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.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT ON ADEA CLAIM

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Introduction

The issues in this case are "vitally important" to employees and their families "[g]iven how profoundly significant retirement plans and planning are to the great majority of Americans." *Amara v. Cigna*, 534 F.Supp.2d 288, 295 (D.Conn. 2008), aff'd, 2009 WL 3199061 (2d Cir. Oct. 6, 2009). In the decision granting Plaintiffs' motion to alter or amend based on the Ledbetter Act, this Court invited El Paso to file "a new motion for summary judgment" on the ADEA claim "[i]n particular" addressing "the relatively recent arguments and authority" in *Hurlic v. Southern Calif. Gas Co.*, 539 F.3d 1024 (9th Cir. 2008), and *Gross v. FBL Fin. Servs.*, 129 S.Ct. 2343 (2009). Dkt. #359 at 7. El Paso's renewed motion exceeds the Court's invitation by relying on statements of fact about which there are genuine issues and statements of fact about which discovery has not been completed under Magistrate Judge Shaffer's April 28, 2008 Minute Order, which bifurcated discovery in this case. [1]

The introduction to El Paso's memorandum states that El Paso "[a]ssum[es] everything Plaintiffs assert is true." Br. at 3. But El Paso's statement of facts and argument do the opposite, even asserting that "the members of the putative collection [sic] action in general, and the named Plaintiffs in particular, did not experience a wear-away." Br. at 22, and see Br. at 19-22. As this Court stated in its first decision: "for some workers, overall benefits did not grow until the cash balance benefits caught up to and exceeded the 'frozen' benefits under the old formula. This period is commonly referred to as a 'wear away'." Slip Op. (dkt.#213) at 3.

At trial, the Plaintiffs will show through lay and expert testimony and documentary evidence that older workers experience much longer periods of wear-away than younger workers.

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[1] This opposition does not address El Paso's request that the Court reconsider its ruling on the Ledbetter Act. Br. at 31-32. The deadline for a Rule 59 motion was September 11, 2009.

In those periods, the cash balance pay and interest credits do not result in an increase to their normal retirement benefits, or their early retirement benefits. 2009 WL 2766718, *4.

The practice that leads to the wear-away periods is a particular type of transition design, called a "greater of" approach with opening account balances. Plaintiffs will show that El Paso's consultants told it that this approach would lead to long wear-away periods for older employees. El Paso was also told that a cash balance conversion could be designed with no wear-aways by using an "A + B" approach in which the cash balance pay and interest credits always add to the participant's previously-earned benefits. But El Paso chose the approach with the long wear-away periods for older employees.

At this stage, the only way that El Paso could obtain summary judgment would be to accept the facts in the light most favorable to the Plaintiffs and contend that there is a gap between ADEA §§4(a) and 4(i) in which the Plaintiffs' disparate treatment and disparate impact claims disappear based on a holding that their claims are "not regulated" under §4(i)'s rule against the cessation of accruals because of age, but nevertheless precluded under §4(a) because the claims "relate to" the subject matter of §4(i) in a broad sense. *Engers v. AT&T*, 2007 WL 958472 (D.N.J. 2007), holds that this construction is inconsistent with the statutory text, and if there is any ambiguity, that it is inconsistent with the statutory objective to end age discrimination in all forms of employee benefits.

Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts

Plaintiffs do not dispute Para. Nos. 3, 6, 9, 14-16, 23, and 25-26 in Defendants' Statement of Undisputed Material Facts. But Plaintiffs dispute Para. Nos. 1-2, 4, 7-8, 10-13, 17-22 and 24.[2]

1. Prior to January 1, 1997, El Paso maintained a defined benefit pension plan that utilized a final average pay formula to calculate retirement benefits. Benefits under the final average pay formula generally increased along with Participants' years of service and the average of their final years of pay. (January 21, 2009 Order, Docket No. 311, p.2; Complaint ¶¶15-16).

2. El Paso converted its pension plan effective January 1, 1997 to a cash balance plan ("Amended Plan"). (Exhibit A, Preamble, p. 1 & §4.1; March 19, 2008 Order, Docket No. 213, p.11).

Pls' Response: El Paso's statements ignore the 1,952 employees of the former Sonat and Coastal companies which El Paso acquired in 1999 and 2001. Ex. 7 at 2. Those employees outnumber the 952 El Paso/EPNG employees by a ratio of 2 to 1. *Id*. Before January 1, 2000 (for Sonat) and March 31, 2001 (for Coastal), the Sonat and Coastal employees participated in pension plans that provided benefits based on final average pay. After those dates, they were converted to the cash balance formula, with long periods of wear-away for older, longer-service employees. Ex. 1 (Poulin Rpt.) at 3.

4. Pay credits increase with age. Thus, the older an employee is, the higher the percentage of pay that is credited to his or her cash balance account each quarter. (Exhibit A, §4.1(a)(ii)).

Pls' Response: The cash balance pay credits are based on percentages of pay that range from 4% to 7%. The percentage of pay in a given year is determined by the employee's combined age and service. Ex. 1 (Poulin Rpt.) at 5 and 8; Defs. Ex. A at §4.1(a)(ii). There is a cap of 7% of salary when a participant's combined age and service equals 65 or more points, e.g., age 45 with 20 years of service. The percentage of pay is <u>not</u> higher after that. *Id*. During the period of time

[2] As provided under this Court's rules, Plaintiffs set forth Additional Disputed or Undisputed Material Facts below.

when an employee is under a "wear-away," the pay credits assigned to the employee's account do not add to his or her retirement benefits. Ex. 2 (Poulin Reb.) at 1.

5. The Amended Plan provided for a five-year transition period for Participants who were active on the date of the conversion to a cash balance formula. (January 21, 2009 Order, Docket No. 311, p. 2). At the start of the transition period (January 1, 1997), these Participants were given a cash balance account with a balance equivalent to their benefit under the final average pay formula. (Exhibit A, § 4.1(a)).

Pls' Response: Plaintiffs' actuarial expert has shown that the cash balance accounts that participants were given were not "equivalent to their benefit under the final average pay formula." Ex. 1 (Poulin Rpt.) at 13-16. The January 1, 1997 date in the statement again ignores the January 1, 2000 and March 31, 2001 start dates of the transition periods for the 1,952 former Sonat and Coastal employees.

7. Generally, the value of a Participant's pension benefits under the final average pay formula is referred to as his or her "Minimum Benefit." (Exhibit A, § 4.1(b); Exhibit B, Bardwell Dep., p. 39:3-10). Like all pension benefits, the value of a Participant's Minimum Benefit can be calculated as an "accrued benefit" (i.e., a benefit that a Participant would receive at "normal retirement age" or age 65) or as an immediately payable benefit that a Participant would receive if he or she retired at any given time prior to normal retirement age.

Pls' Response: Defendants' statement of facts consistently confuses present values with the monthly amount of a participant's pension benefit and consistently miscites Dr. Bardwell's testimony as support. See Ex. 2 (Poulin Reb.) at 8-11 and Defs. Ex. B (Bardwell Dep.) at 39 ("expressed as an age 65 annuity"). Under Section 4.1(b) of the Plan, the monthly amount of a participant's pension benefits earned before December 31, 2001 is called the "Minimum Benefit." Defs. Ex. A. Under Section 4.1(c) of the Plan, as amended and restated effective January 1, 2001, the comparable frozen monthly benefits for former Coastal and Sonat employees are called "Transition Benefits." Ex. 3. Even when the monthly amount of a retirement benefit is “frozen,” the present value will increase as an individual approaches age 55. This happens whether or not the individual is employed. To illustrate, named Plaintiff Alice Ballesteros earned a retirement benefit of $1,612 per month through 12/31/2001. Even though her monthly benefit is frozen, any actuary or economist will say that the present value of the frozen benefit increases as she draws closer to age 55–whether or not she is employed. Ex. 2 (Poulin Reb.) at 8-9. In both situations and at any age, the $1,612 per month remains fixed and frozen. Plaintiffs also dispute the statement that “[l]ike all pension benefits,” benefits are payable before age 65, and the implication that they are payable on equivalent terms at different ages before age 65. El Paso’s prior benefit formula had favorable terms for retirement between ages 55 and 65, involving 3% or 4% per year reductions (or no reduction under the “Rule of 85"), which actuaries describe as “subsidized.” Ex. 1 (Poulin Rpt.) at 3. By contrast, El Paso’s prior formula had unfavorable terms for retirements before age 55. Reductions for “immediately payable” annuities before age 55 were based on an 8% interest rate, which amounted to a penalty. Poulin Suppl. Decl. at 4.

8. At the end of the five-year transition period–December 31, 2001–each Participant’s “accrued benefit” under the final average pay formula was frozen and thus stopped increasing in value. (Exhibit A, §§ 3.1, 4.1(b)(i); Exhibit B, Bardwell Dep., p. 84:15-18; January 21, 2009 Order, Docket No. 311, p. 2; Complaint, ¶¶ 20-21; Declaration of Kevin R. Minor (“Minor Decl.”), ¶ 6, attached as Exhibit C). As discussed below, however, this is not true of the benefit that a Participant actually receives under the final average pay formula if the Participant retires before reaching (1) age 65 or (2) age 60 plus 30 years of service. Moreover, after the end of the transition period, benefits under the cash balance formula continued to accumulate. (Exhibit C, Minor. See Exhibit A, § 3.1.

Pls’ Response: El Paso’s statement confuses the “accrued benefit” with its present value and again miscites Dr. Bardwell’s testimony as support. See Resp. to Stmt. No. 7 and Defs. Ex. B (Bardwell Dep.) at 84 (the benefit is “expressed as an age 65 annuity”). El Paso’s statement also ignores the different transition dates and the different early retirement rules that apply to the former Sonat and Coastal employees. See Ex. 1 (Poulin Rpt.) at 3-4. The monthly amount of participants' "accrued benefits" were "frozen" on December 31, 2001 for former EPNG employees, and on December 31, 2004 and March 31, 2006, respectively, for former Sonat and Coastal employees. The present value of the frozen benefits increases as individuals draw closer to retirement, whether or not they are employed. Those increases in present value are what Defendants' statistical expert, Dr. Ward, characterizes as "growth" analogous to "pay increases." Ex. 7 (Ward Rpt.) at 8. Mr. Poulin's rebuttal shows that this is a mistaken analogy. Ex. 2 (Poulin Reb.) at 9.

