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.

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

Defendants El Paso Corporation and El Paso Corporation Pension Plan (collectively "El Paso") respectfully submit this Reply brief.

I. ARGUMENT

A. Plaintiffs' Request For A Continuance Under Rule 56(f) Should Be Denied

Plaintiffs contend that they need to engage in discovery related to "benefit reductions, wear-aways and disclosures" because such discovery "may reveal instructions to the draftspersons about what to include in the disclosures." (*See* Doc. No. 237, pp. 7-8). However, Plaintiffs seek to prove through additional discovery facts that El Paso does not dispute. Specifically, for purposes of this Motion, El Paso has never disputed that Plaintiffs' benefits under the cash balance formula grow at a slower

rate than they did under the old formula. Similarly, El Paso has never disputed for purposes of this Motion that Plaintiffs experienced a "wear-away."[1] Plaintiffs do not need to conduct discovery about issues that El Paso has not disputed.

With respect to discovery about "disclosures," the August 2002 Summary Plan Description ("SPD"), which is the sole subject of Plaintiffs' Claim V and this Motion, speaks for itself. The Court may assume, for the purposes of this Motion, that El Paso intended the SPD to contain exactly the information it does contain and to contain no other information.

Discovery concerning the manner in which El Paso distributed its SPD need not go forward for two reasons. First, nowhere does Claim V assert that El Paso failed to distribute the SPD properly. (Complaint, ¶¶ 55-57). Second, discovery has nevertheless occurred with respect to the manner in which the SPD was distributed. *See* Exhibit J, p. 900-02 (stating twice that: "More details about CBP Select can be found in the Summary Plan Description of this pension plan, which can be found on El Paso's website at www.elpaso.com/spd."). All three Plaintiffs acknowledged during their depositions that they received that document. (*See* Exhibit K, p. 200:19-23; Exhibit L , p. 108:25 – 109:6; Exhibit M, p. 83:18-20).

Because the discovery identified by Plaintiffs in their Rule 56(f) request will not assist them in responding to this Motion, their request should be denied.

[1] Plaintiffs incorrectly argue that El Paso does not dispute the findings of Plaintiffs' experts regarding the wear-away and reduction in future benefits. (See Doc. No. 237, p. 18). However, the experts' findings are irrelevant for purposes of this Motion.

B. Plaintiffs Fail To Establish That 29 U.S.C. § 1022 Requires Disclosure Of The Items They Claim The SPD Lacks [2]

Plaintiffs do not offer any alternative to El Paso's construction of 29 U.S.C. § 1022. Instead, without any analysis, they quote language from a Department Of Labor Preamble to an amendment of 29 C.F.R. § 2520.102-3(d). That regulation does not even construe the key language that Plaintiffs rely on in support of their claim.[3] Instead, 29 C.F.R. § 2520.102-3(d) simply requires SPDs to state what type of plan the SPD is summarizing (i.e. 401(k), disability plan, etc.). The amendment simply added "cash balance plans" to a non-exhaustive list of possible names to use to describe a plan.

The language Plaintiffs quote is: "...the foregoing SPD provisions require a ... description of ... how a prior conversion may have affected benefits that classes of participants may have reasonably expected the plan to provide." 65 Fed. Reg. 70226, 70227 (Nov. 21, 2000). Read in context, that sentence merely explains that an SPD issued in the aftermath of a conversion to a cash balance plan should state what is happening to the old formula. It is undisputed that El Paso's SPD did that. (*See* Docket No. 233-2, p. 17, unambiguously stating that the Minimum Benefit will continue until December 31, 2001 or until termination of employment, whichever occurs first).

It bears noting that 29 C.F.R. § 2520-102.2(b), one of the sections Plaintiffs do rely on, does not even attempt to describe what an SPD should or should not contain. Instead, the point of that section it to explain that negative statements should not be less

[2]Contrary to Plaintiffs' surprising assertion, the Court did not "rule" that 29 U.S.C. § 1022(b) and 29 C.F.R. § 2520.102-2(b) apply to reductions in future benefits or their rates of accrual. (*See* Doc. No. 237, p. 16). Rather, the Court made clear that it was unable to resolve that issue on the basis of the information provided to it in connection with El Paso's Rule 12(c) motion. (Doc. No. 213, p. 14).

