

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 04-WDM-2686 (WDM/MEH)

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.

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR CLASS CERTIFICATION AND CONDITIONAL
APPROVAL OF ADEA COLLECTIVE ACTION**

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Introduction.

Plaintiffs respectfully submit this memorandum in support of their motion to:

- (1) certify an ERISA class action under Fed. R. Civ. P. 23, and
- (2) conditionally approve an ADEA collective action pursuant to 29 U.S.C. §626(b).

Before 1997, Defendant El Paso Corporation (“El Paso”) offered its employees a traditional defined benefit pension formula that provided retirement benefits based on a formula that multiplied years of credited service by a percentage of the participant’s final average compensation. Complaint ¶¶15-16. Effective January 1, 1997, El Paso adopted a different kind of pension formula called a “cash balance” formula. Under the cash balance formula, which El Paso named “CBP Select,” a participant’s accrued benefit under the old formula was converted to a lump sum amount as of December 31, 1996. El Paso called that amount the participant’s initial “Cash Balance Account.” ¶¶17-18. Each quarter thereafter, hypothetical “pay” and “interest” credits are added to the account. ¶¶23-24.

During a 5-year “transition period” from January 1, 1997 to December 31, 2001, participants continued to accrue benefits under both the old formula and the new cash balance formula. The continuation of the old formula meant that most participants’ benefits continued to be determined by the old formula because it was so much better than the cash balance formula. On January 1, 2002, the transition period ended and benefits continued only under the cash balance formula. ¶20. Under El Paso’s Plan

document, when a participant terminates employment, he or she will receive the “higher of”: (1) the benefits under the old formula, with no additional accruals after December 31, 2001, or (2) the value of the CBP Select account. ¶21.

Although El Paso told the employees that the initial Cash Balance Accounts represented the present value of their accumulated benefits under the old formula as of December 31, 1996, the accounts, in fact, did not include the full value of the accumulated benefits. Cplt. ¶19. Because of that shortfall, participants first have to “catch up” with the value of their prior benefits. Until their hypothetical Cash Balance Account catches up with and exceeds the value of the prior plan benefit, they do not realize a net accrual of additional benefits. ¶¶22, 25, 33-34. As a result, many participants did not earn any additional benefits for a period of years following the end of the transition period in 2001—even though they continued to work for El Paso. In the case of the named Plaintiffs, the period with no additional benefits has continued for the remainder of their careers with El Paso. Ex. 1 (comparing life annuity projections on last page of each print-out).

Furthermore, even when participants actually begin to earn additional benefits, their future rates of benefit accrual are significantly reduced. ¶¶25, 52. Despite the significant impact of the new formula, El Paso neglected to disclose any reductions in the rate of future benefit accruals to its employees, nor did it tell older employees that they would earn even less benefits. ¶¶26, 53, 56.

Plaintiffs’ Complaint sets forth five claims for relief. The first of those claims, for

age discrimination in benefits in violation of Section 4(a) of the ADEA, is subject to the ADEA's approval process which is modeled on the FLSA. The four other class claims or issues under ERISA are as follows:

Claim II: Whether the design of El Paso's cash balance formula violates the nonforfeiture and anti-backloading rules in ERISA §203(a), 29 U.S.C. §1053(a), and ERISA §204(b)(1)(B), 29 U.S.C. §1054(b)(1)(B), because of the years where, in El Paso's words, "accruals under the Plan may effectively cease." Ex. 8.

Claim III: Whether the systematic age-based reductions and cessations in benefit accruals under El Paso's cash balance formula violate the age discrimination provision in ERISA §204(b)(1)(H), 29 U.S.C. §1054(b)(1)(H).¹

Claim IV: Whether El Paso provided a notice of significant reductions in the future rate of benefit accrual with sufficient information for the average plan participant to understand the effect of the changes as required by ERISA §204(h), 29 U.S.C. §1054(h).

Claim V: Whether El Paso adequately disclosed the material modifications to the El Paso Pension plan that could result in reduction, losses or forfeitures of benefits that a participant might otherwise reasonably expect as required by ERISA §102, 29 U.S.C. §1022.

Plaintiffs are moving for certification of these ERISA claims under Fed. R. Civ. P. 23. This action is suited for class treatment because El Paso has engaged in a common

¹ As discussed below, the age-based reductions and cessations are also alleged to violate Section 4(i) of the ADEA, 29 U.S.C. §623(i). 29 U.S.C. §623(i) and 29 U.S.C. §1054(b)(1)(H) contain parallel prohibitions on age discrimination.

course of conduct applicable to all plan participants. Although many cases involving cash balance conversions are still pending on the merits, courts have regularly certified cases with virtually identical claims under Rule 23. In *Wells v. Gannett Retirement Plan*, C.A. 03-2671 (D.Colo. July 11, 2006) (attached as Ex. 2), Judge Matsch certified a class for age discrimination claims arising from Gannett's conversion to a pension equity formula, a type of "hybrid" pension plan. See also *In re Citigroup Pension Plan ERISA Litigation*, 2006 WL 3770504 (S.D.N.Y. 2006) (certifying claims that Citigroup's cash balance plan violated ERISA's backloading, age discrimination, and notice standards); *Richards v. FleetBoston Financial Corp.*, 235 F.R.D. 165 and 238 F.R.D. 345 (D.Conn. 2006) (certifying claims in cash balance case for breach of fiduciary duty and for violations of ERISA's age discrimination and disclosure rules); *Cooper v. IBM Personal Pension Plan*, C.A. 99-829 (S.D.Ill. Sept. 17, 2001) (attached as Ex. 3) (certifying three claims in cash balance case); *Amara v. CIGNA Corp.*, 2002 WL 31993224 (D.Conn. 2002) (certifying age discrimination, forfeiture, backloading, and disclosure claims arising from CIGNA's conversion to cash balance formula); *Engers, et al. v. AT&T Inc., et al.*, C.A. 98-3660 (D.N.J. Nov. 19, 2001) (attached as Ex. 4) (certifying breach of fiduciary duty and disclosure claims in cash balance case).

