IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 04-cv-02686-WDM-CBS

WAYNE TOMLINSON,
ALICE BALLESTEROS,
GARY MUCKELROY,
individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

EL PASO CORPORATION, and
EL PASO PENSION PLAN,

Defendants.

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**DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIM V**

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Pursuant to Federal Rule of Civil Procedure 56(b) and D.C.COLO.L.Civ.R 56.1, Defendants El Paso Corporation and El Paso Corporation Pension Plan (collectively "El Paso") respectfully submit this Memorandum.

## I. INTRODUCTION

In their fifth claim for relief, Plaintiffs allege that El Paso's August 2002 Summary Plan Description ("SPD") was inadequate and violated El Paso's fiduciary duty under ERISA. Plaintiffs' claim is defective for several reasons. First, Plaintiffs cannot establish that they relied on the August 2002 SPD to their detriment. Second, Plaintiffs were not prejudiced, because El Paso did make the disclosures elsewhere that they

claim should have been in the SPD. Third, an SPD need not contain the information that Plaintiffs claim it should. Finally, Plaintiffs cannot establish the "extraordinary circumstances" required to entitle them to relief under ERISA.

## II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Pursuant to Fed.R.Civ.P. 10(c), El Paso incorporates by reference paragraphs 1-5 of the statement of undisputed facts contained in Docket No. 221.

2. In August 2002, El Paso distributed an SPD. (*See* Exhibit A).[1]

3. Plaintiffs did not rely to their detriment on any SPD that was issued by El Paso on or after the January 1, 1997 change to the pension plan. (*See* Exhibit E (Tomlinson excerpts), 132:14 – 136:25; Exhibit F (Muckelroy excerpts), 71:4 – 75:2; 174:25 – 175:17; Exhibit G (Ballesteros excerpts, 63:17-64:6)). Mr. Tomlinson is the only Plaintiff who may have even opened an SPD. If he did so, it was only for the targeted purpose of finding specific formulas, which he did find. He has no recollection of consulting an SPD to determine how the pension plan changed. (Exhibit B, 105:6 – 106:18; 134:12-135:8).

4. El Paso did inform Plaintiffs that the rate at which their benefits will accrue under the cash balance plan will be lower than under the old plan. (Exhibit H, p. 26). El Paso also informed Plaintiffs that their accrual of benefits will effectively cease while their cash balance accounts catch up to their Minimum Benefit. (Docket 221-6, ¶ 2). El Paso even provided individual account statements to Plaintiffs specifically showing their projected individual cash balance accounts trailing their projected Minimum Benefit for a

[1] El Paso issued other SPDs after the conversion of the pension plan to a cash balance plan. However, Plaintiffs do not challenge the sufficiency of those SPDs. Nevertheless, they are lodged as Exhibits B, C and D.

period of many years. (Docket No. 221-12, p. 9 of 11; Exhibit I, p. 8 of 10; Exhibit G, 78:16-81:7). The SPD itself informed employees that benefits under the cash balance formula are calculated using quarterly pay credits, but that the old formula is calculated using final average earnings. (Exhibit A, compare p. 8 with pp. 17-18; Exhibit B pp. 6, 8-9, Exhibit C, pp. 6,8-9, Exhibit D, pp. 7, 16-17)

## III. ARGUMENT

### A. Standard Of Review

Fed.R.Civ.P. 56(b) provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

### B. Plaintiffs Did Not Consult The SPD

To sustain their SPD claim, Plaintiffs must prove that they relied on the SPD to their detriment. "'[T]o secure relief, [the claimant] must show some *significant reliance upon*, or possible *prejudice flowing from*, the faulty plan description.'" *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (internal citations omitted; emphasis added). *See also Aiken v. Policy Management Systems Corp.*, 13 F.3d 138, 141 (4th Cir. 1993) (same); *Govoni v. Bricklayers, Masons & Plasterers Int'l Union of America, Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984) (same).

The only possible time any of the Plaintiffs even opened an SPD was Tomlinson's surgical consultation of an unspecified SPD to find one or two formulas, which he did in fact find. Therefore, Plaintiffs cannot demonstrate "significant reliance"

within the meaning of *Chiles*. *See also Adams v. Southern Labor Union Pension Trust Fund*, 1999 WL 617959, *2 (6th Cir. Aug. 12, 1999) ("Without having read the SPD, [the plaintiff] could not be prejudiced by it."); *Collins v. Am. Cast Iron Pipe Co.,* 105 F.3d 1368, 1371 (11th Cir. 1997) (rejecting SPD claim where plaintiff did not read SPD until after lawsuit was filed). Nor can Plaintiffs simply drum up a different class representative who has read the SPD. *See Chiles*, 95 F.3d at 1519 (issue of detrimental reliance is not appropriate for class determination because each individual plaintiff must demonstrate own reliance on the SPD).