[3] Plaintiffs rely on 29 C.F.R. § 2520-102.2(b) and 29 C.F.R. § 2520.102-3(l). (*See* Docket No. 134, p. 16 and Docket No. 237, p. 17).

prominent than positive statements: "Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits." (*Id.*)

Section 2520.102-3(l) does contain a description of the types of information a summary plan description must contain. Subsection (l) requires: "... a statement clearly identifying circumstances that may result in ... reduction ... of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide *on the basis of the description of benefits required by paragraphs (j) and (k) of this section*." (Emphasis added.) The emphasized language makes clear that the word "reductions" is not meant to compare a current formula to an old formula, or a current rate of accrual to a future rate of accrual. Instead, it refers to reductions in the limited class of existing benefits listed in subsections (j) and (k). Those subsections merely require descriptions of eligibility, the benefits currently being offered by the plan, joint and survivor annuities, and the like. Therefore, nothing in the regulations Plaintiffs rely on requires disclosure of the information Plaintiffs claim El Paso's SPD lacked.

Finally, El Paso does not concede that *Amara v. Cigna*, 534 F.Supp.2d 288, 349 (D.Conn. 2008) "cannot be squared with its position." (*See* Doc. No. 237, p. 17). Unlike Cigna, El Paso did not actively mislead its employees, as demonstrated in El Paso's opening papers and Section E.3 below. Additionally, the Cigna Court made no effort to determine the scope of 29 U.S.C. § 1022 and instead relied on the fact that it had already found a violation of section 204(h) of ERISA.

C. There Is No Remedy Available To Plaintiffs For Their Statutory Notice Claim

Plaintiffs must demonstrate the presence of extraordinary circumstances to be entitled to substantive relief under their statutory notice claim. *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 v. AT&T,* 428 F.Supp.2d 231, 243 (D. N.J. 2006) (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 repeated communications to its employees about the conversion of its pension plan (described in El Paso's opening papers and below), Plaintiffs cannot demonstrate such extraordinary circumstances.

Plaintiffs cite to *Haymond v. Eighth District Electrical Benefit Fund*, 36 Fed.Appx. 369, 373 (10th Cir. 2002), for the proposition that the Tenth Circuit does not require extraordinary circumstances. However, *Haymond* is an unpublished case that only addressed the limited issue of which conflicting statute of limitations provision in an SPD applied to the plaintiff's action. It did not analyze or reject the "extraordinary circumstances requirement." *See e.g. Register v. PNC Financial Services Group, Inc.,* 477 F.3d at 74; *Engers v. AT&T*, 428 F.Supp.2d at 243.

D. Plaintiffs' Breach Of Fiduciary Duty Allegation Fails

Citing *Jordan v. Federal Express Corp.*, 116 F.3d 1005 (3d Cir. 1997), Plaintiffs assert that there is no "extraordinary circumstances" requirement in connection with a

breach of fiduciary duty claim. However, *Jordan* also points out that "a fiduciary has a legal duty to disclose to the beneficiary *only those material facts known to the fiduciary but unknown to the beneficiary, which the beneficiary must know for its own protection*." *Id.* at 1015. Plaintiffs cite no authority for the proposition that as part of its fiduciary responsibilities, El Paso must inform employees of the impact of a plan amendment on changes in the rate of future benefit accrual *in an SPD*. They provide no evidence or argument that their "own protection" required disclosure of the wear-away or changes in the rate of accrual in the SPD itself rather than in other communications. It is also undisputed that El Paso did provide that information in the documents described is section E.3. below. Therefore, their allegation that El Paso breached its fiduciary duty by failing to include information in its SPD fails.

E. None Of The Issues Of Fact Asserted By Plaintiffs Defeat Summary Judgment On Claim V

Plaintiffs assert that summary judgment is inappropriate because genuine issues of fact exist with respect to the distribution of the August 2002 SPD, the adequacy and understandability of El Paso's disclosures, the alleged concealment by El Paso of benefit reductions, and the resulting prejudice. (*See* Doc. No. 237, p. 9). However, no such issues of material fact exist.

1. It Is Undisputed That El Paso Properly Distributed The August 2002 SPD

As mentioned agove, Plaintiffs did not assert in Claim V that El Paso failed to properly distribute the August 2002 SPD. (Compliant, ¶¶ 55-57). In fact, Plaintiffs alleged just the opposite: "On information and belief, El Paso distributed a Summary Plan Description ("SPD") ... in August 2002 to employees." (Complaint, ¶ 56).

Nevertheless, it is undisputed that Plaintiffs were told, in writing, where on El Paso's intranet the SPD could be found. (*See* section A, above). It is also undisputed that Mr. Tomlinson was able to obtain the SPD when he wanted it. (Docket No. 237, p. 2, ¶ 3).