10. On average, the higher a Participant's age at the end of the transition period, the higher his or her Minimum Benefit under the final average pay formula was at the end of the transition period. (Exhibit B, Bardwell Dep., pp. 63:3-5, 91:17-20, 97:6-17). During the five-year transition period, older employees' Minimum Benefits under the final average pay formula grew much faster than their cash balance benefits did. (Exhibit B, Bardwell Dep., pp. 118:23-25, 119:1-3). Thus, for many older Participants, their Minimum Benefits payable at age 65 (i.e., their "accrued benefits") exceeded their cash balance benefits at the end of the five-year transition period. (Exhibit B, Bardwell Dep., p. 118:7-12; Exhibit C, Minor Decl., ¶ 8).

Pls' Response: Plaintiffs' actuarial expert, Claude Poulin, found that "one" of four reasons why older employees' minimum benefits exceed their cash balance benefits is because their benefits grew faster than their cash balance accounts during the five-year transition periods. Mr. Poulin identifies three other reasons why older employees' minimum benefits exceed their cash balance benefits. Ex. 1 (Poulin Rpt.) at 14-15. Defendants' actuarial expert, Ian Altman, agrees with Mr. Poulin's analysis–as does Dr. Bardwell. Ex. 8 (Altman Dep.) at 94-96; Defs. Ex. B (Bardwell Dep.) at 91. Defendants' statement of facts does not reference either Mr. Altman's testimony or Mr. Poulin's analysis.

11. According to Plaintiffs, certain Participants, including themselves, experienced a wear-away period because their Minimum Benefits, payable at age 65, were greater than the value of the cash balance accounts at the end of the transition period. (Complaint, ¶¶ 32-35; Ex. B, Bardwell Dep., pp. 49: 8-20, 73:14-18, 75:2-5, 14-17). Plaintiffs allege that during this so-called wear-away period, the value of their pension benefits did not increase even though their cash balance accounts did increase. (Complaint, ¶¶ 32-35).

Pls' Response: El Paso again confuses participants' retirement benefits with present values. The Complaint alleges that "Defendant El Paso used a method that froze the retirement benefits that the named Plaintiffs and other class members will receive for many years at the previously accumulated levels as of December 31, 2001." Dkt.#1 at 8-9. Dr. Bardwell testified that "if the employee is experiencing wear-away, then their cash balance plan benefit is lower than the frozen or minimum benefit." Defs. Ex. B at 75.

12. Importantly, Plaintiffs' own expert concedes that Plaintiffs' wear-away theory relies only on the value of the Minimum Benefit payable at normal retirement age (i.e., age 65), or the so-called "accrued benefit." (Exhibit B, Bardwell Dep., 49:13-20 (conceding that wear-away as defined by Plaintiffs pertains only to the benefit payable at age 65), 84:15-22 (conceding that he does not know whether the benefit payable at any point in time other than at age 65 continues to grow or not), 118:1-6 (conceding that his calculations pertained only to the benefit payable at age 65)).

Pls' Response: El Paso again miscites Dr. Bardwell's testimony. He did not testify that "Plaintiffs' wear-away theory relies only on the value" of the age 65 benefit. See Defs. Ex. B at 49, 84 and 118. Plaintiffs' actuarial expert, Mr. Poulin, has found that the reductions for early retirement under the prior plan formulas are always less than under the cash balance formula. Ex. 1 (Poulin Rpt.) at 12-14. Because of this, Mr. Poulin finds that when a participant's "accrued benefit" at age 65 is under a period of wear-away, the early retirement benefit at age 55 or more is always under a wear-away. Poulin Suppl. Decl. at 3.

13. However, under the terms of the Amended Plan, the actual value of the Minimum Benefit to which a Participant is entitled at any given point in time grows, even

during a so-called "wear-away" period, as the individual ages towards (1) "normal retirement age" (age 65) or (2) age 60 plus 30 years of service. (Exhibit A, §§ 4.1(b)(i) (defining the Minimum Benefit by applying the Plan's final average pay provisions through December 31, 2001); 4.3(b); 4.5(b)).

Pls' Response: El Paso again confuses the Minimum Benefit with present value (calling it the "actual value" here), and ignores the different transition dates and early retirement rules for former Sonat and Coastal employees. El Paso's statement is also based on a mistaken view of how present values increase. If a participant has a frozen benefit and is subject to a 3 or 4% per year reduction for retirement at age 55 (which is considered "subsidized" from an actuarial standpoint), deferring retirement to age 56, 57, etc. can actually decrease the present value of the frozen benefit. Poulin Suppl. Decl. at 3-4. El Paso's statement about the "actual value" further ignores the fact that the "actual values" to which it refers have not been available to most older, longer service employees because El Paso's Plan has limited distributions of Minimum Benefits in non-annuity form. El Paso's Plan only offered lump sum distributions when the cash account was less than $25,000 for participants who terminated before January 1, 2000 or less than $100,000 for participants who terminate on or after January 1, 2000. Ex. 3 at §5.1(d).[3]

17. Thus, reduction factors decrease each year that a Participant gets closer to either (1) age 65 or (2) age 60 plus 30 years of service.(Declaration of Michael Ward ("Ward Decl."), ¶ 13, attached as Exhibit D). Therefore, the reduction factors that applied on December 31, 2001 (the end of the transition period) are larger than the reduction factors that apply after the close of the transition period as the employee ages toward (1) age 65 or (2) age 60 plus 30 years of service. (*Id.*). As the reduction factors decrease over time, the actual value of the benefit payable on any given day increases. (*Id.*).

Pls' Response: El Paso's statement confuses decreases in "reduction factors" for early retirement between ages 55 and 65 with increases in the "actual value" of a participant's

[3] The $100,000 limitation was removed for terminations after January 1, 2008. Ex. 9.

retirement benefits. Decreases in reductions for early retirement are due to participants deferring retirement past age 55. As stated in response to Statement No. 13, deferring retirement to ages 56, 57, etc., can actually decrease the present value of the frozen benefit. Poulin Suppl. Decl. at 3-4. For "immediate annuities" before age 55, El Paso applies reduction factors based on an 8% interest rate. Ex. 10 (Minor Dep.) at 102. Those reduction factors are in excess of a reasonable actuarial equivalent and amount to penalties. See Poulin Suppl. Decl. at 4. Not applying those reduction factors because a participant waits until age 55 to commence a frozen monthly benefit does not constitute an increase in the actual value of the participant's benefits, but is a rational avoidance of a penalty.

18. A Participant who is entitled to a Minimum Benefit and who elects Early Retirement is also eligible for a Supplemental Early Retirement Benefit. (Ex. A, § 4.3(a) ("In addition, if the Participant's Early Retirement Benefit is based on his or her Minimum Benefit..., the Participant shall also receive the supplemental benefit described in section 4.3(c).")). Therefore, Participants whose Minimum Benefits exceed their cash balance benefits (including all three Plaintiffs) receive an additional benefit that other employees do not. Therefore, under the terms of the Plan, the value of the Minimum Benefit grows every year as a Participant ages up to age 65 or age 60 plus 30 years of service.

Pls' Response: A Supplemental Early Retirement Benefit ("SERB") was part of the prior Plan for employees in the EPNG group who retired after age 55 and elected an annuity. Defs. Ex. A at §4.3(a)(iv) and (c). The SERB is a frozen benefit payable only from the early retirement date until the participant attains age 62; it does not "grow every year." *Id*. The SERB is also not conditional on whether a participant's Minimum Benefit "exceeds their cash balance benefits." Former Sonat or Coastal employees were not offered the SERB. *Id*.

19. Moreover, the Amended Plan itself recognizes that the value of the Minimum Benefit that is actually payable to a Participant changes over time, even after the end of the transition period. Specifically, the Amended Plan guarantees that a Participant's actual pension benefit will be the greater of their cash balance benefit "or the Minimum Benefit <u>payable as of such date</u>." (Exhibit A, §4.1 (emph. added); see also Complaint ¶21).

Pls' Response: No provision in the Amended Plan "recognizes that the value of the Minimum Benefit that is actually payable to a Participant changes over time." *Id*. Section 4.1 of the Amended Plan compares the Minimum Benefit in the form of a monthly retirement benefit with the cash balance benefit in the same monthly form. Defs. Ex. A.

20. El Paso retained Michael Ward, Ph.D., to test statistically whether Participants' benefits actually do grow as the Amended Plan dictates they should. Dr. Ward's expert qualifications are contained in his contemporaneously filed Declaration. (Exhibit D, Ward Decl., Ex. 1).

Pls' Response: Dr. Ward's report and declaration offer opinions about "growth" that require the expertise of an actuary, pension consultant, or economist with expertise in pension provisions. Dr. Ward is not qualified to testify as such and does not rely on anyone with those qualifications. El Paso's designated actuarial expert is Ian Altman. Ex. 13 (Altman Rpt.) at 1. Dr. Ward did not rely on Mr. Altman's actuarial expertise. Mr. Altman's expert report and deposition testimony are not cited anywhere in his report (or in El Paso's statement of undisputed facts).

The "growth" constructs that Dr. Ward offers are not grounded in any accepted analysis in a recognized field of expertise. Dr. Bardwell testified that Dr. Ward's assertions about growth were not based on any statistical expertise. Defs. Ex. B at 85, 129; see also Ex. 16 (Bardwell Dep.) at 124-125; 130-33. Plaintiff's actuarial expert, Mr. Poulin, detailed the actuarial faults in Dr. Ward's growth analysis. Ex. 2 (Poulin Reb.) at 7-11. At his deposition, Mr. Altman testified that he did not know whether Dr. Ward's "growth" analysis conforms with any actuarial or accounting principles. Ex. 8 (Altman Dep.) at 151-52, 154-59. Dr. Ward admitted that he made no inquiries about how accountants or actuaries would treat his analysis of "growth" in present values. Ex. 14 (Ward Dep). at 74-75. By contrast, Plaintiffs' statistical expert relied on the analyses of wear-aways developed by the Plaintiffs' actuarial expert, Mr. Poulin, for the statistical analysis he set forth in his report. See Ex. 15 (Bardwell Rpt.) at 3 and Ex. 16 (Bardwell Dep.) at 113-114 and 145-146.

