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

Civil Action No. 04-cv-2686 (WDM/CBS)

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

Plaintiffs,

v.

EL PASO CORPORATION, and
EL PASO PENSION PLAN,

Defendants.

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# PLAINTIFFS' MEMORANDUM IN SUPPORT OF A CONTINUANCE UNDER RULE 56(f) AND IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIM V

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**Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts**

1. Plaintiffs oppose Defendants' incorporation by reference of Paragraphs 1-5 from the statement of undisputed facts in support of its motion for partial summary judgment on the ADEA claim (dkt. #221). Rule 10(c) does not support incorporation by reference from other motions. Moreover, Plaintiffs' opposition disputed each of those statements--with the exception of the first one. See Pls. 4/28/2008 Opp.(dkt.#229) at 1-2. Although Plaintiffs maintain that Rule 10(c) does not allow for this kind of incorporation by reference, we incorporate our responses by reference to comply with the Court's page limits.

2. Plaintiffs dispute that El Paso distributed a Summary Plan Description (SPD) to its employees in August 2002. No one from El Paso has offered any evidence about how SPDs were distributed to employees. Two of the named Plaintiffs testified that they did not receive the 2002 SPD. Ex. 1 (Ballesteros Depo.) at 63, line 23 - 64, line 3; Ex. 2 (Muckelroy Depo.) at 74, line 5 - 75, line 1. Mr. Muckelroy testified that if he had received an SPD, he would have kept it in his files. Ex. 2 at 174, line 25 - 175, line 17. To date, discovery has not established who drafted El Paso's SPDs or how they were distributed–whether by mail, by hand, or through online access. It appears that the 2004 SPD which El Paso attaches was only posted online and was not posted in compliance with

Department of Labor regulations. See Ex. 3 and 29 C.F.R. §2520.104b-1(b)(1) and 1(c)(1).[1] Two of the other SPDs which Defendants attach to their motion are in draft form, i.e., the cover pages bear legends indicating they are not final products. See Defs. Exs. B and C ("Date Document Last Changed: December 22, 1998" and "Date Document Last Changed: July 1, 1999").

3. Plaintiffs dispute that none of the Plaintiffs read the SPD. Mr. Tomlinson testified that he read the SPD to learn how his benefit was calculated. Ex. 4 (Tomlinson Depo.) at 104, line 10 - 106, line 18; 132, line 14 - 135, line 8. As stated, the other two Plaintiffs testified that they never received the SPD, not that they received it but did not read it.

4. Plaintiffs dispute that El Paso's written communications to employees adequately or understandably described the benefit reductions from the conversion of El Paso's pension plan to a "cash balance" formula. A presentation by the Mercer consulting company to El Paso stated that cash balance conversions are "popular with employers" because of "Masking a cut in pension plan benefits." Ex. 5 (EPTO 3505).

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[1] The regulations provide that an SPD may be provided through electronic media only if the distribution "results in actual receipt of transmitted information" and notice is simultaneously provided that "apprises the individual of the significance of the document when it is not otherwise reasonably evident as transmitted" and "the right to request and obtain a paper version of the document." 29 C.F.R. §2520.104b-1(c)(1).

4.a. Plaintiffs' communications expert, Professor Stratman, analyzed the 2002 SPD and determined that "participants would find nothing within it to suggest that their benefits under the new CBP Select plan would be significantly less than those in their existing final average pay plans." Ex. 6 (Stratman Rpt.) at 15. There were "no statements, illustrative examples, or warnings" of wear-away periods or benefit reductions. *Id*. at 13-15. Professor Stratman also found no information in the SPD that "permits participants to compare directly, in 'side by side' fashion, the benefit they would earn under the old plan (had it continued) and the benefit provided under the new cash balance plan." *Id.* at 13.