2. The Court May Determine Whether the SPD is Adequate and Understandable

SPDs must be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). Plaintiffs rely heavily on their communications expert to try to create a disputed issue of material fact. However, most of their expert's conclusions relate to documents other than the SPD. (Docket No. 237, pp. 14-15). The only statement in the SPD that Plaintiffs' expert finds problematic relates to the failure of the SPD to adequately discuss the wear-away. However, as discussed above, SPDs are not required to discuss a wear-away. Moreover, El Paso adequately described the wear-away elsewhere, such as in the December 2001 Notice. (Docket No. 221-6, ¶ 2). That paragraph states: "...for a participant whose minimum benefit is greater than the cash account benefit, accruals under the Plan may effectively cease *until the participant's cash account benefit exceeds the minimum benefit earned as of December 31, 2001*." (Emphasis added). That language is exceedingly clear and unambiguous.

Plaintiffs' expert nevertheless opines that the language "accruals under the plan may effectively cease" could be misread by an employee to refer only to the cessation of old plan benefits. (Docket No. 237, p. 15). While that is unlikely even looking at that phrase in isolation, it is impossible given the language that follows the phrase. The sentence, looked at as a whole, makes very clear that accruals under the Plan will

cease until the cash account catches up to the Minimum Benefit.

Not only is Professor Stratman's conclusion nonsensical, it is also irrelevant to El Paso's argument; namely, that Plaintiffs cannot establish that they relied on the August 2002 SPD to their detriment. Finally, the Court should not consider the conclusions reached by Plaintiffs' communications expert because they do not meet the *Daubert* reliability test, and because Plaintiffs' expert impermissibly opines on ultimate issues which are reserved for the Court. El Paso intends to file a motion to strike Professor Stratman's report at the conclusion of his deposition.[4]

3. It Is Undisputed That El Paso Did Not Conceal Reductions In The Rate Of Future Benefits Accruals Or The Wear-Away

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." (Doc. No. 233-9, p. 26; Exhibit K, p. 137:11 – 138:10; Doc. No. 226-4, p. 76:10-77:5; Doc. No. 226-5, p. 70:18-71:5). A subsequent 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, and the Minimum Benefit is calculated using final average earnings. (*See* Doc. No. 233-2, pp. 8, 17-18).

In addition to those documents, Mr. Tomlinson acknowledged receiving a Manager's Update which was distributed to all managers in October 1996. (Exhibit K, p.

[4] Similarly, El Paso intends to challenge the findings of Plaintiffs' other experts should this matter survive the outstanding summary judgment motions.

149:6 - 151:17). The Update instructed managers like Mr. Tomlinson to caution employees that they will need to save more money for retirement through personal savings and El Paso's RSP program[5] otherwise "they may need to work longer or have less income for retirement." (Doc. No. 221-2; p. 1). That same brochure reiterates the message of the January 1996 Employee Update and states: "Benefits will accrue at a slower rate in the future than under the current plan." (*Id.* at 6). The document further acknowledged that El Paso reduced "overall future benefits for employees and some employees will feel negatively about this." (*Id.* at 7).

Similarly, a letter sent to all employees in October 1996 unequivocally states: "The hard truth is that those who are not prepared may have to postpone retirement. Or, they may have to retire with less money than they had anticipated." (Doc. No. 221-3, p. 1). Accordingly, it is undisputed that El Paso repeatedly informed its employees about the potential effect of the Plan conversion.

4. Plaintiffs Cannot Show Prejudice

"'[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 at 1519 (internal citations omitted; emphasis added); *see also Adams v. Southern Labor Union Pension Trust Fund*, Nos. 98-6182, 98-6236, 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).

[5] El Paso's RSP program is a 401(k) Plan.

Plaintiffs attempt to sidestep this fundamental requirement by asserting that they would have likely learned about the reduction in benefit accruals if it was disclosed in the SPD and, as a result, Plaintiffs might be able to establish "likely prejudice." This argument is wrong. First, Plaintiffs submitted no evidence of this. They cite a case for the proposition that the rumor mill could in some circumstances come into play, but they provided no evidence (not even their own Declarations) that in their particular circumstance it actually would have. Second, and perhaps more importantly, Plaintiffs did in fact receive the very information they claim should have been contained in the SPD. (*See* section 3, above). Because Plaintiffs cannot establish prejudice, their SPD claim fails.

II. 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 30th day of June, 2008.

s/ Darren E. Nadel

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2008, a true and correct copy of the foregoing **DEFENDANTS' REPLY 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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