Plaintiffs further request that this Court conditionally approve an ADEA "collective" or "representative" action for Claims I and III. In essence, Claim I alleges that El Paso violated Section 4(a) of the ADEA by reducing retirement benefits much more for older employees. As indicated above, Claim III is brought under both the ADEA

and ERISA because the same rule appears in both statutes. ADEA claims are also different than ERISA claims not only in the procedure for proceeding on a collective basis, but also because ADEA claims are tried to a jury and double damages are awarded for willful violations. 29 U.S.C. §626(b) and (c).²

Actions brought under the ADEA are approved for treatment as collective actions under the procedure established by Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. §216(b). Under the FLSA and the ADEA, notice is given to individuals who are affected by the unlawful practice. Those individuals must then decide whether to “opt-in” to the action. By contrast, inclusion in a class certified under FRCP 23 is either automatic or subject to an “opt-out” procedure. See *Newberg on Class Actions* (3d ed.), §4.01.

Plaintiffs’ request for certification of ERISA and ADEA classes is consistent with the case law. Courts have allowed certification of overlapping ERISA and ADEA classes and representation of both classes by the same named plaintiffs, finding that the ERISA and ADEA claims do not necessarily conflict. See, e.g., *Vaszlavik v. Storage Tech. Corp.*, 175 F.R.D. 672, 681 (D. Colo. 1997) (“Plaintiffs’ ADEA and ERISA claims are complimentary and do not conflict so as to preclude the same named plaintiffs from representing each class); *Krueger v. New York Tel. Co.*, 163 F.R.D. 433, 446 (S.D.N.Y. 1995) (certifying ERISA and ADEA classes with same named plaintiffs; finding each ERISA subclass “identical to and coextensive with the ADEA class”).

² When both ERISA and ADEA claims are tried at the same time, the jury can sit as an advisory jury on the ERISA claims. See *Pennington v. Western Atlas*, 202 F.3d 902, 904 and 911 (6th Cir. 2000).

I. Plaintiffs' ERISA Claims Are Appropriate for Class Certification under Rule 23.

“Class actions serve an important function in our system of civil justice.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). “[T]he class action device save[s] the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion.” *Gratz v. Bollinger*, 539 U.S. 244, 268 n. 17 (2003). Accordingly, Fed. Rule Civ. P. 23 is given a liberal construction. *Adise v. Mather*, 56 F.R.D. 492, 496 (D.Colo. 1972).

Under Rule 23(a), a class may be certified when four requirements are met: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the class; and (4) the representative parties adequately will protect the interests of the class. F.R.C.P. 23(a). These requirements are referred to as numerosity, commonality, typicality, and adequacy of representation. The court must also determine whether the action falls under one of the subcategories of Rule 23(b). *Shook v. El Paso County*, 386 F.3d 963, 971 (10th Cir. 2004); *Adamson v. Bowen*, 855 F.2d 668, 675n.10 (10th Cir. 1988). In a class action certified under Rules 23(b)(1) or (b)(2), inclusion in the class is automatic, although a right to “opt-out” may be provided in certain circumstances. See, e.g., *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 219 F.R.D. 661, 681 (D.Kan. 2004). Actions certified under Rule 23(b)(3) are subject to an “opt-out” procedure.

In deciding to certify a class, the allegations of the plaintiffs' complaint are accepted as true. *Shook*, 386 F.3d at 968; *In re Telecom Group Inc Sec. Litig.*, 169 F.R.D. 142, 145 (D.Colo. 1996). Although the Court may be required to analyze the substantive claims of the parties to determine whether the requirements of Rule 23 have been met, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Shook*, 386 F.3d at 971 (quoting *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir. 1982)); *Adamson*, 855 F.2d at 676 ("district court should avoid focusing on the merits underlying the class claim"). Because a class certification order is always subject to alteration before a final judgment, "the court should err in favor of, and not against, the maintenance of the class action." *Joseph v. General Motors*, 109 F.R.D. 635, 638 (D. Colo. 1986) (citing *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968)).

A. The Requirements of Rule 23(a) Are Satisfied.

Plaintiffs request that this Court certify a class under Rule 23(c)(1)(B) consisting of any and all person who:

- A. Are former or current El Paso employees,
- B. Participated in the El Paso Pension Plan on or after the January 1, 2002 date on which the Pension Plan was fully converted to a cash balance design, and
- C. Are over age 40, or will be over age 40 as of the date of the judgment.

See Cplt. ¶10.

1. The Members of the Class Are So Numerous that Joinder is Impracticable.

To satisfy the numerosity requirement, the Plaintiffs must show that the proposed class “is so numerous that joinder of all numbers is impractical.” F.R.C.P. 23(a)(1).

