arbitration proceedings hereunder may be commenced by written notice from either party hereto to the other party. Such proceedings and evidence shall be confidential. The arbitrator shall have the power and the authority to make such decisions and awards as he/she shall deem appropriate, including granting compensatory damages and costs to the prevailing party (including fees of the arbitrator,

but excluding punitive, exemplary, consequential or special damages, and attorneys' fees),and the granting or issuance of such mandatory directions, prohibitions, orders, restraints and other injunctions (other than any of the foregoing that would reestablish the employment relationship formerly existing between the Company and Employee) that he/she may deem necessary or advisable directed to or against any of the parties, including a direction or order requiring specific performance of any covenant, agreement or provision of this Agreement as a result of a breach or threatened breach thereof. The cost of such arbitration shall be borne equally by the parties except that each party shall bear its own cost of attorneys' fees and expenses. Any decision and award of the arbitrator shall be final, binding and conclusive upon all of the parties hereto and said decision and award may be entered as a final judgment in any court of competent jurisdiction. It is expressly agreed that arbitration as provided herein shall be the exclusive means for determination of all matters as above provided and neither of the parties hereto shall institute any action or proceeding in any court of law or equity, state or federal, other than respecting enforcement of the arbitrator's award hereunder. The foregoing sentence shall be a bona fide defense in any action or proceeding instituted contrary to this Agreement. Notwithstanding the foregoing, nothing contained herein shall prevent or restrain in any manner the Company from instituting an action or claim in any court, or such other forum as may be appropriate to enforce the terms of any employee patent and secrecy agreement, (or similar agreement relating to the Company's confidential or proprietary business information or trade secrets) to protect the Company's proprietary or confidential business information or trade secrets, to enforce or protect the Company's patent, copyright trademark, trade name or trade dress rights, to redress claims of product disparagement or trade libel, or to protect the Company's reasonable business expectations or relations with third parties. To the extent this paragraph sets forth different procedures, or remedies, or provides the arbitrator different powers than are set forth in the Voluntary Post-Arbitration Program of the CPR Employment Dispute Procedure, the terms of this paragraph shall take precedence.

I HAVE READ THIS AGREEMENT AND I UNDERSTAND ALL OF ITS TERMS. I ENTER INTO AND SIGN THE AGREEMENT KNOWINGLY AND VOLUNTARILY WITH FULL KNOWLEDGE OF WHAT IT MEANS.

Executed at Siemens Westinghouse, this 8 day of MAY, 00

Orlando, Florida
City State

Ronald F. Clarke
Employee

Executed at Siemens Westinghouse, this 8th day of May, 00

Orlando, FL
City State

Lee E. Hurl
Human Resources Representative

SW11444

EXHIBIT B

CONFIDENTIAL

SETTLEMENT AGREEMENT, WAIVER AND RELEASE OF ALL CLAIMS

October 15, 2002

Richard Junker
2 Winged Foot Lane
Newport Beach, CA 92660

Dear Mr. Junker:

This Agreement sets forth the understanding between Siemens Energy & Automation, Inc. (the "Company") and you in connection with your separation from employment with the Company effective October 15, 2002 ("Separation Date"). This Agreement shall become effective as provided in Paragraph 18 below.

1. Your signing of this Agreement shall constitute acknowledgment by you of your separation from employment with the Company effective October 15, 2002.

2. This Agreement shall not in any way be construed as an admission by the Company that it has acted wrongfully with respect to you or any other person, or that the Company is liable to you in any way. You agree not to assert otherwise.

3. Both the Company and you agree to keep the terms of this Agreement confidential. Without limiting the generality of the foregoing, you specifically agree that you will not disclose information regarding this Agreement or the amounts paid to you under it to any person other than your spouse, attorney or tax advisor or pursuant to a legal requirement. The Company shall, however, have the right to advise its personnel who have a need to know and any applicable government agency or Court of the reasons for your separation. You agree that if you find it necessary to disclose the existence or terms of this Agreement to your attorney, tax advisor or spouse, you will advise such persons that they are under an obligation to maintain the confidentiality of such information, and you shall remain liable and responsible for any disclosures made by the aforementioned persons.