4.b. It is undisputed that El Paso was putting draconian benefit reductions in place. An August 14, 1996 presentation by Mercer for the El Paso Pension Committee states that the "Impact on Employees" is a "36% average reduction in pension benefits at age 60." Ex. 7 (EPTO 3669). Plaintiffs' actuarial and statistical experts, Mr. Poulin and Dr. Bardwell, have found that the benefit reductions were even worse. They found that El Paso's plan design produces periods of wear-away with no additional benefit accruals that often last more than 10 years. Ex. 8 (Poulin Rpt.) at 13-17 and Ex. 9 (Bardwell Rpt.) at 5-12. Based on individual-by-individual calculations, their reports detail how future benefits are reduced on average by 89% after ten years for employees in the old El Paso/EPNG

group. Ex. 8 at 8-13 and Ex. 9 at 12-14. El Paso's experts have not disputed these reductions. The May 15th rebuttal report of El Paso's actuarial expert, Ian Altman, concedes that it is "not in dispute" that "the rate of benefit accrual under the cash balance plan is significantly lower than under the prior plan formula." Ex. 10 (Altman Rpt.) at 4.

4.c. Rather than disclosures of wear-aways and benefit reductions, Professor Stratman found that the SPD and other communications only provided examples of "winners" and no "losers" and "misleadingly reassured that CBP Select benefits would be paid continuously following the five year transition period" by stating that "The value of your El Paso Cash Account Benefit will continue to grow as long as you maintain a balance in your CBP Select Account" and "Your account increases in value over time." Ex. 6 at 7, 13 and 15.

4.d. Plaintiffs dispute that the benefit reductions were disclosed in any other written communications besides the SPD. The January 1996 "Employee Update" to which El Paso now turns was a 45-page document, which included a one-page "overview" about "a new type of plan called a 'cash balance' plan." Defs. Ex. H at 26. The one-page overview stated that benefit would accrue at a "lower rate" under the cash balance plan but also stated that "[d]etails of this new type of plan have not been finalized." At that time, El Paso had not decided

whether to include the transition provision which continued the prior highest-average-pay formula for 5 years. A subsequent "Program Highlights" brochure distributed in October 1996 after the Plan was finalized did not include any language about employees earning benefits "at a lower rate," thereby indicating that this was not a feature of the final version of the plan Ex. 11. The SPD on which El Paso relies also fails to mention any lower rate, further indicating that this was not a feature.

4.e. Plaintiffs also dispute that El Paso's purported 204(h) notice, a one-page document entitled "Notice of Plan Changes" from December 2001 told participants that they would experience a significant reduction in the rate of benefit accrual. Plaintiffs' communications expert, Professor Stratman, explains that lay persons cannot comprehend the legalistic language in this notice. Ex. 6 at 17-20. Professor Stratman found that the phrase "accruals under the Plan may effectively cease," in the fifth paragraph of the notice, is ambiguous and would likely cause readers to believe that statement "simply refers to the cessation of their old plan benefits," rather than the pay and interest credits provided by the cash balance plan. *Id.* at 18-19. Professor Stratman's report cites the deposition testimony of each of the three named Plaintiffs to show that they did not understand the legal jargon in the notice. *Id.* at 19-20. Again, El Paso has not

provided any expert testimony or other contrary evidence to dispute Professor Stratman's analysis or the deposition testimony of the three named Plaintiffs.

4.f. Plaintiffs further dispute that any individual Compensation Statement told participants about significant benefit reductions. The bar graph upon which El Paso relies from a 1999 Compensation Statement, see Defs. Ex. I at P 47, includes no accompanying text or description of wear-away periods or benefit reductions.

## I. El Paso's Motion Should Be Continued Under F.R.C.P. 56(f) Until Discovery Is Complete Under the Joint Proposal for Bifurcating Discovery Which the Court Adopted on April 28, 2008.

Pursuant to F.R.C.P. 56(f), Plaintiffs request that the Court order a continuance until the parties complete discovery and the Court decides the pending motions before it, namely, Defendants' motion for partial summary judgment based on the timeliness of the ADEA charge and the Plaintiffs' motion for reconsideration of dismissal of the backloading and Section 204(h) claims.