### C. Plaintiffs Cannot Show Prejudice Because El Paso Provided The Information That Plaintiffs Claim Was Not Disclosed In The SPD

On January 11, 1996, El Paso stated in an all-employee communication that: "Under the cash balance plan, employees will earn future benefits at a lower rate than under the current plan." (Exhibit H, p. 26). A Notice Of Plan Changes sent to all participants stated in no uncertain terms that: "accruals under the Plan may effectively cease until the participant's cash account benefit exceeds the minimum benefit...." (Docket 221-6, ¶ 2). The SPD itself informed employees that benefits under the cash balance formula are calculated using quarterly pay credits, but that the Minimum Benefit is calculated using final average earnings. (See Undisputed Fact 4, above).

Having received from El Paso the very information they claim should have been contained in the SPD, Plaintiffs cannot establish that they suffered prejudice, as required by *Chiles*. *See Weinreb v. Hospital For Joint Diseases Orthopaedic Institute*, 404 F.3d 167, 171-72 (2d Cir. 2005) (no prejudice from failure to issue any SPD at all where Plaintiff received notice from other sources); *Kamenstein v. Jordan Marsh*

*Company*, 623 F.Supp. 1109, 1112 (D.Mass. 1985) (no prejudice where participant had actual knowledge of, or access to, information that should have been in SPD); *Meester v. IASD Health Services Corp.*, 963 F.2d 194, 196 (8th Cir. 1992) (notice letters served as adequate substitutes for summaries of material modifications).

D. The SPD Nevertheless Satisfies ERISA's Requirements

1. The SPD Statute Does Not Require Disclosures Concerning How A Current Plan Differes From A Prior Plan

Plaintiffs contend that the SPD issued in August 2002 failed to disclose that the "new" features of the cash balance plan: "(a) cause[d] older participants to earn no *additional benefits* beyond those already earned [i.e. there is a wear-away period]; (b) significantly reduce[d] the rate of *future benefit accruals*; and (c) *change[d]* the basis for benefits to year-by-year salary...." (Docket No. 1, ¶ 56; emphasis added). On the basis of these alleged omissions,[2] Plaintiffs assert that El Paso breached its fiduciary duty and further assert that the August 2002 SPD was not "sufficiently accurate and comprehensive." (*Id.* ¶ 57).

Each of the items that Plaintiffs believe should have been included in the SPD relate to ways in which the cash balance plan changed from the prior plan. However, Congress chose to place the disclosure requirements concerning plan amendments in section 204(h) of ERISA, not in the SPD statute, which only requires disclosures concerning how a plan operates. *See* 29 U.S.C. § 1022(b). It is a well settled principle of statutory construction that: "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts

[2] As mentioned above, the third point actually is made in the SPD itself.

intentionally and purposely in the disparate inclusion or exclusion. *Keene Corp. v. U.S.,* 508 U.S. 200, 208 (1993) (internal citations omitted). Because the SPD statute is completely silent with regard to disclosures that must be made in connection with a plan amendment, the SPD statute simply does not require El Paso to disclose in its SPDs the three items Plaintiffs claim should have been disclosed.

**2. The Phrase "Denial Or Loss Of Benefits" Does Not Encompass The Disclosures Plaintiffs Claim Should Have Been Made**

The SPD statute requires, as relevant to this motion, disclosure of the "circumstances which may result in disqualification, ineligibility, or *denial or loss of benefits*." 29 U.S.C. § 1022(b) (emphasis added). The phrase "denial or loss of benefits" cannot support Plaintiffs' claim because the failure to earn *additional benefits* that Plaintiffs complain of (i.e the wear-away) is not a denial of benefits, or a loss of benefits, or even a reduction in benefits. Rather, a wear-away is a temporary halt on the accrual of *additional* benefits beyond those already earned. The same is true of a reduction in the rate of *future* benefit accruals. It is a reduction in the rate at which benefits *that have not yet been earned* will be earned in the future compared to the rate they were earned in the past. That is not a denial, a loss, or even a reduction of existing benefits.

Importantly, the phrase "denial or loss of benefits" is part of a clause that refers to ways in which a participant may end up losing benefits they would have otherwise earned, such as "disqualification" or "ineligibility." This critical placement of the phrase "denial or loss of benefits" suggests that it requires disclosures of ways in which a

participant may suffer a loss of existing benefits.[3] However, nothing about the clause (particularly given its placement in the statute) suggests that it is meant to require disclosures concerning the accrual (or rate of accrual) of *additional* benefits beyond those already earned. Of course, had Congress intended the SPD statute to require disclosures concerning the accrual (or rate of accrual) of additional benefits beyond those already earned, it would have made its intent clear in the statute itself. *Holloway v. United States*, 526 U.S. 1, 6 (1999) ("[T]he language of the statutes that Congress enacts provides the most reliable evidence of its intent.... In interpreting the statute at issue, *we consider not only the bare meaning of the critical word or phrase but also its placement and purpose in the statutory scheme*.") (Emphasis added).

This is consistent with the Ninth Circuit's analysis in *Stahl v. Tony's Building Materials, Inc.*, 875 F.2d 1404 (9th Cir. 1989), although the Ninth Circuit reached this result by employing slightly different reasoning. In *Stahl*, the court held that an SPD was not required to disclose that future benefits may cease to accumulate after the expiration of a collective bargaining agreement. *Stahl*, 875 F.2d at 1407. The court held that an SPD "... instead, should provide information about the general circumstances in which benefits could be lost." *Id.* at 1408. *See also Allen v. Honeywell Retirement Earnings Plan*, 382 F.Supp.2d 1139, 1169-70 (D. Ariz. 2005) (no obligation to disclose rate used to calculate benefit offset).