4. You agree that you will comply with the terms and conditions of the "Employee Invention and Proprietary Information Agreement" entered into by you on July 10, 1967, as well as any other confidentiality agreement you may

have entered into with the Company prior to or during the course of your employment with the Company. You agree, in addition to the terms and conditions of any proprietary information or confidentiality agreement, that you will not remove from the Company or retain in any form, including electronic form, any original or duplicated confidential information of the Company or any modified or extracted version thereof. You further agree that, without the prior written consent of the Company, you will not disclose to any person, firm, corporation or other entity any confidential information of the Company. "Confidential information" shall include any and all confidential or proprietary written, recorded or oral information or data, including without limitation research, development, engineering, software, manufacturing, technical, marketing, sales, financial, operating, performance, legal, business and process information or data.

5. Regardless of whether you sign this Agreement, the Company will pay you the compensation that you have earned through the date of your separation, any unused vacation benefits, and severance pay equal to twenty-five (25) weeks of pay ($37,650.00), less all applicable federal, state and local taxes in accordance with the terms and conditions of the Salaried Employees Termination Pay Plan. Similarly, even if you do not sign this Agreement, you will be offered benefits to which you are entitled under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), and you will retain all vested benefits under the Company's 401(k) Plan.

6. Following your Separation Date and your execution of this Settlement Agreement, the Company will pay you an additional eight (8) weeks of pay ($12,048.00), less all applicable federal, state and local taxes, with the understanding that such payment shall only be due and payable following the expiration of the time period set forth in Paragraph 18 below. You would not be entitled to payment of the foregoing amount absent this Agreement between you and the Company.

7. If within forty-five (45) days of your Separation Date, you are offered Comparable Employment (as defined in the Company's Salaried Employees' Termination Pay Plan) with a division or business unit of the Company, its affiliates or their subsidiaries within fifty (50) miles of your former primary work location, then no further termination payments will be made to you. The Company will not seek reimbursement of any termination payments properly made to you prior to your receipt of the offer of Comparable Employment regardless of whether you accept or decline the offer. You will be entitled to continue to receive your termination payments despite rejecting an offer of re-employment with a division or business unit of the Company, its affiliates or their subsidiaries only if: (1) the offer is made greater than forty-five (45) days

after your Separation Date; or (2) the offer is not for Comparable Employment; or (3) the Comparable Employment is not within fifty (50) miles of your former primary work location.

8. Also in consideration for signing this Agreement, the Company will provide you and your qualified dependants with a continuation of medical and dental, vision, and hearing coverage for which you are currently enrolled through March 31, 2003. This extension of coverage will be deemed to be part of the COBRA continuation period. You would not be entitled to this coverage absent this Agreement.

9. Also in consideration for signing this Agreement, the Company will provide you with outplacement services as arranged by your Human Resources organization for a three (3) month period beginning on the day of your separation. You would not be entitled to have the Company pay for these services absent this Agreement.

10. The Company is providing you with the payments and benefits described in paragraphs 6 through 9 above in consideration for your signing this Agreement. By signing, you acknowledge your acceptance of this consideration and its sufficiency.

11. In consideration of these additional payments and benefits, you agree irrevocably and unconditionally to release, acquit and forever discharge the Company, its employees, directors, officers, shareholders, agents, representatives, subsidiaries, parents, affiliates, predecessors, successors or assigns, on behalf of yourself, your spouse, your heirs and legal representatives, and all persons claiming through you, from all claims or causes of action that you have, known or unknown, including any claims or causes of action that have already been made or filed by you, which may by law be waived, based on your employment with the Company, or your separation from the Company and the events leading thereto. The waiver and release of claims contained herein includes any and all claims or causes of action under federal, state or local laws, and specifically includes, but is not limited to, the Civil Rights Acts of 1964 and 1991 (42 U.S.C. § 2000 et seq.), as amended ("Title VII"); the Equal Pay Act of 1963; the Age Discrimination in Employment Act of 1967 (29 U.S.C. Sections 621 through 634), as amended (the "ADEA"); and the Americans with Disabilities Act, as amended (the "ADA"); the Employee Retirement Income Security Act of 1974 ("ERISA"); the Fair Labor Standards Act ("FLSA"); the Occupational Safety and Health Act ("OSHA"); the Immigration Reform and Control Act of 1986; the Worker Adjustment and Retraining Notification Act of 1989 ("WARN"); the Family Medical Leave Act of 1993 ("FMLA"); wrongful discharge and/or breach of any alleged employment contract; and claims or causes of action based on any