There is “no minimum numerical threshold which must be exceeded to satisfy this requirement.” *In re Qwest Savings and Investment Plan ERISA Litigation*, 2004 U.S. Dist. LEXIS 24693 *11 (D.Colo. 2004). Instead, “the nature of the particular case, and the nature of the proposed class, are key considerations in determining whether joinder of all parties is not practical.” *Id.* at *11. See also *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 273 (10th Cir. 1977) (“impracticability does not mean that joinder must have been shown to have been impossible, but only that it would have been difficult or manifestly inconvenient”).

There are no reported cases where it has been considered practicable to join a class of over 1,000 persons. See, e.g., *Vaszlavik v. Storage Technology Corp.*, 183 F.R.D. 264, 270 (D.Colo. 1998) (“joinder of 1,266 plaintiffs is impracticable”). Indeed, classes of less than 50 persons are often certified. See, e.g., *Horn*, 555 F.2d at 273 (class of 46 plaintiffs was large enough to warrant class certification).

It is undisputed here that Plaintiffs’ proposed class is well in excess of 1,000 persons. In addition, the proposed class is geographically dispersed so as to render joinder of all parties impracticable. El Paso Corporation is the largest pipeline company and the leading provider of natural gas interstate transportation services in North

America. The official “Form 5500” filed on behalf of the El Paso Pension Plan for the 2001 plan year shows that there were over 10,500 Plan participants at the end of that year. Ex. 5 (EPTO 9317). El Paso has facilities with Plan participants located in numerous states, making their joinder in any one proceeding highly impracticable.

2. Plaintiffs’ Claims Present Common Questions of Law and Fact.

The commonality requirement of Rule 23(a)(2) is easily met here. Rule 23(a)(2) requires “questions of law or fact common to the class.” “The claims of the class members need not be identical for there to be commonality; either common questions of law or fact will suffice.” *Schwartz v. Celestial Seasonings*, 178 F.R.D. 545, 551 (D.Colo. 1998) (citing *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982)); *Colorado Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 359 (D.Colo. 1999) (“Not every issue must be common to the class so long as the claims of the plaintiffs and other class members are based on the same legal or remedial theory”). Even if “some of the facts underlying each Plaintiff’s claims may vary,” commonality exists where “the claims arise from the same set of broad circumstances.” *Cook v. Rockwell International Corp.*, 181 F.R.D. 473, 480 (D.Colo. 1998).

In this case, the Plaintiffs allege statutory violations that are common to all members of the class. Claim II alleges that El Paso’s pension plan design makes payment of annual cash balance benefits conditional on participants foregoing receipt of their previously-earned benefits, in violation of ERISA §§ 203(a) and 204(b)(1)(B). Cplt. ¶¶41-45. Claim III alleges that the rate of an employee’s benefit accrual is reduced under the

cash balance formula on account of the participants' age in violation of ERISA §204(b)(1)(H). *Id.* at ¶¶46-50. Claim IV alleges that El Paso failed to disclose the benefit reductions to participants understandably in advance of their effectiveness as required by ERISA §204(h). *Cplt.* ¶¶51-54. Claim V alleges that El Paso failed to distribute an updated Summary Plan Description, or Summary of Material Modification, to participants to explain the new circumstances that can result in reductions, denial, loss, or forfeiture of benefits that participants might otherwise reasonably expect, as required by ERISA §102. ¶¶55-57.

In *Richards v. FleetBoston Financial Corp.*, *supra*, 235 F.R.D. at 172, a cash balance case addressing similar claims, the court found “common questions of law” where the plaintiff’s “claims allege that the terms of the plan, in which all class members participate, violate ERISA.” See also *Amara v. CIGNA Corp.*, 2002 WL 31993224, *3 (plaintiffs’ age discrimination and disclosure claims were common legal questions “generally applicable to all members of the class”); *Cooper v. IBM*, *supra*, Ex. 3 at 6 (“common nucleus of operative fact” was “whether Defendants’ pension plan comports with the requirements of ERISA”).

Whether disclosures are misleading or inadequate presents legal issues common to the class. See *Amara*, 2002 WL 31993224, at *3 n.4 (“the threshold inquiry on this claim, whether the SPD (Summary Plan Description) was misleading, is a legal question common to each class member”); *In re Citigroup*, 2006 WL 3770504 at *4 (“Questions of law common to the potential class include...whether Plan participants received adequate

notice of the 2000 and 2002 [Cash Balance Amendments]”); *Richards*, 235 F.R.D. at 172 (plaintiffs’ 204(h) and SPD disclosure claims did not require “individualized assessments” and therefore did not preclude commonality); see also *Schwartz*, 178 F.R.D. at 552 (misrepresentation claims “involve a common scheme affecting the entire class”).