21. Dr. Ward's calculations prove several unassailable facts, all of which are consistent with the terms of the plan document itself as described above.

- **a. First, for employees who are under 65 years old, the actual value of the Minimum Benefit that is payable at any given point in time grows as the employees age toward 65 years of age or 60 years of age plus 30 years of service. (Exhibit D, Ward Decl., ¶ 10).**
- **b. Second, over 99% of El Paso's employees retire before reaching age 65. (Exhibit D, Ward Decl., ¶ 16).**
- **c. Third, older workers' (i.e., over 40) Minimum Benefits grew more than twice as much as younger workers' (i.e., under 40) benefits under the cash balance formula, even after the close of the transition period. (Exhibit D, Ward Decl., ¶ 20). Specifically, Dr. Ward calculated that the actual, immediately payable value of older workers' Minimum Benefits grew by $16,081, on average, per year of service following the end of the transition period. By contrast, younger workers' benefits under the cash balance formula grew by only $6,681, on average, per year of service following the end of the transition period. (Exhibit D, Ward Decl., ¶¶18, 19).**

Pls' Response: Dr. Ward's analysis is built on confusing present values with the monthly amount of the Minimum Benefit, with the present values distorted by fundamental misunderstandings of early retirement benefits and benefits payable prior to age 55. Minimum Benefits under the prior formulas do not "grow" for older or younger employees after the transition periods end. Mr. Poulin explains that comparing increases in actuarial value of a fixed future benefit to "pay increases," as Dr. Ward did, is a false analogy. Ex. 2 (Poulin Reb.) at 9.

In an effort to identify any form of "growth" to analogize to "pay increases," Dr. Ward counts decreases in reduction factors for early retirement as "growth" in participants' Minimum Benefits. Ex. 7 (Ward Rpt.) at 4-5 and 8. Dr. Ward's assertion that the present value grows "at any given point in time" between ages 55 and age 65 (or age 60 with 30 years of service), is incorrect for the reasons explained in the Response to Defendants' Statement No. 17. Dr. Ward was unaware that the reduction factors for El Paso's so-called "immediate annuities" before age 55 were based on an 8% interest rate, which is actuarially excessive. *Id.* at 66-69, 71, 95-96 ("You're talking to the wrong guy about this. I'm taking whatever number is in the book"). Not applying excessive reduction factors because a participant waits until age 55 to commence a frozen benefit does not constitute "growth" in the individual's benefits and is not analogous to "cash compensation" or a "pay increase" under any accepted actuarial or economic analysis.

With respect to No. 21.c., Dr. Ward's report admits that he applied different methods to calculate his "growth" in benefits based on the ages of the employees. As Dr. Bardwell pointed out, Dr. Ward calculated "the average annual dollar increase of the cash balance benefit for younger workers" and compared this to the "increase in early retirement benefit for the same period for workers age 40 or over." Ex. 17 (Bardwell Reb.) at 2 and Ex. 7 (Ward Rpt.) at ¶¶38-39. This is an "apples to oranges" comparison. At his deposition, Dr. Ward conceded that he performed "two different calculations" for older and younger workers. Ex. 14 at 21-23.

When Dr. Ward was asked about Plaintiffs' allegations concerning the effect of the wear-away design on older workers, he admitted that Plaintiffs' allegations are true: "It is definitely true that most of these older workers have an age 65 benefit which is in excess of the cash balance benefit. And if that constitutes a wear-away period, then fine, that's what happens." Ex. 14 (Ward Dep.) at 84. Dr. Ward also agreed that "in periods of time when the minimum benefit is higher than the cash balance" the cash balance pay and interest credits "have no effect" "because the [minimum] benefit they receive is higher." *Id.* at 86-87 and 114.

Plaintiffs do not dispute No. 21.b.

22. Dr. Bardwell testified that he does not dispute the accuracy of Dr. Ward's calculations. (Exhibit B, Bardwell Dep., p. 85:4-2, 120:6-22, 128: 11-23, 129: 2-21).

Pls' Response: Dr. Bardwell and Mr. Poulin both testified there was not sufficiently detailed information, backup data, or calculations to replicate Dr. Ward's numbers. Ex. 17 (Bardwell Reb.) at 1-2 and Ex. 2 (Poulin Reb.) at 7-8.

24. Looking at the benefits actually received by all three named Plaintiffs (as opposed to their hypothetical "accrued benefits" payable at age 65), the actual, payable value of <u>both</u> their cash balance benefit and their Minimum Benefits continued to grow after the close of the transition period. (Ex. C, Minor Decl., ¶ 9). In fact, for all three Plaintiffs, the immediate value of each Plaintiff's Minimum Benefit grew faster than the immediate value of his or her cash balance benefit from the time the transition period closed until the time he or she actually started to receive retirement benefits. (Id.)

Pls' Response: El Paso again confuses the frozen "accrued benefit" with present values (which it calls "the actual, payable value" or "the immediate value"), that have been distorted by a faulty analysis of reductions for early retirement, here going so far as to call the employee's "accrued benefit" "hypothetical." El Paso ignores the mandated protection of early retirement features under ERISA §204(g)(2) and the fact that the reductions for "immediate annuities" prior to age 55 are penalties. In this statement, El Paso relies on Kevin Minor who is a fact witness, not an expert. Mr. Minor previously submitted a declaration admitting that the periods of wear-aways exist and that they "depend[] heavily on the combination of that participant's age and years of service." Pls. Stmt. Addt'l Facts ¶18.

Plaintiffs' Statement of Additional Disputed or Undisputed Material Facts

1. An August 14, 1996 presentation by Mercer for the El Paso Pension Committee stated that the "Impact on Employees" of the cash balance changes would be a "36% average reduction in pension benefits at age 60." Ex. 18 at Mercer 679. Plaintiffs' actuarial and statistical

experts, Mr. Poulin and Dr. Bardwell, calculate that the reductions in future benefits were actually even more than this. Based on individual-by-individual calculations, their reports detail how future benefits are reduced on average by 75% after ten years for the EPNG, Sonat and Coastal employees. Ex. 1 (Poulin Rpt.) at 11-12 and Ex. 15 (Bardwell Rpt.) at 12-14.

2. Mr. Poulin found that the reductions in future benefits are due to both the periods of wear-away and the poorer benefit formula that was adopted with the cash balance design. Ex. 1 (Poulin Rpt.) at 8-11. The initial cash balance accounts that El Paso established effective January 1, 1997 for EPNG employees, and at later dates for former Sonat and Coastal employees, were at levels well below the full value of the older, longer-service employees' accumulated benefits under the prior plans. By contrast, the initial cash balance accounts for younger employees were close to the full value of their benefits. Ex. 1 (Poulin Rpt.) at 14-15.

3. During a 5-year transition period ending on December 31, 2001, EPNG employees continued to earn benefits under both the new cash balance formula and the old final average pay formula. 2009 WL 151532, *1. Former Sonat and Coastal employees continued to earn benefits under their plans' final average pay formulas in five-year periods ending on December 31, 2004 and March 31, 2006, respectively. Ex. 1 (Poulin Rpt.) at 3-4.

4. Employees who terminated before these transition periods ended received the "greater of" the two benefits as annuities. Defs. Ex. A at §§4.1 and 5.1. Lump sum distributions were offered, but employees who terminated employment before January 1, 2000 were ineligible for lump sums if their cash balance account exceeded $25,000. After January 1, 2000, this limit was raised to $100,000. Ex. 3 at §5.1(d). The limit was eliminated after January 1, 2008. Ex. 9.

5. After the transition period ended on December 31, 2001 for EPNG employees

(and on December 31, 2004 and March 31, 2006 for former Sonat and Coastal employees), retirees continued to receive the "greater of" the two benefits in annuity form or a lump sum (unless their cash balance account exceeded $100,000). However, after the transition periods ended, the final average pay benefit was "frozen." Benefits continued to increase thereafter only under the new cash balance formula.

6. For older, longer-service workers, "one effect" of the transition design was that their overall monthly benefits did not grow until the cash balance benefits caught up to and exceeded the "frozen" benefits due under the old formula. 2009 WL 151532, *1. These "*de facto* benefits freezes" are called wear-away periods. 2008 WL 762456, *1 and 8. The pay credits assigned during the wear-away periods do not increase the employee's retirement benefit. 2009 WL 2766718, *4.

7. According to Plaintiffs' actuarial expert, Mr. Poulin, the practice that leads to these periods of wear-away is El Paso's use of a "greater of" approach based on opening account balances that are not equal to the frozen benefits that employees earned under the prior formulas. Ex. 1 (Poulin Rpt.) at 13-14.

8. Wear-aways are not an inherent part of cash balance conversions. A cash balance conversion can easily be designed with an "A+B" approach in which the prior benefits are frozen and the cash balance benefits always add to those benefits. Ex. 1 (Poulin Rpt.) at 13-14. Congress has, in fact, prohibited wear-aways for all cash balance conversions after June 29, 2005. P.L. 109-80, §701(a)(1). El Paso was told that it had the option of using an "A+B" transition as early as November 3, 1995 and was also told that "[a]ll participants would receive additional benefit accruals under this option." Ex. 6 at EPTO-14245.

9. Mr. Poulin's report details four reasons why the duration of wear-away under El Paso's plan design is longer for older employees:

(1) El Paso excluded the value of early retirement benefits from the opening account balances. The value of early retirement benefits is greater for older employees because they are close to early retirement eligibility.

(2) El Paso applied a pre-retirement mortality discount in establishing the opening account balances. This discounts the opening accounts by a larger amount for older employees.