"Rule 56(f) allows a court to stay or deny a summary judgment motion in order to permit further discovery if the nonmovant states by affidavit that it lacks facts necessary to oppose the motion." *Price v. Western Resources, Inc*., 232 F.3d 779, 783 (10th Cir. 2000). 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).

An affidavit by Plaintiffs' counsel is attached as Exhibit 12. As the affidavit explains, at the April 16, 2008 status conference, Magistrate Judge Shaffer stated that he wanted the parties to bifurcate discovery and hold off on further discovery and motions. See Ex. 12 (Bruce Aff.) at ¶3. At Magistrate Judge Shaffer's request, the parties developed a bifurcated discovery schedule. It was only after this schedule was negotiated and the parties left the courtroom that El Paso's counsel announced to Plaintiffs' counsel that it intended to file the instant motion. When Plaintiffs' counsel said that the schedule was negotiated on the basis that discovery related to Claim V (the SPD claim) would take place later, Defendants' counsel represented that its motion would not turn on any facts to which any discovery could relate. *Id*. at ¶4 and Joint Proposal (dkt. #227) at 2.

Plaintiffs can offer a number of reasons why Defendants' representation is inaccurate. As the Joint Proposal describes, the parties stipulated that the deposition of El Paso's Rule 30(b)(6) witness on "benefit reductions, wear-aways and disclosures" will be deferred. *Id*. at 3. That deposition is clearly relevant to

the SPD claim. Depositions of individual benefit department employees and executives who El Paso has identified as involved in the planning and implementation of the changes, including the related benefit communications, have also been deferred. *Id*. at 3. To date, discovery has not even established whether El Paso's SPDs were drafted by consultants or how they were distributed–whether by mail, by hand, or through online access. Further discovery may reveal instructions to the draftspersons about what to include in the disclosures. Finally, discovery may show that El Paso's concealment of the drastic benefit reductions brought about by the cash balance formula was deliberate, as indicated by Mercer's presentation to El Paso about "masking" benefit cuts. Ex. 5. In *Amara v. CIGNA Corp.*, 534 F.Supp.2d 288, 343 (D.Conn. 2008), the plaintiffs uncovered emails and other communications about not offering participants any comparisons of benefits or other disclosures of the reductions in order to avoid any "adverse employee reaction."

Because the parties agreed that the discovery related to Claim V would be deferred until the Court's decisions on the timeliness of the ADEA claim and the motion for reconsideration, this discovery has not taken place. Because the additional discovery is relevant and necessary for Plaintiffs to fully oppose Defendants' present motion, the Court should order a continuance of El Paso's

motion under Rule 56(f) until discovery is completed under the Joint Proposal that Magistrate Judge Shaffer approved. If the Court wants to consider this motion concurrently with the pending dispositive motions, Plaintiffs would request that the depositions and production of documents related to the SPD Claim be moved to the category of discovery which is not deferred.

## II. Summary Judgment Cannot Be Granted In El Paso's Favor Where Genuine Issues of Material Fact Exist.

Even if the Court proceeds to consider El Paso's motion, summary judgment should not be granted because genuine issues of fact exist with respect to the distribution of the SPDs, the adequacy and understandability of El Paso's disclosures, El Paso's concealment of the benefit reductions, and the prejudice resulting therefrom. Pursuant to Federal Rule 56(c), summary judgment may 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." F.R.C.P. 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 moving party has the initial burden of showing an absence of evidence to support the nonmoving party's case. *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. The factual record is viewed in the light most favorable to the nonmovant. *Byers v. City of Albuquerque*, 150 F.3d 1271,1274 (10th Cir. 1998).

### A. The Standard in *Chiles* Is "Some Significant Reliance" or "Possible Prejudice" From a Faulty SPD; If these Reductions Were Disclosed, an Employee Could Have Learned About Them From Co-Workers "Even If He Never Read the SPD Himself."