The only discernable difference between members of the proposed class is based on when the cash balance formula took effect. For employees of the El Paso Energy Corp., the cash balance formula took effect after a 5-year transition from January 1, 1997 to December 31, 2001, during which the old formula continued side-by-side with the cash balance formula. El Paso subsequently acquired the Sonat Inc. in 1999 and the Coastal Corp. in 2001. The former Sonat employees began participation in the El Paso Pension Plan on January 1, 2000, with a corresponding 5-year “transition period” during which their old benefit formula continued to apply from January 1, 2000 until December 31, 2004. The transition period for Coastal employees occurred from March 31, 2001 until March 31, 2006. Except for the differences in these dates, the rules for transitioning each group into the El Paso cash balance formula were virtually identical.³

Where the legal issues are the same, differing factual issues like these will not defeat class certification. In *Forbush v. J.C. Penney Co. Inc.*, 994 F.2d 1101, 1106 (5th Cir. 1993), a class covering four different retirement plans was certified where the common issue of J.C. Penney’s alleged overestimation of Social Security benefits was

³ See Ex. 6 at EPTO 953 and 959 (excerpt from “Cash Balance Plan (CBP Select) Program Highlights for Sonat Employees”) and Ex. 7 at EPTO 878 and 885 (excerpt from “CBP Select Program Highlights for former Coastal Corporation Employees”).

sufficient to meet the commonality requirement. Because the common issue was whether the overestimation of benefits violated ERISA's nonforfeiture provisions, "the necessity for even somewhat individual calculations does not supply a basis for concluding that Forbush has not met the commonality requirement." ⁴

3. The Named Plaintiffs' Claims Are Typical of the Class.

The typicality requirement in Rule 23(a)(3) is also satisfied because the claims of the named Plaintiffs are based on the same legal theories and course of conduct as the claims of other class members. The named Plaintiffs were all participants in El Paso's Plan both prior to and after the December 31, 2001 date when the transition period ended and El Paso's cash balance formula took full effect. Cplt. ¶1.

Of course, no two class members are identical. But "[s]o long as there is a nexus between the class representatives' claims or defenses and the common questions of fact or law which unite the class," the typicality requirement is met. *Schwartz*, 178 F.R.D. at 551. "[T]he threshold for typicality is low and the claims asserted by the class representative need only be typical of, not identical to, those of other class members." *Cook*, 181 F.R.D. at 481.

Any "differing fact situations of class members" will not "defeat typicality under

⁴ See also *Fallick v. Nationwide Mutual Insurance Company*, 162 F.3d 410, 422-23 (6th Cir. 1998) (plaintiff could pursue class action claiming improper denial of reimbursement for health care benefits on behalf of beneficiaries of "numerous" ERISA-regulated health insurance plans administered by defendant); *Caranci v. Blue Cross & Blue Shield of Rhode Island*, 194 F.R.D. 27, 39 (D.R.I. 2000) (certifying class of individuals participating in three different ERISA plans administered by defendant).

Rule 23(a)(3) so long as the claims of the class representative and class members are based on the same legal or remedial theory.” *Adamson*, 855 F.2d at 676; accord *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982), *cert. denied*, 460 U.S. 1069 (1983) (“Factual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist”); *Amara*, 2002 WL 31993224, *3 (fact that plaintiff left CIGNA’s employment and then returned “does not render her claim fundamentally different from those of the other class members”); *Engers v. AT&T Inc.*, supra, Ex. 4 at 10 (typicality satisfied where “Plaintiffs’ claims and the putative class members’ claims all arise from the Defendants’ alleged violations of ERISA”).

Likewise, “[d]ifferences in the degree of harm suffered, or even in the ability to prove damages, do not vitiate the typicality of a representative’s claims.” *Richards*, 235 F.R.D. at 173. In *Richards*, the court found that “each class member’s claim arises from the same course of events and that each makes similar legal arguments to prove the defendants’ liability.” *Id.* See also *Cooper*, supra, Ex. 3 at 7 (typicality met where “[a]ll members of the class have a common interest in maximizing their benefits under the Plan by compelling Defendants to comply with the law”).

In this instance, the design of El Paso’s cash balance formula and El Paso’s failure to adequately disclose its effects gives rise to the named Plaintiffs’ claims and to the claims of the class. The named Plaintiffs do not assert claims that are any different from those of the members of the proposed Class.

4. Plaintiffs Will Fairly and Adequately Protect the Class' Interests.

Rule 23(a)(4) requires that the proposed class representatives fairly and adequately protect the interests of the class they wish to represent. “This requirement dovetails with the last in that typicality ensures that the class representatives’ claims resemble the class claims to an extent that adequate representation can be expected.” *Vaszlavik*, supra, 183 F.R.D. at 271. The class representatives must (1) have common interests with the class members and (2) the class representatives must vigorously prosecute the interests of the class through qualified counsel. See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *Schwartz*, supra, 178 F.R.D. at 552. A presumption of adequate representation exists, and any doubt regarding whether this requirement is fulfilled “should be resolved in favor of the upholding the class, subject to later possible reconsideration.” *Schwartz*, 178 F.R.D. at 552.

No conflicts exist between the interests of the named Plaintiffs and the interests of putative class members. As described above, the named Plaintiffs share the class’ interest in ensuring that they earn retirement benefits in compliance with ERISA. See *Richards*, 235 F.R.D. at 170 (class representative’s claims “allege violations of statutory ERISA rights held by all of the putative class members” and “are based solely on plan terms and plan documents applicable to all class members”).

Courts have, moreover, “routinely rejected arguments that differing remedial interests within a class defeat class certification.” *Cooper*, supra, Ex. 3 at 8. The

Richards, *Amara*, and *Cooper* courts held that whether some potential class members might benefit by remaining under the present cash balance formula does not create any conflict with the interests of the class representatives. *Amara*, 2002 U.S. Dist. LEXIS at *6-7 (“this problem can be addressed when the court determines what remedy should be provided if plaintiff prevails”); *Richards*, 235 F.R.D. at 171 (even if, as defendants alleged, “some class members would prefer to receive the greater benefits afforded to them by the Amended Plan, with its alleged violations of ERISA,” “does not mean that the court should exclude those individuals from a class that is created to vindicate their ERISA-created rights”).