In addition to recognizing the proper scope of the statute, the court expressly

[3] Examples of this under a pension plan might include failing to make a claim for benefits or not designating a beneficiary. A common example under a welfare plan is that someone might lose the right to receive disability benefits altogether if they are injured on the job and fail to make a claim for workers' compensation benefits or social security disability benefits.

recognized that the aim of an SPD is to discuss circumstances applicable to all employees, not just a select group. The reason for that is straightforward: the more an employer attempts to discuss different scenarios applicable to different groups, the more confusing the SPD will be. *Id.* Thus, the *Stahl* court carefully explained that the "plan's rules should be explained to permit the ordinary employee to recognize that certain events or actions could trigger a loss of benefits. It need not discuss every imaginable situation in which such events or actions might occur, but it must be specific enough to enable the ordinary employee to sense when there is a danger that benefits could be lost or diminished." *Id.* Thus, the appellate court recognized both that: (1) SPDs need not disclose factors that may affect the accrual of additional benefits beyond those already earned and (2) SPDs are meant to describe situations that apply to participants as a whole, not select groups of them.

The implementing regulation similarly does not support Plaintiffs' claim. Rather, the regulation simply requires that any "description of exceptions, limitations, reductions, and other restrictions *of plan benefits* shall not be minimized, rendered obscure or otherwise made to appear unimportant." 29 C.F.R. § 2520.102-2(b) (emphasis added). Nothing in the language of the regulation suggests that it is meant to encompass a temporary cessation in the ability to earn *future benefits* beyond those benefits already earned or to encompass changes in the *rate* at which benefits are earned in a new plan compared to a former plan. Instead, the regulation governs disclosures of ways in which existing benefits may be reduced or lost.[4]

[4] Thus, by way of example, the August 2002 SPD carefully describes a reduction in benefits occasioned

The Ninth Circuit discussed the requirements of 29 C.F.R. § 2520.102-2(b) in *Arnold v. Arrow Transportation Co. of Delaware*, 926 F.2d 782 (9th Cir. 1991). In doing so, the court recognized that the scope of the regulation applies only to the loss or reduction of existing benefits, and again made clear that SPDs are not meant to describe situations affecting only select groups:

> The plan's rules should be explained to permit the ordinary employee to recognize that certain events or actions could trigger a loss of benefits. It need not discuss every imaginable situation in which such events or actions might occur, but it must be specific enough to enable the ordinary employee to sense when there is a danger that benefits could be lost or diminished.

926 F.2d at 785-86 (citing *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404, 1408 (9th Cir. 1989)). *See also Engers v. AT&T*, 428 F.Supp.2d 213, 236, 242 (D. N.J. 2006) (SPD need not disclose cash balance conversion factors or differences in the relative values of participants' benefits); *Custer v. Southern New England Telephone Company*, 2008 WL 222558 at *13 (D. Conn. January 25, 2008) (SPD need not disclose how the operation of the plan would affect certain participants as compared to others).

The only published case discussing 29 C.F.R. § 2520.102-2(b) with respect to a wear-away is *Amara v. CIGNA Corp.*, 534 F.Supp.2d 288 (D.Conn. 2008). That case did not consider the arguments concerning statutory construction asserted by El Paso here, and has no binding effect on this Court. Instead, the *Amara* court was heavily influenced by the fact that CIGNA apparently had intentionally misled plan participants by trying to hide the fact that future benefits accruals were being reduced. The court, having found that CIGNA had intentionally violated ERISA's 204(h) requirements, found

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by early retirement. Exhibit A, p. 18.

that an overtly misleading SPD constituted a similar breach of fiduciary duty.

### E. There is No Remedy Available to Plaintiffs

Even if El Paso's SPD should have contained the information discussed above, Plaintiffs must demonstrate the presence of extraordinary circumstances to be entitled to substantive relief. *Register v. PNC Financial Services Group, Inc.,* 477 F.3d 56, 74 (3d Cir. 2007). Extraordinary circumstances "generally involve acts of bad faith on the part of the employer, attempts to actively conceal a significant change in the plan, or commission of fraud." *Id.* (internal citations omitted). ). *See also Engers,* 428 F.Supp.2d at 243 (noting that active concealment or affirmative acts of fraud, particular vulnerability, or inequitable conduct, are required to demonstrate the existence of extraordinary circumstances). Given El Paso's communications to its employees discussed above, Plaintiffs cannot demonstrate such extraordinary circumstances.

## IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter partial summary judgment in their favor with respect to Plaintiffs' Claim V.

Respectfully submitted this 14th day of May, 2008.

*s/ Darren E. Nadel*

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## CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2008, a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIM V** was electronically filed and served via the *CM/ECF* system which will send notification of such filing to the following. The duly signed original is on file at the office of Littler Mendelson, P.C.

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