El Paso has provided no evidence that it distributed SPDs with the disclosures of benefit reductions and losses that are required by law. To the contrary, named Plaintiffs Alice Ballesteros and Gary Muckelroy testified that they do not recall receiving or ever seeing the 2002 SPD. Ex. 1 at 63, line 23 - 64, line 3; Ex. 2 at 74, line 5 - 75, line 1. Because Mr. Muckelroy keeps practically everything related to his retirement, it is unlikely that he received an SPD and did not keep it. See Ex. 2 at 174, line 25 - 175, line 17. Based on their testimony that they never received an SPD, El Paso's suggestion that they received an SPD but did not read it is misleading.

Mr. Tomlinson has testified that he received the 2002 SPD and that he read it to learn how his benefit was calculated. Ex. 4 at 104, line 10 - 106, line 18; 132,

line 14 - 135, line 8. Mr. Tomlinson believes that he specifically requested the SPD, and he knows he did not learn that his benefits had been reduced from reading it.

Assuming the SPDs had been distributed and that they disclosed substantial benefit reductions, it is likely that a participant like Mr. Muckelroy, Ms. Ballesteros and Mr. Tomlinson would have heard about the reductions from fellow co-workers "even if he never read the SPD himself." Indeed, if El Paso had disclosed drastic reductions like this, it is unlikely that there would be any El Paso employees who did not hear about it. In *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003), cert. denied, 540 U.S. 1105 (2004), the Second Circuit cited the decision in *Manginaro v. Welfare Fund of Local 771, I.A.T.S.E.*, 21 F.Supp.2d 284, 297 (S.D.N.Y. 1998), for the proposition that had a limitation been adequately disclosed "via the SPD, it is likely that [the plaintiff] would have learned of this limitation from his employer, his co-workers, or the union, even if he never read the SPD himself."[2]

*Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996), does not shut the

[2] Accord, *Estate of Ritzer v. Nat'l Org. of Indus. Trade Unions Ins. Trust Fund*, 822 F.Supp. 951, 955 (E.D.N.Y. 1993) ("Ritzer would have learned about [the rule] from co-workers, even if he had not read the plan. While many employees may never in fact study summary plan descriptions, they are likely to learn of the provision as explained in the description through conversations with fellow employees and their employer").

door to relief for a faulty SPD in the manner that El Paso suggests. See Defs. Br. at 3-4. *Chiles* says that "to secure relief" the plaintiff "must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description." 95 F.3d at 1519. In *Burke v. Kodak*, supra, 336 F.3d at 112-13, the Second Circuit rejected detrimental reliance as the only way to obtain relief for a faulty plan description and held that participants are entitled to relief if they can show "likely prejudice." "Likely prejudice" is established where participants are "deprived of the opportunity to take timely action in response to the purported amendment," including "seeking injunctive relief, altering their retirement investment strategies, or perhaps considering other employment." *Frommert v. Conkright*, 433 F.3d 254, 266 (2d Cir. 2006). Plaintiffs submit that they will be able to establish likely prejudice as outlined in *Burke* and *Frommert*. Had El Paso told the three named Plaintiffs about the extent of the benefit reductions, they could have joined with others to complain about the changes, sought additional benefits or compensation to make up for the losses, increased their savings or 401(k) contributions, looked at other employment opportunities, or filed this action sooner. *Chiles*' reference to "possible prejudice" should be no more stringent than "likely prejudice" since in ordinary usage "possible prejudice" is broader and more encompassing than "likely prejudice."

### B. El Paso's SPDs and Other Written Communications Never Disclosed Significant Benefit Reductions Like the 10 or More Year Periods of Wear-Away and 89% Reductions in Future Benefits that Plaintiffs' Experts Have Found.