“The adequacy requirement of Rule 23(a)(4) also requires th[e] court to determine whether plaintiffs’ attorneys are qualified, experienced and able to conduct the proposed litigation.” *Steiner v. Ideal Basic Industries, Inc.*, 127 F.R.D. 192, 194 (D.Colo. 1987). Plaintiffs are represented by lead counsel Stephen Bruce of Washington, D.C., and co-counsel Barry D. Roseman of Denver, Colorado. Plaintiffs’ counsel have substantial experience in representing plaintiffs on both a class-wide and individual level in employment matters, as well as cases under ERISA.

Mr. Bruce has extensive experience handling similar cash balance conversion cases and has substantial knowledge of the applicable law. He represents the plaintiffs in two certified cash balance class actions, *Amara, et al. v. CIGNA Corp., et al.*, C.A. 01-2361 (D.Conn.) and *Engers, et al. v. AT&T Inc., et al.*, C.A. 98-3660 (D.N.J.), and in a proposed cash balance class action, *Jensen v. Solvay Chemicals, Inc., et al.*, C.A. 06-273

(D.Wyo.). Mr. Bruce has served as lead counsel in other nationwide class actions to recover lost pension benefits, including *Kifafi v. Hilton Hotels Retirement Plan*, C.A. 98-1517 (D.D.C.), a nationwide class action on the “backloading” of pension benefit accruals, *Page/Collins v. PBGC*, C.A. 88-340 and 89-2997 (D.D.C.), and *Forbush v. J.C. Penney Co. Pension Plan*, C.A. 92-1131 (5th Cir.). The *Page/Collins* class action recovered over \$1 billion in retirement benefits for over 35,000 individuals. Mr. Bruce is the author of *Pension Claims: Rights and Obligations* (BNA Books 1st ed. 1988; 2nd ed. 1993), a treatise about benefit law under ERISA that the Supreme Court and many appeals courts have cited.

Co-counsel Barry Roseman is a member of the law firm of Roseman & Kazmierski, LLC. Mr. Roseman has represented plaintiffs in employment cases since 1975, including *Hillig v. Rumsfeld*, 381 F.3d 1088 (10th Cir. 2004); *Davey v. Lockheed Martin Corp.*, 304 F.3d 1204 (10th Cir. 2002); *Booker v. Brown*, 619 F.2d 57 (10th Cir. 1980); *Sedillos v. Bd. of Educ. of Sch. Dist. No. 1*, 313 F. Supp. 2d 1091 (D. Colo. 2005); *Jones v. Frank*, 819 F.Supp. 923 (D.Colo. 1993); *Punahale v. United Air Lines*, 756 F.Supp. 487 (D.Colo. 1991); *Nixon v. UFCW, Local No. 7*, 751 F. Supp. 1491 (D. Colo. 1990); *Price v. Federal Express Corp.*, 660 F. Supp. 1388 (D. Colo. 1987); *Potter v. Continental Trailways*, 480 F.Supp. 207 (D.Colo. 1979). He currently serves on the Executive Board of the National Employment Lawyers Association (NELA) and is the chair of the Executive Board of NELA’s affiliate in Colorado, the Plaintiff Employment Lawyers Association. Mr. Roseman is also a fellow of the College of Labor and

Employment Lawyers.

Although named Plaintiffs are not required to be informed beyond a basic knowledge of the status and underlying legal basis of the action, see *Schwartz*, 178 F.R.D. at 553, the named Plaintiffs here are in fact very well-qualified to lead this class. Mr. Tomlinson is a Director of Strategy, Market and Project Analysis for El Paso. Ms. Ballesteros is a former Senior Capacity Analyst in Volume Accounting (and a former analyst in the Office of General Counsel). Mr. Muckelroy is a Negotiator/Manager for El Paso Natural Gas (EPNG) Marketing. The class representatives and their counsel will therefore fairly and adequately protect the interests of the class.

B. The Proposed Class Should Be Certified Under Rule 23(b)(2).

As stated, this Court must also determine whether the case fits within one or more of the subcategories of Fed.R.Civ.P. 23(b). Plaintiffs seek certification under Rule 23(b)(2), which authorizes class certification where a defendant is alleged to have “acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”⁵ The Advisory Committee Notes state that Rule 23(b)(2) “is intended to reach situations where a party has taken action...with respect to a class, and final relief of an injunctive nature...settling the legality of the behavior with respect to the class as a whole

⁵ Plaintiffs also seek certification under Rule 23(b)(1), but in view of the relevant case law supporting Rule 23(b)(2) certification, Plaintiffs believe the Court need not determine whether Rule 23(b)(1) certification is also appropriate. See *Richards*, 235 F.R.D. at 176 (“in light of its decision to certify a (b)(2) class,” “the court does not reach the merits of whether the proposed class could be certified under Rule 23(b)(1)”).

is appropriate.” Advisory Comm. Notes to 1966 Amendments.

Cases in this circuit hold that certification of an ERISA claim is appropriate under Rule 23(b)(2) where declaratory or injunctive relief is sought. See, e.g., *In re Williams Companies ERISA Litigation*, 231 F.R.D. 416, 425 (N.D. Okla. 2005) (certification under Rule 23(b)(1)(B) and 23(b)(2)); *Vaszlavik*, 183 F.R.D. at 272.