(3) Participants' cash balance accounts did not include the benefits earned under the prior formula during the 5-year transition period. That shortfall was generally larger for older workers because an improvement in final average salary improves benefits for all past years of service and older employees generally have the more past service.

(4) After the opening accounts were set up, interest rates fell below the rates used to establish the opening account balances, which has a greater impact on the retirement benefits provided to older employees by the accounts than it does for younger employees.

Ex. 1 (Poulin Rpt.) at 14-15.

10. Mr. Poulin developed Excel spreadsheets to compute the expected duration of wear-away under El Paso's transition design. Ex. 1 (Poulin Rpt.) at 14-15. Mr. Poulin's analysis of wear-aways conforms with the definition of "wear-away" the Treasury Department uses and Mr. Poulin applied the same actuarial assumptions that the Treasury Department specifies for determining the expected duration of wear-aways.[4] Mr. Poulin found that for older participants, the wear-away period often exceeds 10 years. For example, he found that the wear-away period for Alice Ballesteros, who was age 50 at the end of the five-year transition period, was 11-12 years. *Id*. at 16-17.

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[4] See 26 C.F.R. 54.4980F-1, Q&A-11(a)(4)(ii)(A) and (C).

11. To respond to this Court's January 2009 decision, Mr. Poulin also prepared an Excel spreadsheet to show how for "two employees, one younger and one older, with the same accrued frozen benefit under the old plan and the same salary," the wear-away period is longer for the older employee, without even taking into account the correlation between age and the amount of the frozen benefit. Suppl. Decl. at 2-3. For instance, for two employees with 10 years of service and the same frozen benefit of $735 (based on a salary of $70,000), Mr. Poulin's spreadsheet shows that an employee who was age 30 on 12/31/01 will have a 1.3 year period of wear-away compared with a 5.3 year period for an employee who is age 55. *Id.*

12. It is undisputed that ERISA §204(g)(2) protects the early retirement features that are attached to a frozen accrued benefit against reduction by plan amendment. Ex. 4 and 5. Mr. Poulin's report describes the reduction factors for early retirement that were offered under the prior plan formulas for EPNG, Sonat and Coastal employees. Ex. 1 (Poulin Rpt.) at 3-4. Mr. Poulin found that the reduction factors for early retirement under the prior formulas were generally 20% at age 55, or 28% for former Coastal and Sonat employees, compared to a <u>53%</u> reduction under the cash balance design. Ex. 1 (Poulin Rpt.) at 12-13. Because the reductions in the cash balance benefits for early retirement always exceed the reductions under the prior plan, Mr. Poulin finds that any periods of wear-away that exist in terms of the age 65 benefits will always exist for retirements at age 55 and over. Poulin Suppl. Decl. at 3.

13. Dr. Robert Bardwell, the Plaintiffs' statistical expert, developed calculators to apply Mr. Poulin's Excel spreadsheets to data for each participant. Ex. 15 (Bardwell Rpt.) at 2-3. Dr. Bardwell found that the mean duration of the wear-aways for participants over 40 is 8.2 years compared with 1.9 years for participants under 40. This represents an adverse impact ratio of

421%. *Id.* at 6. Dr. Bardwell also applied Mr. Poulin's Excel spreadsheets to calculate damages from El Paso's wear-away design and found that over 90 percent of damages are borne by employees age 40 and older. Ex. 15 (Bardwell Rpt.) at 14-15. Dr. Bardwell found that the statistical significance of the effect of age on the duration of wear-away is 35 standard deviations, which rules out the possibility that the impact is due to chance. Ex. 15 (Bardwell Rpt.) at 11-12.

14. El Paso knew from 1996 forward that the older employees would be subject to long periods of wear-away. Michael Crumley who was an accountant in El Paso's benefits department at the time, declares that during internal meetings in July-August of 1996 that he attended, the term "wear-away" was not discussed. But it was discussed that after the 5-year transition period, employees who were currently over age 40 would earn nothing more in retirement benefits. Kevin Minor of the Mercer consulting firm told members of the Executive Committee and benefit department managers, including Joel Richards, Brent Austin, Barbara Williams, and Linda Camarillo, that this would be the case and provided graphs to illustrate. Decl. of Michael Crumley at 2.

15. The graphs that Mr. Minor prepared show that the benefits provided under the cash balance formula were not expected to exceed those provided under the frozen prior formula for <u>11-12 years</u> after the end of the 5-year transition period for employees who were ages 43 and 47 at the end of 1996, and not expected to exceed the frozen benefits for employees who were ages 54 and 58 until after they reached age 65. Ex. 18 at Mercer 669-72.

16. In a September 2001 PowerPoint presentation for EPNG employees, three slides that El Paso's "actuarial firm put together" illustrate <u>9-11 year</u> periods of wear-away for employees who were ages 50 and 55 on 12/31/2001. Ex. 21 at 33-37.

17. Calculations that El Paso's actuaries performed in June 2004 related to the December 31, 2004 conclusion of the transition period for Sonat showed <u>15-year</u> periods of wear-away for employees ages 48 and 50 as of December 31, 2004. Ex. 22.

18. In opposing Plaintiffs' motion for approval of the ADEA collective action, El Paso submitted a declaration from Mr. Minor which admits that "Some employees included in the proposed class did, in fact, experience the wear-away described in Plaintiffs' Complaint." Mr. Minor further admitted that "Whether a particular employee in the proposed class experienced wear-away...depends heavily on the combination of that participant's age and years of service." Dkt.#130-2 at 4 and 6.

19. Handwritten notes of an October 25, 1999 conference call with Mercer's consultants show that El Paso knew that there were issues concerning the "age discrimination" laws. The notes refer to El Paso's "wear-away transition" and recognize that an EEOC task force is studying the "age discrimination issue in wear away." Ex. 19.

20. This Court has found that "the wear away effect was apparent as early as 1999, as was the alleged correlation to older employees with larger pension balances under the old formula." 2009 WL 2766718 at *3. The Court found that a "bar graph [in a September 15, 1999 Compensation Statement prepared by El Paso] clearly shows the wear-away effect, as it shows both the frozen old benefit and the growing cash balance plan benefit at several intervals. In the example provided, ... the cash balance benefit does not exceed the participant's frozen previous benefit even at age 65." 2009 WL 151532 at *7 and Ex. 20 at P47.

21. In an April 18, 2007 review of a pending Application for Determination over the tax-qualification of this plan, the IRS objected to how El Paso restructured the Supplemental

Early Retirement Benefit ("SERB") for EPNG employees with the cash balance changes on the basis of "age discrimination" and required El Paso to "convert the Supplemental Benefit to a formula that does not discriminate on account of age." Ex. 11 at 2 and Ex. 12.

22. Valuation data for the years from 1998 through 2007, which Mercer only produced on October 6, 2009 pursuant to an October 15, 2008 Order by Magistrate Judge Shaffer, shows that El Paso totally reversed the Plan's cost structure after the end of the transition periods so that the costs of older employees' benefits are now only one-third of the costs for younger employees' benefits. Poulin Suppl. Decl. at 5. For example, the annual costs for named Plaintiffs Gary Muckelroy and Alice Ballesteros in 2002 were only $148.80 and $821.99, whereas the costs for them were $4,445.86 and $3,086.14 in 2001. Poulin Suppl. Decl. at 4. By comparison, for younger employees with comparable salaries to Mr. Muckelroy's $103,000 salary or Ms. Ballesteros's $63,000, the annual costs are in the $1,500-3,000 range in both 2001 and 2002 (and succeeding years). *Id.*

Magistrate Judge Shaffer's April 28, 2008 Minute Order Bifurcating Discovery Has Prevented Plaintiffs From Developing Additional Facts to Present in Opposition.

Rule 56(f) provides that when a party shows specific reasons why it cannot present facts to justify its opposition, the Court "may: (1) deny the motion [for summary judgment]; (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or (3) issue any other just order." "The crux of Rule 56(f) is that summary judgment should be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Hackworth v. Progressive Cas. Ins. Co.*, 468 F.3d 722, 732 (10th Cir. 2007). A Rule 56(f) affidavit is "entitled to liberal treatment" and must "identify the probable facts not available" and "what steps have been taken to obtain those facts" and "explain how additional time will enable [the non-movant] to rebut the movant's allegations of no genuine issue of fact."*Natural Wealth Real Estate, Inc. v. Cohen*, 2008 WL 511761, *2-3 (D.Colo. Feb. 21, 2008). "[E]xclusive control of such information" by the party moving for summary judgment "is a factor weighing heavily in favor of relief under Rule 56(f)." *Price v. Western Resources, Inc.*, 232 F.3d 779, 783 (10th Cir. 2000).

Here, Plaintiffs respectfully submit that this Court should deny El Paso's motion or order a continuance to allow Plaintiffs to complete discovery under Rule 56(f) based on the facts set forth in the accompanying Rule 56(f) Affidavit. By Minute Order entered on April 28, 2008 (dkt. #228), Magistrate Judge Shaffer bifurcated discovery in this case and thereby deferred a large portion of the Plaintiffs' discovery until after rulings on the then-pending dispositive motions. The Minute Order adopted a "Joint Proposal on Bifurcating Discovery" that Magistrate Judge Shaffer directed the parties to prepare. The Joint Proposal on Bifurcating Discovery identifies executives and other benefits managers that Plaintiffs intend to depose. Other than one consultant from Mercer (Mr. Minor), Plaintiffs have not deposed anyone who would have known about the periods of wear-away and discrimination based on age. Rule 56(f) Aff. of Stephen Bruce, at 2-3.