Plaintiffs' actuarial and statistical experts have found that El Paso's cash balance conversion was designed to produce wear-away periods lasting 10 or more years and that future benefits were reduced by 89% on average after ten years for employees in the old El Paso/EPNG group. Ex. 8 at 8-17 and Ex. 9 at 5-14. In response to those reports, Defendants' actuarial expert, Mr. Altman, concedes "there is no dispute" that "the rate of benefit accrual under the cash balance plan is significantly lower than under the prior plan formula." Ex. 10 at 4-5.

Despite the 10-year periods of wear-away and 89% reductions in future benefits, Plaintiffs' communications expert, Professor Stratman, determined that "participants would find nothing within [El Paso's SPD] to suggest that their benefits under the new CBP Select plan would be significantly less than those in their existing final average pay plans." Ex. 6 at 15. There were "no statements, illustrative examples, or warnings" of wear-away periods or benefit reductions. *Id.* at 15. Instead, Professor Stratman found "misleading" assurances that "The value of your El Paso Cash Account Benefit will continue to grow as long as you maintain a balance in your CBP Select Account" and "Your account increases in

value over time." *Id.* at 13 and 15.

El Paso has prepared no expert report and offered no other evidence to counter Professor Stratman's report. Instead, El Paso's counsel have said that they intend to lodge a *Daubert* challenge to Professor Stratman's report. Tellingly, no *Daubert* challenge accompanies El Paso's motion and El Paso's memorandum nowhere defends the adequacy of the disclosures in the SPD. Instead, El Paso asserts that even if the SPDs do not disclose lower rates of accrual, the reductions were purportedly disclosed in other documents–namely, a January 11, 1996 Employee Update newsletter, a December 2001 "Notice of Plan Changes," and an individual Compensation Statement issued in 1999. Defs. Br. at 2 and 4.

Plaintiffs have already made the point that the one-page "overview" on cash balance in the 45-page Employee Update specifically says that the"[d]etails of this new type of plan have not been finalized." See Pls. 5/12/2008 Reply in Support of Mot. to Reconsider (dkt. #231) at 7. At the time this Update was distributed, El Paso's cash balance plan did not include the 5-year extension of the prior highest-average-pay formula. After the Plan was finalized, a "Program Highlights" brochure was distributed in October 1996. The Program Highlights did not contain the "lower rate" statement contained in the January 1996 Update. Ex. 11. Thus, even a participant who noticed the language in the January 1996 Update would

reasonably assume that El Paso had modified the final version of the Plan so there were no lower rates of accrual.

El Paso's 2001 Notice likewise fails to adequately disclose any reductions. Professor Stratman has opined on how that one-page notice is basically incomprehensible to the average plan participant because of its use of legalistic language. Ex. 6 at 17-20. Professor Stratman found that the phrase "accruals under the Plan may effectively cease," in the fifth paragraph of the notice, was ambiguous and would likely cause readers to believe that statement "simply refers to the cessation of their old plan benefits," rather than the pay and interest credits provided by the cash balance plan. *Id.* at 18-19.

Professor Stratman's report cites the deposition testimony of the three named Plaintiffs to show that they did not understand the notice's legal jargon. *Id.* at 19-20. For example, when asked what the phrase "accruals under the plan may effectively cease," means, Ms. Ballesteros responded, "Well, the phrase ". . . accruals under the plan" is a little confusing because they don't specify which plan . . . I didn't understand what they mean by accruals would cease." Ex. 6 at 20.

Lastly, El Paso resorts to a bar graph in a 1999 individual Compensation Statement and contends that it provided notice of reduced rates of benefit accrual. Defs. Br. at 2-3, citing Defs. Ex. I at P 47. The bar graph contains no text or other

description about benefit reductions or wear-aways.

### C. The Department of Labor's Regulations Require Summary Plan Descriptions to Tell Plan Participants that the Benefits They Reasonably Expect May Be Reduced or Lost.