Other cash balances cases, specifically including *Wells v. Gannett Retirement Plan*, have also been certified under Rule 23(b)(2). See, e.g., *Wells*, supra, Ex. 2 at 2; *Richards*, 235 F.R.D. at 176; *In re Citigroup*, 2006 WL 3770504 at *6; *Hirt v. Equitable Retirement Plan for Employees*, 450 F.Supp.2d 331, 334 (S.D.N.Y. 2006) (indicating that class was certified under 23(b)(1) and (b)(2) “to avoid the potential of inconsistent or varying adjudications for individual members of the class”); *Amara*, 2002 WL 31993224 at *4; *Engers*, supra, Ex. 4 at 11 (certifying class under 23(b)(2) “[i]nasmuch as Plaintiffs here are seeking various injunctive and declaratory relief” for statutory violations).

This action is like the other cash balance cases certified under Rule 23(b)(2). There is no question that defendants have acted or refuse to act on grounds generally applicable to class members. Plaintiffs have requested that this Court order appropriate equitable and remedial relief to enjoin and provide redress for Defendants’ violations of ERISA’s benefit accrual standards and its disclosure requirements. See Cplt. at 14-15; *Amara*, 2002 WL 31993224 at *4 (“Plaintiffs’ claims fall squarely within the purview of this provision because they seek injunctive relief, pursuant to ERISA, generally applicable to the entire class”).

The fact that monetary relief might also be obtained if plaintiffs prevail does not prevent Rule 23(b)(2) certification. See *Richards*, 235 F.R.D. at 174 (“The defendants argue that ‘the only real interest of these former participants is the possibility of obtaining monetary relief’). “As long as the plaintiffs’ primary claim is for injunctive relief, certification under Rule 23(b)(2) is proper.” *Colorado Cross-Disability Corp.*, 184 F.R.D. at 361; accord, *Richards*, 235 F.R.D. at 174. As *In re Citigroup* observed, Rule 23(b)(2) certification is appropriate even where the “recalculation and crediting of withheld pension benefits will be the direct anticipated consequence” of a ruling in favor of the plaintiffs because “a declaratory judgment is normally a prelude to a request for other relief, whether injunctive or monetary.” *Id.* at *6.

C. Plaintiffs’ Counsel Should be Appointed as Class Counsel.

As amended effective December 1, 2003, Fed. R. Civ. P. 23(g)(1) requires that the Court appoint class counsel, based on consideration of (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel’s knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. As detailed above, Plaintiffs’ counsel are highly experienced in complex employment litigation, particularly ERISA class actions, and are knowledgeable about the applicable law. Plaintiffs’ counsel represent classes in cases similar to the case at bar. Class counsel have investigated Plaintiffs’ claims prior to bringing this action and are prepared to commit significant resources to represent the

class in this action.

II. Conditional Certification of an ADEA Collective Action for the First and Third Claims for Relief Is Appropriate.

The Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §621 *et seq.*, was enacted “to protect a relatively older worker from discrimination that works to the advantage of the relatively young.” *General Dynamics Land Systems v. Cline*, 540 U.S. 581, 591 (2004). The ADEA prohibits an employer from discriminating against any individual with respect to compensation, terms, conditions or privileges of employment, including employee benefits, because of the individual’s age. 29 U.S.C. §§623(a)(1) and 630(l). The ADEA also prohibits an employer from limiting, segregating or classifying its employees in any way that adversely affects their status as employees because of age. 29 U.S.C. §623(a)(2).

“The ADEA expressly authorizes employees to bring collective actions in behalf of themselves and other employees similarly situated.” *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 171 (1989). “Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources. The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.” *Id.* at 170.

In this instance, Plaintiffs’ age discrimination claims (Claims I and III) allege that

El Paso's transition to a "cash balance" pension formula discriminated against older employees by:

- (1) Effecting a benefit "freeze" during which older workers do not earn any additional pension benefits for a period of years, while younger workers receive benefits under the cash balance formula without any contingency; and
- (2) Causing future rates of benefit accrual to decrease with advancing age.

The named Plaintiffs seek approval from this Court to maintain Claims I and III as an ADEA "collective" or "representative" action.

A. Plaintiff Wayne Tomlinson Filed a Timely Charge of Age Discrimination with the EEOC in Accordance with ADEA Section 7(d).

On July 16, 2004, named plaintiff Wayne Tomlinson filed a class-wide charge of discrimination on behalf of himself and other workers in the protected age group with the Equal Employment Opportunity Commission ("EEOC") on July 16, 2004. Defendants denied the charge and the EEOC was unable to resolve the controversy. Cplt. ¶39. Plaintiffs filed this action in accordance with ADEA §7(d) on December 28, 2004.

ADEA Section 7(d), 29 U.S.C. §626(d), requires a plaintiff to file an age discrimination charge with the EEOC before bringing a collective action. *Thiessen v. General Electric Capital Corporation*, 996 F.Supp. 1071, 1074-75 (10th Cir. 2001). Under the "single filing" rule, only one named Plaintiff need file a timely charge in order to satisfy the requirements on behalf of a class of similarly-situated individuals. *Id.* at 1075; *Foster v. RuhrPumpen, Inc.*, 365 F.3d 1191, 1197 (10th Cir. 2004) ("if one plaintiff has filed a timely EEOC complaint as to that plaintiff's individual claim, then co-

plaintiffs with individual claims arising out of similar discriminatory treatment in the same time frame need not have satisfied the filing requirement”).