The bifurcated discovery may provide additional evidence of disparate treatment and knowledge of the disparate impact. As mentioned, Michael Crumley, a former accountant in El Paso's benefits division, declares that Joel Richards, Barbara Williams, Linda Camarillo, Armida Solis and others within El Paso knew that the wear-aways would affect older employees. Decl. of Michael Crumley at 2. There was also a conference call with Mercer consultants in October 1999 in which both the Plan's wear-away design and the EEOC's interest in whether wear-aways discriminated on the basis of age were discussed. Ex. 19. Plaintiffs have been unable to depose the individuals involved because of the discovery bifurcation.[5]

I. Summary Judgment Cannot Be Granted If Genuine Issues of Material Fact Exist.

Pursuant to Federal Rule 56(c), summary judgment can only be granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c); see *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248-50 (1986); *Concrete Works, Inc. v. City & County of Denver*, 36 F.3d 1513, 1517 (10th Cir. 1994). "The movant bears the initial burden of making a prima facie demonstration of the absence of a genuine issue of material fact and entitlement to judgment as a matter of law." *Adler v. Wal-Mart Stores, Inc*., 144 F.3d 664, 670-71 (10th Cir. 1998); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets that burden, the other party must demonstrate a "genuine issue for trial on a material matter." *Concrete Works*, 36 F.3d at 1518; accord, *Defreitas v. Horizon Investment Mgmnt.*, 577 F.3d 1151, 1161-62 (10th Cir. 2009).

In ruling on a motion for summary judgment, the district court's "role is simply to determine whether the evidence proffered by plaintiff would be sufficient, if believed by the ultimate fact-finder, to sustain the claim." *Marcus v. McCollum*, 394 F.3d 813, 820 (10th Cir.

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[5] El Paso has also not produced all of its communications with the IRS about "age discrimination" under this Plan. See Pls. Ex. 11, at 2 (April 18, 2007 letter from IRS requesting that El Paso "convert the Supplemental Benefit to a formula that does not discriminate on account of age") and Ex. 12.

A continuance or denial is also in order because Plaintiffs' renewed request for approval of the ADEA notice and consent form has not been resolved. See dkt. #313, 326. Issuing the ADEA notice to more than 2,000 current and former El Paso employees will allow Plaintiffs to obtain more information about El Paso's knowledge and intent.

2004). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge considering a summary judgment motion." *Stahl v. Bd. of County Comm'rs,* 101 Fed. Appx. 316, 320 (10th Cir. 2004).

In determining whether there are genuine issues of material fact, the district court must "examine the factual record in the light most favorable to the party opposing summary judgment." *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996). "All inferences arising from the record ... must be drawn and indulged in favor of the party opposing summary judgment." *Stinnett v. Safeway,* 337 F.3d 1213, 1216 (10th Cir. 2003). "In discrimination cases, where intent and credibility issues inhere, summary judgment standards should be applied strenuously." *Swenson v. Lincoln County Sch. Dist. No. 2*, 260 F. Supp. 2d 1136, 1142 (D.Wyo. 2003).

Expert testimony submitted with a motion for summary judgment is subject to the same standard. No genuine issue of material fact can exist when the proposed testimony is viewed in the light most favorable to the non-moving party. See *Hayes v. Douglas Dynamics*, 8 F.3d 88, 92 (1st Cir. 1993) ("As with all other evidence submitted on a motion for summary judgment, expert affidavits must be reviewed in light of F.R.Civ.P. 56"). If there are substantial issues of admissibility under *Daubert v. v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), or *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), expert testimony cannot form the basis for a grant of summary judgment.[6]

Finally, "Rule 56(f) allows a court to stay or deny a summary judgment motion to permit

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[6] In this instance, the report of Defendants' statistical expert is constructed on measures of "growth" that are not grounded in statistics or accepted actuarial or economic models. See Pls. Resp. to Defs. Stmnt. No. 20. In *Yapp v. Union Pacific R.R.*, 301 F.Supp.2d 1030, 1037 (E.D.Mo. 2004), Dr. Ward's report was stricken because it was based on surveys that were not scientifically reliable and that were shaped by defense counsel.

further discovery if the nonmovant states by affidavit that it lacks facts necessary to oppose the motion." *Price*, supra, 232 F.3d at 783.

II. El Paso Is Not Entitled to Summary Judgment on Plaintiffs' ADEA Claim.

A. Congress Intended for ADEA Sections 4(a) and 4(i) to Protect Employees Against Age Discrimination "in All Forms of Employee Benefits"; the Objective Is for ADEA Section 4(a) to Protect Employees Against Age Discrimination in Pension Benefits If Section 4(i) Is "Inapplicable."

Section 4(a) of the ADEA, 29 U.S.C. §623(a), provides that it "shall be unlawful for an employer":

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

In 1986, Congress added ADEA §4(i) to "prevent the reduction or cessation of benefit accruals on account of the attainment of age." H.R. Conf. Rep. 99-1012, at 378-79, reprinted in 1986 U.S.C.C.A.N. 3868, 4023-24. In 1990, Congress amended ADEA §4(f)(2) and added ADEA §11(l) in response to the Supreme Court's decision in *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158 (1989), which questioned whether the protections in §4(a) applied to employee benefit plans. *Id*. at 177. The amended §4(f)(2) codified the EEOC's equal cost/equal benefit regulations on employee plans. Subsection 11(l) also defined the phrase "compensation, terms, conditions, or privileges of employment" in §4(a) to specifically "encompass[] all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. §630(l). Congress thereby made it "unmistakably clear" that §4(a) protects employees against "age discrimination in all forms of employee benefits." S.Rep. No. 263, 1990 U.S.C.C.A.N. 1509, 1521-22. The Committee reports also describe the interaction between the amended protections against age discrimination in employee benefits in §§4(a) and 4(f)(2) and the narrower protection in §4(i):

> In circumstances in which the provisions of section 4(i) are inapplicable, claims of discriminatory accruals or pension credits in defined benefit and defined contribution pension plans shall continue to be resolved under section 4(f)(2) as modified by these amendments.

H.R. Rep. 664, 101st Cong., 2d Sess., at 35-36, 1990 WL 200383 (Leg.Hist.); S. Rep. 263, 101st Cong., 2d Sess., 1990 U.S.C.C.A.N. 1509, 1525.

In 2005, the Supreme Court ruled in *Smith v. City of Jackson*, 544 U.S. 228 (2005), that the ADEA authorizes disparate impact claims under §4(a). The Supreme Court recognized that the EEOC's regulations "have consistently interpreted the ADEA to authorize relief on a disparate impact theory" and held that the ADEA "focuses on the effects of the action on the employee rather than the motivation of the employer." *Id.* at 236 and 239.

El Paso's renewed motion for summary judgment maintains that the Plaintiffs' claim that the wear-aways of retirement benefits are because of age "can only be brought under section 4(i) of the ADEA..., not section 4(a)." El Paso next argues that section 4(i) "concerns itself only with the rate of 'inputs' to a pension plan (such as the pay credits provided under the cash balance formula) rather than a plan's 'outputs'" and therefore "does not regulate" the outputs. Br. at 3 and 19; see also *id.* at 16-18, 27. Following this logic, El Paso submits that Plaintiffs do not have a claim under either ADEA §§4(a) or 4(i).

El Paso's syllogism suffers from a fundamental flaw: The 1990 legislation was enacted to make clear that §4(a) of the ADEA prohibits age discrimination "in all forms of employee benefits." Thus, the statutory objective is to regulate discrimination in employee benefits under either ADEA §4(a) or §4(i). There is a fundamental flaw in the logic that if periods of wear-aways are "not regulate[d]" by §4(i), they must be exempt from protection against age discrimination under §4(a). In *Engers v. AT&T*, 2007 WL 958472 (D.N.J. 2007), Judge Chesler rejected the position that El Paso espouses here:

> [T]he language of §4(i) implies exactly the opposite of what Defendants contend. The provision only has usefulness when benefit accrual issues arise under other parts of §4. Section 4(i) states that compliance under the subsection, §4(i), constitutes compliance with benefit accrual requirements under the entire section, §4. If benefit accrual requirements cannot be at issue outside of §4(i), this is surplusage. It is only meaningful if, contrary to Defendants' argument, benefit accrual issues can arise under subsections other than §4(i).

Id. at *2-3.

The legislative history to the 1986 enactment of §4(i) makes clear that Congress' intent was to provide for continued accruals to older workers after age 65, not to open a gap between §4(a) and §4(i) in which well-founded claims disappear. See H.R. Conf. Rep. 99-1012, at 376-79, 1986 U.S.C.C.A.N. 3868, 4021-24. There was never a proposal before Congress to require continued accruals for employees over age 65, but simultaneously permit employers to adopt plan designs that provide zero additional retirement income to employees between the ages of 40 and 65. As the 1990 amendments make clear, Congress intended to protect employees over age 40 against age discrimination in all forms of employee benefits.

El Paso's argument that any cause of action under §4(a) is precluded by §4(i) (Br. at 3, 14-16) is also at odds with this Court's initial ruling on §4(a) in March 2007. There, the Court rejected Plaintiffs' claim that the rate of benefit accruals resulting from the cash balance credits decreases with age in violation of §4(i), but recognized that there are discrimination issues under ADEA §4(a) "if the company knows that the vast majority of older workers will never cash in these [cash balance credits] but will rather elect the (now-frozen) benefits they had earned under the old plan." 2007 WL 891378, *2.

To contend that even "if the company knows" this, it does not violate the ADEA, El Paso turns to the Ninth Circuit decision in *Hurlic v. Southern California Gas Co.*, 539 F.3d 1024, 1036-37 (2008). The *Hurlic* plaintiffs brought an age discrimination claim about periods of wear-away not under §§4(a) or 4(i) of the ADEA but under the California Fair Employment and Housing Act ("FEHA"). Southern California Gas contended that ERISA §514, 29 U.S.C. §1144, preempted the plaintiffs' state law claim under FEHA and obtained a dismissal of the FEHA claim under FRCP 12(b)(6) (with no opinion). On appeal, the Ninth Circuit recognized that while ERISA §514's preemption of State laws is broad, there is an exception for State "anti-discrimination laws" that are a part of a "joint state/federal enforcement scheme." *Id.* at 1035. To decide whether the savings clause applied, the Ninth Circuit first determined that the ADEA and FEHA "both ... contain broad prohibitions against age discrimination." But the panel then found that "unlike FEHA, the ADEA contains specific provisions relating to pension plans" in §4(i). *Id.* at 636. The court observed that those specific provisions provide that "compliance" with the specific requirements "shall constitute compliance with the requirements of [ADEA §4] relating to benefit accrual under [an employee pension benefit] plan." *Id.* (citing ADEA §4(i)(4)).