tort, such as invasion of privacy, defamation, fraud and intentional infliction of emotional distress.

12. You acknowledge that you have been informed pursuant to the Federal Older Workers Benefit Protection Act of 1990 that you do not herein waive rights or claims under the Federal Age Discrimination in Employment Act that may arise after the date this Agreement is executed.

13. On or before October 15, 2002, you will return all of the Company's property in your possession including, but not limited to, such as customer lists, mailing pricing information, any credit cards, phone cards, cellular phone, automobile and all of the tangible and intangible property belonging to the Company and relating to your employment with the Company. You further represent and warrant that you have not retained any copies, electronic or otherwise, of such property.

14. You will cooperate fully with the Company in its defense of or other participation in any administrative, judicial or other proceeding arising from any charge, complaint or other action which has been or may be filed.

15. In the event that you breach any of your obligations under this Agreement, any outstanding obligations of the Company hereunder shall immediately terminate, and, to the extent permitted by applicable law, any payments previously made to you in consideration for signing this Agreement shall be returned to the Company.

16. This Agreement waives rights to which you may be legally entitled. Accordingly, you should consult with an attorney prior to signing this Agreement.

17. You have forty-five (45) days from October 15, 2002 within which to consider whether to sign this Agreement and accept the Company's offer.

18. After you sign this Agreement, you will have seven (7) days in which to revoke this Agreement by delivering a written notice of revocation within that seven (7) day period, and this Agreement shall not become effective or enforceable until the seven (7) day period has expired.

19. The provisions of this Agreement are severable. If any provision is held to be invalid or unenforceable, it shall not affect the validity or enforceability of any other provision.

20. This Agreement constitutes the entire Agreement between the Company and you, and it supersedes any and all other agreements, whether written or oral,

between the Company and you with respect to your separation and the events leading thereto, excluding those agreements referenced in Paragraph 4.

21. You acknowledge that you have carefully reviewed and understand this Agreement and that you have had sufficient time to consult with an attorney regarding this Agreement. Your signature will indicate that you accept and agree to its terms voluntarily and knowingly and with full understanding of its consequences. Please note that you should sign this Agreement before a Notary Public.

SIEMENS ENERGY & AUTOMATION, INC.

BY: Tiffany C. Carter

PRINTED NAME: Tiffany C. Carter, HR Manager

Date: 10/15/02

SW11434

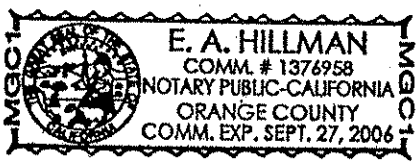
I have read and agree to the foregoing Settlement Agreement, Waiver and Release Of All Claims between Siemens Energy & Automation, Inc. and Richard Junker. I have been given forty-five (45) days to sign this Agreement. I have been advised to consult with an attorney prior to signing this Agreement and I understand that I have 7 days from the date indicated below in which to revoke this Agreement.

SIGNED:

Richard J. Junker

PRINTED NAME: RICHARD J. JUNKER
DATE: OCTOBER 28, 2002

Subscribed and sworn to before me this 28 day of Oct, 2002



E A Hillman, EA Hillman
Notary Public

My Commission expires: Sept 27, 2006

SW11435

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 September 1, 2011.

The undersigned counsel further certifies that, on September 1, 2011, ten identical hard copies of the foregoing brief were provided to a third-party courier for overnight delivery to the Clerk of the Court; and that one identical hard copy for overnight delivery upon:

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/s/ *Michael B. Kimberly*