In this instance, Mr. Tomlinson satisfied the filing requirement on behalf of the entire class.

B. Plaintiffs Have Demonstrated that the Putative Class Members Are “Similarly Situated” to Justify Conditional Certification of a Collective Action Under ADEA Section 7(b).

After an EEOC charge is filed, plaintiffs must demonstrate that they are “similarly situated” with other putative class members in order to maintain a collective action. Section 7(b) of the ADEA, 29 U.S.C. § 626(b), incorporates certain provisions of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201 et seq., including the FLSA’s procedure for bringing collective actions. *Thiessen*, 267 F.3d at 1102. This procedure permits plaintiffs to proceed under the ADEA “for and in behalf of...themselves and other employees similarly situated.”

The Tenth Circuit has approved a two-step approach to determine whether plaintiffs are “similarly situated.” *Thiessen*, 267 F.3d at 1102; see generally *Vaszlavik*, supra, 175 F.R.D. at 678; *Williams v. Sprint/United Management Co.*, 222 F.R.D. 483, 485 (D.Kan. 2004). During the “notice stage,” “the district court makes a decision – usually based on the pleadings and any affidavits which have been submitted – whether notice of the action should be given to potential class members.” *Thiessen*, 996 F.Supp. at 1080. This step utilizes a “lenient standard” and “typically results in conditional certification of a representative action.” *Id.* See also *Sperling v. Hoffman-LaRoche*, 118

F.R.D. 392, 406 (D.N.J. 1988), *aff'd in relevant part*, 862 F.2d 439 (3d Cir. 1988), *aff'd and remanded by* 493 U.S. 165 (1989) (permitting notice to absent class members “before the ‘similarly situated’ issue is decided...insure[s] that all possible class members who are interested are present, and thereby assure[s] that the full ‘similarly situated’ decision is informed, efficiently reached, and conclusive”).

After members of the class file consents with the court and discovery takes place, the court makes a factual determination of whether plaintiffs are “similarly situated.” This second step involves a “stricter” standard, taking into account a number of factors, including “(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant which appear to be individual to each plaintiff; (3) fairness and procedural considerations; and (4) whether plaintiffs made the filings required by the ADEA before initiating suit.” *Thiessen*, 267 F.3d at 1103.

Here, because discovery is not complete, the more lenient standard of the notice stage applies. See *Vaszlavik*, 175 F.R.D. 678-79 (lower standard for conditional certification applied even where “significant discovery” had already taken place because discovery remained incomplete). As described next, Plaintiffs satisfy that standard.

C. Plaintiffs Have Set Forth Substantial Allegations that El Paso’s Implementation of a Cash Balance Formula with Understated Opening Balances and a “Higher of” Transition Rule Is a “Decision, Policy, or Plan” that Discriminated Against Employees Based on Age.

Conditional certification of a class under the initial “notice stage” “requires nothing more than substantial allegations that the putative class members were together

the victims of a single decision, policy, or plan infected by discrimination.” *Thiessen*, 267 F.3d at 1102. Allegations of discrimination are sufficient to permit conditional certification; “whether plaintiffs can meet their burden in the liability phase...is irrelevant to the question of §216(b) certification.” *Vaszlavik*, 175 F.R.D. at 679-80 (conditionally certifying class based on plaintiffs’ allegations that class members were “victims of a “Strategic Plan” by defendant to eliminate older employees and their associated costs”); see also *Williams*, supra, 222 F.R.D. at 487 (plaintiffs’ allegations were “more than sufficient to support provisional certification”); *Sperling*, 118 F.R.D. at 407 (plaintiffs’ detailed allegations in pleadings and supporting affidavits were sufficient to allow class notice); *Mueller v. CBS, Inc.*, 201 F.R.D. 425, 429 (W.D.Pa. 2001) (sufficient facts were provided “on which a reasonable inference could be made that defendant orchestrated or implemented a single decision, policy or plan to discriminate against their employees on the basis of age”).

As in these cases, the named Plaintiffs have set forth substantial allegations that the putative class members “were together the victims of a single decision, policy or plan infected by discrimination.” The Complaint alleges that El Paso froze the benefits that employees earned under the prior benefit formula and established initial account balances at levels “far below” the value of the frozen benefits, particularly for older, longer-service participants. ¶¶18-19, 22, 33. The difference between the value of the pension benefits earned before the conversion and the initial account balances was significantly larger for “older” employees. ¶¶19, 25, 33-34.

El Paso's transition provisions have provided that employees can only receive the "higher of" (1) their frozen previously-earned benefits with nothing added to those benefits, or (2) the understated opening balances with the "cash balance" accruals added to them. Participants have not been permitted to receive their previously-earned benefits plus any additional benefits earned under the cash balance formula after the conversion (an "A + B" transition). ¶¶20-21, 32-35.

For older employees, the difference in value between the initial account balances and their previously-earned benefits creates periods of time during which no additional benefits were earned. ¶¶22, 25, 32-35. These periods of time are referred to as "wear-away" periods. A "wear-away" causes employees "to work for many years following [the conversion] without actually accruing any new benefits, despite the existence of a hypothetical cash balance account that show[s] benefits being added each quarter."