The *Hurlic* panel next determined that the "wear-away" claim that the plaintiffs were bringing under FEHA "relate[d] to benefit accrual because it challenges the fact that benefits do not increase for some period of time." The court concluded that because the claim relates to benefit accrual, it "must be brought under ADEA §4(i)," but that "FEHA mirrors ADEA §4(a), not ADEA §4(i)." At the same time it faulted the plaintiffs for not bringing a claim under ADEA §4(i), the court incongruously stated that "the wear-away claim is not cognizable under ADEA §4(i)." 539 F.3d at 1037. The court did not explain this dicta, other than to say that this subsection provides that "a plan only engages in prohibited discrimination if it violates §4(i)(1)(A)." The court concluded that "Because FEHA prohibits practices which would be lawful under the ADEA, Plaintiffs' FEHA claim is preempted." *Id*.

Although the reasoning in *Hurlic* is intricate, Plaintiffs submit that it is inapplicable and wrong: *Hurlic* is inapplicable because here, Plaintiffs pled both §§ 4(a) and 4(i) and are presenting actuarial, statistical and documentary evidence of the age discrimination. Second, *Hurlic* clearly rewrites the statutory text about "compliance" with §4(i) and makes it into a question of whether a practice relates to benefit accruals in a broad sense. The Supreme Court and this Circuit recognize that "[i]f "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes" it "would never run its course, for "[r]eally, universally, relations stop nowhere." As a result, the statutory "objectives" must be used "as a guide to the scope" of the law Congress intended to affect. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 989-90 (10th Cir. 1999).

In concluding that the wear-away practice relates to benefit accruals, the *Hurlic* panel never addressed the statutory objectives and did not even address whether there was "compliance" with the §4(i) requirements relating to benefit accrual. Instead, it incongruously found that the practice of wear-aways is "not cognizable" under §4(i). 539 F.3d at 1037. Finding that a claim is "not cognizable" cannot be equated to finding that a practice is in "compliance." See *Engers*, supra, 2007 WL 958472, *3 ("decision that Plaintiffs lack standing to pursue a claim under §4(i) does not constitute a determination of Defendants' compliance with that provision").

The Treasury Department, which has the responsibility for interpreting the ERISA and Internal Revenue Code counterparts to ADEA §4(i), appears to take the position that wear-aways can be addressed under the Internal Revenue Code counterpart to §4(i). As early as 1999, the IRS's General Counsel testified before the Senate Labor Committee that in applying Internal Revenue Code §411(b)(1)(H), which parallels ADEA §4(i), "we will consider the impact of the wearaway period, as it affects employees of various ages." 1999 TNT 183-11 (Sept. 21, 1999) at [25], available on Lexis-Nexis. A form letter that the IRS has sent to cash balance plan sponsors also states the IRS's "serious concerns" about whether periods of "wear-away" violate IRC §411(b)(1)(H). Ex. 23.[7]

To the extent that a wear-away claim does not relate to the regulation of benefit accruals in §4(i), but relates to whether the company knows that older employees will not "cash in" the cash balance pay credits, this practice should be addressed under ADEA §4(a)–as this Court stated in its March 2007 decision. As *Engers* found, Congress "clearly contemplated" that there are "circumstances in which claims of discriminatory pension accruals will be resolved outside of §4(i)" because §4(i) is "inapplicable." 2007 WL 958472, *3. *George v. Duke Power*, 560 F.Supp.2d 444, 462-63 (D.S.C. 2008), likewise held that the plaintiffs did not state a claim for

[7] The Treasury Department has applied IRC §411(b)(1)(H) to El Paso's Plan. In connection with how El Paso restructured its Supplemental Early Retirement Benefit after the end of the transition period, Treasury directed El Paso to "convert the Supplemental Benefit to a formula that does not discriminate on account of age." Pls. Addit. Stmt. No. 21.

disparate treatment from a "wear-away" effect under ADEA §4(i). However, the district court held that the plaintiffs sufficiently stated a claim for disparate impact under §4(a): "Plaintiffs have identified the specific employment practice being challenged, i.e., Duke's conversion of its traditional pension plan to a cash balance plan and the 'wear away' effect caused by the manner in which the conversion was implemented. Plaintiffs have alleged that employees over the age of 40 disproportionately suffer as a result of the wear away period because older employees must endure longer periods during which no additional benefits accrue." *Id*. at 463-464.[8]

Plaintiffs submit that, to adhere to the statutory text and objectives, §4(a) and §4(i) must be construed in a manner that does not create a gap in the protection of older employees against discrimination "in all forms of employee benefits." Consistent with this Court's distinction of §4(i) from whether the company knows that older employees will not "cash in" the credits and with *George*'s distinction of disparate impact claims,[9] this Court should hold that §4(i) is "inapplicable" and that §4(a) applies. Alternatively, consistent with the IRS, this Court could hold that §4(i) is applicable to the practice of wear-aways in age 65 benefits. Any other construction in which a clearly well-founded claim of age discrimination is not cognizable under the ADEA fails to enforce the statutory text and the objective of the 1990 amendments to protect older employees against discrimination in employee benefits.

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[8] *Vaughn v. Air Line Pilots Ass'n*, 395 B.R. 520, 542 n. 14 (E.D.N.Y. 2008), similarly holds that a disparate impact claim can only proceed under the general prohibition of §4 because §4(i) pertains to discrimination in the terms of a plan.

[9] 2007 WL 891378, *1-3. In this Court's decision on the Ledbetter Act, this Court also ruled that "[b]ecause [Mr. Tomlinson's] pay credit allegedly did not result in any increase to his pension benefit during the wearaway period, it would appear that this is an application of an allegedly discriminatory practice affecting Plaintiff." 2009 WL 2766718, *4.

In terms of the no-genuine-issues element of the summary judgment standard, El Paso's contention that it complies with the ADEA ignores the fact that the declaration of Michael Crumley and the reports of Plaintiffs' actuarial and statistical experts show that El Paso's plan design knowingly adopted a wear-away approach that made the pay credits for older employees into fictitious notations. See Pls. Addit. Facts ¶¶6-22. Mercer's actuarial valuation data for 1998-2007 shows that the Plan's costs have been totally reversed so that the costs for older employees are now <u>only one-third</u> of the costs for younger employees. *Id*. at 22. As this Court said in its first decision, "if the company knows that the vast majority of older workers will never cash in these [cash balance credits]" there are genuine issues about compliance with the ADEA.

As an alternative to the argument that neither §4(a) nor §4(i) regulates wear-aways, El Paso contends that "Plaintiffs' claim fails because it is not pled under section 4(i) of the ADEA." Br. at 3, 16. El Paso did not raise this defense in its Answer to the Complaint or four previous dispositive motions, and it should therefore be waived. See Dkt. #10, 128, 220, and 232. Moreover, the statutory language does not support any such distinction. The statute says that "compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan." 29 U.S.C. §623(i)(4). Under this language, an age discrimination claim can be brought under §4(a) of the ADEA, but an employer can potentially defend by showing compliance with §4(i). The statute does not contain the pleading requirement that El Paso seeks.

El Paso's effort to establish a technical pleading requirement (Br. at 3, 16) is also at odds with F.R.C.P. 8(a)(2): "The purpose of fact pleading, as provided by Fed.R.Civ.P. 8(a)(2), is to give the defendant fair notice of the claims against him without requiring the plaintiff to have every legal theory or fact developed in detail before the complaint is filed and the parties have opportunity for discovery." *Evans v. McDonald's Corp.*, 936 F.2d 1087, 1091 (10th Cir. 1991); *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008). Here, there is no question that El Paso had fair notice of the claim that its wear-aways discriminate based on age since it has filed four dispositive motions to defeat it.[10]

B. Plaintiffs' Claim that the Duration of Wear-Away Is "Because of Age" Should Proceed Under Both the Disparate-Treatment and Disparate-Impact Theories of Discrimination.

Plaintiffs' age discrimination claim should be allowed to proceed under both the disparate treatment and the disparate impact theories of discrimination. Plaintiffs' actuarial and statistical experts have prepared reports showing that under El Paso's transition design age is an actuarially and statistically inextricable factor in the duration of the wear-away periods. See Ex. 1 (Poulin Rpt.) at 13-17 and Ex. 15 (Bardwell Rpt.) at 5-12. Mr. Crumley's declaration and the evidence obtained in discovery further show that El Paso's decision-makers knew that being over 40 was a determinative factor in the duration of the periods without additional benefits and intended that result. See ¶¶14-22 supra.

1. Older Employees Are Subject to Disparate Treatment Under El Paso's Wear-Away Design.

Plaintiffs do not contend that age is the only factor in determining the duration of wear-away: As Mr. Poulin finds, it is a necessary condition that a participant have a previously earned benefit that may be 'worn away' by such a design. Ex. 1 (Poulin Rpt.) at 14. However, Plaintiffs

[10] If a technical amendment to the pleadings were required, "[c]ourts may treat new claims raised in a plaintiff's opposition to summary judgment as a motion to amend the complaint pursuant to FRCP 15." *Freeman v. White*, 2006 WL 2793139, *17 (D.Colo. 2006); *Carr v. Morgan County Sch. Dist. RE-3*, 2007 WL 2022055, *12 (D.Colo. 2007).

contend that age is a determinative factor: Mr. Poulin shows the direct effects that age has in each of four factors that contribute to wear-aways. *Id*. at 14-15. As Dr. Bardwell explains, "[a]ge impacts the length of the wear-away period both directly through structural features of the plans and indirectly, by means of its strong relationship with all the other factors that directly impact the length of the wear-away period." Ex. 15 (Bardwell Rpt.) at 3. Age and the other factors that bear a strong relationship to age (the frozen benefit and years of service) were known by El Paso in advance so that the effect of the wear-away design on older employees was predictable before adoption and implementation of the design. *Id*. at 5.

With respect to disparate treatment, the Supreme Court's decision in *Gross v. FBL Fin. Svcs*.,129 S.Ct. 2343 (June 18, 2009), may at first blush appear to heighten the evidentiary requirements. However, *Gross* adopted the evidentiary standard from *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), and expressly states that the Court's intent is not to create a "heightened evidentiary requirement." *Id*. at 2349 and 2351 n.4. *Hazen Paper* holds that "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id*. at 2349, quoting 507 U.S. at 610. *Hazen Paper* made clear that this does not mean that age has to be the "predominant" factor in the discrimination. Indeed, *Hazen Paper* criticized the Tenth Circuit's 1990 decision in *Spulak v. K Mart*, 894 F.2d 1150, because it "insisted that age be the 'predominant,' rather than simply a determinative, factor." 507 U.S. at 616 and 617.

In response to El Paso's first motion to dismiss, this Court concluded that "it is far from clear that the hypothetical payments made to older employees' cash balance accounts (or 'pay credits' attributed to these accounts) should qualify as a 'cost incurred' under §623(f), especially if the company knows that the vast majority of older workers will never cash in these 'payments' but will rather elect the (now-frozen) benefits they had earned under the old plan." 2007 WL 891378, *2 (emph. added). The discovery obtained to date, combined with the analyses of Plaintiffs' actuarial and statistical experts, shows that El Paso knew that the vast majority of its workers over age 40 would never cash in the cash balance pay credits but would end their employment with the frozen benefits they had earned under the old plan. Michael Crumley, a former accountant in El Paso's benefits department, has declared based on meetings he attended that the benefit managers and members of the executive committee who were charged with making the decisions about the cash balance design knew in 1996 that employees over age 40 would not earn additional retirement benefits after the end of the 5-year transition period. Decl. of Michael Crumley at 2-3. Contemporaneous graphs from the meetings he describes show this effect. Ex. 18 at Mercer 669-72. And the Mercer consultant who made the presentations to El Paso admitted in his May 2007 Declaration to this Court that "Whether a particular employee in the proposed class experienced wear-away...depends heavily on the combination of that participant's age and years of service." Dkt.#130-2 at 4 and 6 (emph. added).[11]

In the January 2009 decision on the timeliness of the ADEA charge, this Court stated that there is "no evidence to show that two employees, one younger and one older, with the same accrued frozen benefit under the old plan and the same salary, would suffer different wear-away periods." 2009 WL 151532 at *5. To address this, Plaintiffs' actuarial expert prepared an Excel spreadsheet which shows that for "two employees, one younger and one older, with the same

[11] Under Rule 56(f), it should be presumed that discovery will enable Plaintiffs to obtain more evidence from the other persons who attended these meetings.

accrued frozen benefit under the old plan and the same salary," the wear-away period is longer for the older employee. Suppl. Decl. of Claude Poulin at 2-3.

The case law shows that statistical analysis supports not only disparate impact claims but also disparate treatment claims. See *Hazelwood School District v. United States*, 433 U.S. 299, 307-8 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination"); *Baker v. Ogden Servs. Corp.*, 1996 WL 15490, *4 (10th Cir. 1996); *Roemer v. Public Serv. Co.*, 911 F. Supp. 464, 467 (D.Colo. 1996). In this instance, Dr. Bardwell calculated the duration of the wear-aways for 2,464 older and younger individuals and concludes that "the age of employees has a strong impact on the existence and length of wear-away." Dr. Bardwell further finds that the "relationship between age" and other variables, including years of service and the frozen benefit, "means that each of these variables will mediate the impact of age, tending to act as a proxy for age in their impact on wear-away." Ex. 15 (Bardwell Rpt.) at 9. As indicated, these are not predictions based on an unknown causal chain as in an epidemiological study. As Dr. Bardwell observed, before El Paso adopted this design, "an analyst with the details of the plan and a few basic assumptions could have estimated the impacts on El Paso employees and recognized that the impact is borne primarily by older workers." Ex. 15 (Bardwell Rpt.) at 5. Thus, if El Paso did its due diligence (as Mr. Crumley's declaration and Mercer's 1996 graphs attest that it did), El Paso knew that the result of its design was long periods of wear-away for older employees. [12]

In its motion, El Paso mischaracterizes what *Hazen Paper* and its progeny say about years

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[12] In fact, documents produced by El Paso show that even before the 5-year transition periods for the EPNG and Sonat employees ended, Mercer was predicting 9-15 year periods of wear-away for older employees. Exs. 21 (2001 PowerPoint) and 22 (2004 Sonat calcs).

of service being "analytically distinct" from age. See Br. at 24-26. *Hazen Paper* holds that:

> When the employer's decision *is wholly* motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.... Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is *necessarily* 'age based.'

507 U.S. at 611 (emph. added). The Court went on to explain:

> We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent ..., but in the sense that the employer may suppose a correlation between the two factors and act accordingly.

507 U.S. at 612-13. Here, El Paso had two basic approaches from which to choose in converting to a cash balance plan: a "greater of" approach with opening account balances that would produce wear-aways or an "A + B" approach that would not. Mr. Poulin's actuarial analysis and Dr. Bardwell's statistical results show that age was an inextricable part of the transition design that El Paso chose. As Mr. Crumley declares, El Paso knew that this meant that almost all of its older employees would not earn additional benefits for the rest of their careers with El Paso.

2. El Paso's Wear-Away Design Has a Disparate Impact on Older Employees.

Even if the Court did not agree that Plaintiffs' evidence establishes a prima facie case of disparate treatment, Plaintiffs' charge of discrimination in the duration of the wear-aways should proceed under the disparate impact theory. In *Griggs v. Duke Power*, 401 U.S. 424, 432-33 (1971), race discrimination was the reasonably foreseeable result of Duke Power's use of standardized test scores and a high school diploma requirement as job qualifications–even though race was not expressly used in the hiring process. In *Smith v. City of Jackson*, supra, 544 U.S. at

235-36, the Supreme Court held that the ADEA, like Title VII, prohibits practices that "adversely affect" an employees' status because of age. Following *Griggs*, the Court observed that:

> In disparate impact cases, the allegedly 'otherwise prohibited' activity is not [expressly] based on age.... [C]laims that stress 'disparate impact' ... involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another.

Id. at 239; accord *Pippin v. Burlington Resources Oil & Gas*, 440 F.3d 1186, 1198 (10th Cir. 2006) ("*Smith* definitively holds that disparate impact theories of age discrimination are cognizable under ADEA").

Smith v. City of Jackson requires that the plaintiffs identify "the specific...[facially neutral] practice within the pay plan that has an adverse effect on older workers." 544 U.S. at 241. Here, Plaintiffs' expert identifies that practice as the "greater of" approach based on opening account balances. Ex. 1 (Poulin Rpt.) at 13-15. As in *Griggs*, Mr. Poulin has found that the reasonably foreseeable result of this practice was wear-aways of long durations for older employees, often lasting over 10 years.

Dr. Bardwell finds that age plays a determinative role in the duration of the periods of wear-away, not just indirectly, but standing alone. Age played a further role through its collinearity with length of service and the frozen benefit amounts. As Dr. Bardwell observes, age is not merely congruent with those factors, but causally related because "it is impossible for an employee who is age 30 or 40" to have 25 years of service. Ex. 15 (Bardwell Rpt.) at 9 and Ex. 16 (Bardwell Dep.) at 94.

To prepare his report, Dr. Bardwell applied Mr. Poulin's spreadsheets on the duration of wear-away to the entire population of 2,464 participants. The disparity in the duration of wear-aways between the over-40 and under-40 group that he found far exceeds the 20% disparity often used to "draw a line" in discrimination cases. *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1202 (10th Cir. 2006); *Bullington v. United Air Lines*, 186 F.3d 1301, 1312 (10th Cir. 1999). Dr. Bardwell finds that the mean duration of the wear-aways for participants over 40 is 8.2 years compared with 1.9 years for participants under 40. Ex. 15 (Bardwell Rpt.) at 6. This represents an adverse impact ratio of 421%.

Dr. Bardwell's report also shows that age is a statistically significant factor in the duration of wear-aways when a regression analysis is run. Ex. 15 (Bardwell Rpt.) at 12 (finding 35 standard deviations). The Supreme Court and the Tenth Circuit "recognize[] that a disparity of more than two or three standard deviations in a large sample makes 'suspect' the contention that the differential occurs randomly." *Carpenter*, supra, 456 F.3d at 1195 (citing *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299, 308 n.14 (1977)). Here, the disparity was not 2 or 3, but 35.

El Paso contends that even if this is true, Dr. Bardwell has not shown that age is an "analytically distinct" factor in the duration of wear-aways. Br. at 24-25. [13] However, Dr. Bardwell has shown that when he "controls for" all of the other variables (which is the statistical language for keeping all the factors "analytically distinct"), he continues to find that age is highly significant statistically. Ex. 15 (Bardwell Rpt.) at 11-12; Ex. 16 (Bardwell Dep.) at 101-109. Moreover, the case on which El Paso relies, *Hazen Paper*, is a "disparate treatment" case.[14]

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[13] El Paso's assertions about Dr. Bardwell's statistical analysis are not supported by its statistical expert. In his report, El Paso's statistical expert, Dr. Ward, only performed a single variable "t-test" and did not perform any regression analysis. See Ex. 7 (Ward Rpt.) at 7-8.

[14] *Kentucky Retirement Sys. v. EEOC*, 128 S.Ct. 2361, 2366, 2369-70 (2008), cited on pages 24-25 of El Paso's brief, is also a "disparate treatment" case.

When *Hazen Paper* referred to "analytically distinct" factors in the context of disparate treatment, the Court distinguished situations in which an "employer may suppose a correlation between the two factors and act accordingly." 507 U.S. at 612-13.[15]

In sum, Plaintiffs have presented "statistical data [that is] sufficiently reliable to raise a genuine issue of material fact regarding the existence of a statistical disparity." *Bullington*, supra, 186 F.3d at 1314. None of El Paso's criticisms "undermine the probativeness of the statistics to such a degree that no reasonable jury could return a verdict in [Plaintiffs'] favor."*Id.* at 1315.