Richards v. FleetBoston, 427 F.Supp.2d 150, 155 (D.Conn. 2006).⁶

The Complaint further alleges that younger employees do not experience a benefit freeze, nor do they experience any wearaway periods. Instead, younger employees

⁶ Accord 58 F.R. 46835, 46837 (Sept. 3, 1993) (when "a plan utilizes a 'wear-away' formula," some employees will "not receive an accrual for the plan year"); 68 F.R. 17277, 17285 (April 9, 2003) (describing "wear-away period" as when a "change from a traditional defined benefit formula to a cash balance formula results in a period of time during which there are no accruals (or minimal accruals) with regard to normal retirement benefits or an early retirement subsidy").

Section 701(a)(1) of the 2006 Pension Protection Act, P.L. 109-280, prospectively outlawed "wear-aways" in cash balance conversions, regardless of whether they have a disparate impact on older workers.

receive annual increases to their pensions without contingency. ¶35.

Plaintiffs' age discrimination claim is also based on a second feature of El Paso's cash balance design. Even when benefits of older employees ultimately resume after these "wearaway" periods, they accrue at lower rates than under the previous pension formula and at lower rates compared to the rates of benefit accrual offered to younger employees.

¶25, 49. El Paso credits participants' Cash Balance Accounts with pay and interest credits on a quarterly basis. The pay credit increases at certain intervals, beginning at a minimum of 4% of salary for participants whose age and years of credited service is less than 35 points, 5% for participants whose age and years of credited service is between 35 and 49, 6% for age and service between 50 and 64, and a maximum of 7% of salary for participants whose age and service totals 65 points or more. The pay credit does not increase thereafter. ¶24. As a result, participants with 65 or more age and service points experience decreases in their rates of benefit accrual every year until they retire. ¶49.

Documentary evidence from the discovery taken to date confirms these allegations. El Paso's purported "204(H)" notice concedes that there are periods where "accruals under the Plan may effectively cease," without illustrating how long such periods last. Ex. 8. An August 14, 1996 presentation by the William Mercer consulting company to the El Paso Pension Committee further states that the "Impact on Employees" is a "36% average reduction in pension benefits at age 60." Ex. 9 (EPTO 3669). An earlier presentation by Mercer to El Paso stated that cash balance plans are "popular with employers" precisely because of "Masking a cut in pension plan benefits." Ex. 10 (EPTO

3505). El Paso also recognized that the reductions for older employees would be greater than for younger employees. Ex. 10 (EPTO 3507).

Plaintiffs' "substantial allegations" and documentary evidence thus establish that El Paso's conversion to a cash balance pension formula discriminates against participants in the El Paso Pension Plan based on age. This Court should therefore conditionally certify an ADEA class to give the putative class members notice and the opportunity to join the collective action.

D. The Proposed ADEA Notice and Opt-In Consent Form Are "Accurate and Informative" and Therefore Proper.

Upon certification of a collective action, plaintiffs may send a court-approved notice and consent form to potential members of the class. *Vaszlavik*, 175 F.R.D. at 682-83. The notice should be "accurate and informative." *Sperling*, 493 U.S. at 172. The named Plaintiffs seek to sue on behalf of any and all persons who:

1. Are former or current El Paso employees;
2. Participated in the El Paso Pension Plan on or after the January 1, 2002 date on which the Pension Plan was fully converted to a cash balance design; and
3. Are over age 40, or will be over age 40 as of the date of the judgment.

A proposed notice to the members of this class with an opt-in consent form is attached to the Proposed Order. The notice and consent form will be mailed with a stamped envelope for returns. The notice and consent form follow the format, style, and wording of other notices approved by the courts. See, e.g., *Sperling*, 118 F.R.D. at 415-

17.

Plaintiffs are entitled to obtain the names and addresses of the putative class members. *Vaszlavik*, 175 F.R.D. at 683; *Sperling*, 493 U.S. at 168-69 (“The District Court was correct to permit discovery of the names and addresses of the ... employees”). The proposed Order therefore requires Defendants to timely produce a mailing list to Plaintiffs.

Plaintiffs’ counsel will pay the cost of the mailing and related services (e.g., staffing 1-800 numbers to answer questions). In addition to notifying potential class members by mail, Plaintiffs will provide notice through newspapers and the Internet. See *Geller v. Markham*, 481 F.Supp. 835 (D.Conn. 1979), *aff’d in part, rev’d in part on other grounds*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) (newspaper notice given in addition to mailing).

Plaintiffs propose that the time limit for consents will be 90 days after the mailing is complete. See *Sperling*, 24 F.3d 463, 472 (3d Cir. 1994) (district court can set “reasonable cut-off date for closing the opt-in class”); *Rosen v. Reckitt & Colman, Inc.*, 1991 U.S. Dist. LEXIS 14663, *1 (S.D.N.Y. 1991) (adopting 90-day limit). If no response is received in the first 45 days, Plaintiffs will mail reminder notices to ensure that participants have the notice and respond on a timely basis. If notices are required to be re-mailed because any addresses continue to be out of date, the time period for responding will start with the date of the re-mailed notice.

As noted in the Proposed Order, to avoid unnecessarily burdening the Clerk of

Court with logging responses, the consents will be mailed to a Post Office box maintained by an experienced administrative firm for the Plaintiffs which will be responsible for assembling the list of persons who consent. Defendants will be able to review the original consents to verify the list.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the court certify an ERISA class action pursuant to Rule 23, approve an ADEA collective action for the First and Third Claims, and authorize notice to the putative class members in the form provided.

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Respectfully submitted,

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