C. El Paso Cannot Contend that Older Employees "Did Not Experience a Wear-Away" by Changing to a Definition of "Wear-Away" that Ignores this Court's Rulings, the Prior Testimony of El Paso's Declarants, and the Complaint.

Changing course from its prior filings where it contended that the employees should have known about the periods of wear-away, El Paso now contends that older employees "did not experience a wear-away." Br. at 22-23. El Paso makes this argument by ignoring the "frozen" monthly retirement benefits payable at normal retirement age and early retirement age, and switching to a new definition of the term "wear-away." El Paso contends that if one was to look at the older employees' "frozen" pension benefits from the perspective of actuarial present values of "immediately payable" annuities, the frozen monthly benefits actually "grow." See Br. at 19-22. This argument is built on several fundamental mistakes, most notably, a mistaken use of the

[15] Finally, when a regression model is applied to collinear variables, the principles of statistical analysis are the opposite to what El Paso suggests. If "the coefficient on the explanatory variable of concern" is not statistically significant when a collinear variable is included in the regression, the *Reference Manual on Scientific Evidence* says that it "can be instructive" to "drop[] the second variable from the regression." *Id.* at 197 n.47. Here, it was not necessary for Dr. Bardwell to do this because even with the collinearity between age and the frozen benefit, the coefficient for age is highly significant statistically (35 standard deviations). Ex. 15 (Bardwell Rpt.) at 11-12; Ex. 16 (Bardwell Dep.) at 101-109.

actuarial and financial principle that the "present value" of a frozen annuity entitlement (e.g., the present value of a frozen $100 per month benefit) generally increases each year up to the date of retirement even though the monthly benefit remains fixed. See p. 4-5, supra. El Paso's statistical expert, Dr. Ward, would offer a construct to this Court (with no support from El Paso's actuarial expert) under which the retirement benefits of former El Paso employees "grow" even though they are no longer employed by El Paso. As Mr. Poulin points out, this is analogous to contending that a rule that denied older employees any matching contribution to their 401(k) accounts can be excused by pointing to investment returns on their existing balances. Ex. 2 (Poulin Reb.) at 9.

To support its new argument, El Paso turns to declarations from Dr. Ward and Kevin Minor, the Mercer actuary who advised El Paso on the transition design. However, as Plaintiffs pointed out in their response on the motion to alter or amend (dkt. #330), El Paso's actuarial expert is Ian Altman, not Mr. Minor.[16] Far from being independent, Mr. Minor is a fact witness with an interest in avoiding any ruling that the consulting advice that he and Mercer provided to El Paso discriminated against older employees. Most critically, Mr. Minor's declaration is inconsistent with the graphs he presented to El Paso in August 1996 which showed lengthy 11-12 year periods of wear-away for employees ages 43 and 47 (as of 1997). Ex. 18 at Mercer 669-72. In an earlier declaration in this case, Mr. Minor admitted that: "Whether a particular employee in the proposed class experienced wear-away...depends heavily on the combination of that participant's <u>age</u> and years of service." Dkt.#130-2 at 4 and 6 (emph. added). As for Defendants'

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[16] Mr. Altman testified that he does not understand what Dr. Ward counts as "growth" or how Dr. Ward's analysis comports with accepted actuarial or accounting principles. Ex. 8 (Altman Dep.) at 151-52, 154-59.

statistical expert, Dr. Ward, he admitted at his deposition that "most of these older workers" had experienced wear-aways: "It is definitely true that most of these older workers have an age 65 benefit which is in excess of the cash balance benefit. And if that constitutes a wear-away period, then fine, that's what happens." Ex. 14 (Ward Dep.) at 84; and see Pls. Resp. to Stmnt. No. 20.[17]

El Paso's newfound assertion that older workers "did not experience a wear-away" is also at odds with this Court's previous three decisions. In the March 19, 2008 decision, this Court found that "for some workers, overall benefits did not grow until the cash balance benefits caught up to and exceeded the 'frozen' benefits under the old formula. This period is commonly referred to as a 'wear away'." 2008 WL 762456, *1; see also 2009 WL 151532, *7 (El Paso's September 1999 "bar graph clearly shows the wear away effect, as it shows both the frozen old benefit and the growing cash balance plan benefit at several intervals"); 2009 WL 2766718 *3 ("the wear away effect was apparent as early as 1999, as was the alleged correlation to older employees with larger pension balances under the old formula").

Under "the law of the case" doctrine, "a court should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236 (1997); accord *United States v. Monsisvais*, 946 F.2d 114, 117 (10th Cir. 1991). The prior statements of El Paso's declarants and El Paso's own prior statement of undisputed facts also constitute judicial admissions. See *Progressive Northwestern Ins. v. Weed Warrior Servs.*, 588 F.Supp.2d 1281, 1283-84 (D.N.M. 2008) (binding plaintiff to assertion in statement of undisputed facts); *Cross Country Land Servs.*

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[17] El Paso's "statement of undisputed material facts" in support of summary judgment on the SPD claim represents that El Paso "informed Plaintiffs that their accrual of benefits will effectively cease [and] ... provided individual account statements to Plaintiffs specifically showing their projected cash balance accounts trailing their projected Minimum Benefit <u>for a period of many years</u>." Dkt.#233 at 2-3 (emph. added).

v. PB Network Servs., 2006 WL 1028790, *1 (D.Colo. 2006).

D. El Paso's "Equal Benefits" Defense Is an Unpled Affirmative Defense that Is Inconsistent with Its Declarants' Prior Statements, This Court's Rulings, and the EEOC's Regulations on "Benefit Package" Defenses.

El Paso next contends that it has an "equal benefits" defense. Br. at 30. *Meacham v. Knolls Atomic Power Lab.*, 128 S.Ct. 2395, 2402 (2008), establishes, however, that an equal cost/equal benefits defense is an "affirmative defense." El Paso did not affirmatively plead any such defense in its Answer. See Dkt. #125. As support for this unpled defense, El Paso asserts that "during the wear-away period, older employees receive benefits that are at least as great as those received by younger workers." Br. at 30. This assertion is clearly at odds with this Court's decisions on the periods of wear-away, as well as the prior statements of El Paso's supporting declarants. El Paso next asserts that "even if a meaningful wear-away period existed...those who experienced a wear-away have higher benefits than they would have had if there had been no transition period." Br. at 31. This is not an "equal benefits" defense, nor does it offer any excuse for denying older workers additional benefits for their services after the transition period.

The EEOC's equal cost/equal benefit regulations at 29 C.F.R. 1625.10 demonstrate that an "equal benefits" defense based on benefits earned in the period before the alleged discrimination occurred will not pass muster. The EEOC's regulations contain rules on when an employer is permitted to defend an age discrimination claim with a "benefit package" approach. Those regulations specifically provide that "A benefit package approach shall not apply to a retirement or a pension plan." 29 C.F.R.1625.10(f)(2)(ii). Thus, if the company knows that older employees will not "cash in" their cash balance pay and interest credits because of how the transition to a cash balance plan was structured, the EEOC's regulations do not allow this to be excused by saying that the older employees generally earned more benefits than younger employees in previous years. Pursuant to the 1990 amendments to the ADEA adopted in response to the *Betts* decision, ADEA §4(f)(2) has codified the EEOC regulations on "benefit packages", so the deference owed to them exceeds even that mandated by the Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' renewed motion for summary judgment. Even if the Court does not agree that Plaintiffs' expert reports and evidence are dispositive, there are genuine issues of fact with respect to disparate treatment and disparate impact that must be resolved after discovery is complete.

Dated: November 2, 2009

Respectfully submitted,

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Accompanying Filings:

Rule 56(f) Affidavit of Stephen R. Bruce.

Supplemental Declaration of Claude Poulin, F.S.A., M.A.A.A., E.A.

Declaration of Michael A. Crumley.

Exhibits:

1. Expert Report of Claude Poulin, F.S.A.
2. Rebuttal Report of Claude Poulin, F.S.A.
3. Excerpts from Plan document, as amended and restated as of Jan. 1, 2001
4. Sept. 3, 1997 email on early retirement subsidy (Defs. Dep. Ex. 21)
5. Legal Issues for Cash Balance Plans (Pls. Dep. Ex. 29)
6. Nov. 3, 1995 letter from Mercer (EPTO-14243-46)
7. Expert Report of Michael Ward
8. Extracts from Deposition of Ian Altman
9. Email on 2008 amendment to $100,000 limit for lump sum distributions.
10. Extracts from Deposition of Kevin Minor
11. IRS correspondence on Supplemental Early Retirement Benefit
12. Aug. 18, 2009 Notice on change to Supplemental Early Retirement Benefit
13. Expert Report of Ian Altman
14. Extracts from Deposition of Michael Ward
15. Expert Report of Robert Bardwell
16. Extracts from Deposition of Robert Bardwell
17. Rebuttal Report of Robert Bardwell
18. Aug. 14, 1996 Pension Committee Presentation with graphs (Pls. Dep. Ex. 21)
19. Handwritten notes from Oct. 25, 1999 conference call (Pls. Dep. Ex. 32)
20. Sept. 15, 1999 Compensation Statement (Defs. Dep. Ex. 56)
21. Excerpt from Pension Overview presentation, with speaker's notes (Pls. Dep. Ex. 37)
22. 2004 Sonat graphs showing wear-away (Pls. Dep. Ex. 26)
23. IRS form letters on wear-away
24. El Paso's Rule 26(a) Disclosures

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 2nd day of November 2009, a true and correct copy of (1) Plaintiffs' Opposition to Defendants' Renewed Motion for Summary Judgment on ADEA Claim, with Exhibits 1 to 24, (2) the Declaration of Stephen R. Bruce Under Rule 56(f), (3) the Supplemental Declaration of Claude Poulin, F.S.A., and (4) the Declaration of Michael A. Crumley, was served through the CM/ECF electronic filing system on the following attorneys for the Defendants:

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