In the March 19, 2008 ruling on the Section 204(h) claim (Claim IV), this Court recognized that the SPD regulations appear to require disclosure of "reductions." Slip Op. at 14. The Court ruled that "The regulations for this section appear to imply that such information might need to be disclosed as they provide that "[a]ny description of exception, limitations, *reductions*, and other restrictions of plan benefits shall not be minimized, rendered obscure, or otherwise made to appear unimportant." *Id*.

El Paso's brief disregards the Court's ruling by suggesting that "the SPD statute ... only requires disclosures concerning how a plan operates." Defs. Br. at 5. El Paso goes on to narrow the disclosure requirements by contending that the "losses" or "reductions" in benefits to which the regulations refer are limited to losses or reductions "of existing benefits" and not losses or reductions in "additional" or "future" benefits. Defs. Br. at 6.

El Paso's distinction disregards not only this Court's March 19th ruling but also the Department of Labor's regulations which refer to the denial, loss or reduction "of any benefits that a participant or beneficiary might otherwise

reasonably expect the plan to provide on the basis of the description of benefits" required by the regulations. 29 C.F.R. 2520.102-3(l). The Department of Labor, which is entitled to deference on such issues, has explained that the SPD regulations "require a reasonably comprehensive and clear description of the provisions of a cash balance plan and how a prior conversion may have affected benefits that classes of participants might have reasonably expected the plan to provide." 65 Fed. Reg. 70226, 70227 (Nov. 21, 2000).

El Paso does admit that *Amara v. CIGNA*, 534 F.Supp.2d 288 (D.Conn. 2008), cannot be squared with its position. Defs. Br. at 9. *Amara* held that CIGNA's SPD was required to disclose the "phenomenon of wear away" to plan participants. *Id.* at 347-51. The Court rejected CIGNA's argument that informing participants "that they might receive their protected Minimum Benefit if it was higher than their cash balance benefit" was an adequate disclosure, finding that "Nowhere in any of the notices is the phenomenon of wear away, or any substantive equivalent, discussed or described." *Id.* at 349-50. "Treasury regulations require that any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant...By ignoring the risk of wear away, CIGNA did exactly that." *Id.* at 348.

As described above, El Paso's experts do not dispute the findings by Plaintiffs' experts of 10-or-more-year wear-away periods and 89% reductions in future benefits over the next 10 years. It is incredible that El Paso is willing to claim that benefit reductions on this order of magnitude do not qualify as "reductions" or "losses" of benefits that need to be disclosed to employees.

### D. *Chiles* Does Not Require a Showing of "Extraordinary Circumstances"; Even If It Did, Additional Discovery May Confirm that El Paso Actively Concealed the Draconian Benefit Reductions Effected by the Cash Balance Conversion.

El Paso acts as though there is an extraordinary circumstances requirement in the Tenth Circuit beyond the "some significant reliance" or "possible prejudice" standard in *Chiles*. See Defs. Br. at 10. Simply put, there is no such requirement. In *Hammond v. Eighth District Electrical Benefit Fund*, 36 Fed. Appx. 369, 373 (10th Cir. 2002), the Tenth Circuit found that "Section 1022(b) requires that certain information be included in the summary plan description, including circumstances which may result in disqualification, ineligibility or denial or loss of benefits." Because the Fund's SPD was ambiguous with respect to the applicable limitations period, the court held that it "failed in its duty to provide this critical information to participants in a clearly understandable manner." *Id.* at 374.

El Paso looks to the Third Circuit for supporting authority, but it is clear

that in the Third Circuit an "extraordinary circumstances" requirement does not apply to a breach of fiduciary duty claim involving disclosures. See *Jordan v. Federal Express*, 116 F.3d 1005, 1012 (3d Cir. 1997) ("we have not employed the [extraordinary circumstances] test for breach of fiduciary duty claims"). For a pure SPD claim, the Third Circuit seems to be of two minds. *Burstein v. Allegheny*, 334 F.3d 365, 377-83 (3d Cir. 2003), holds that "extraordinary circumstances" is not required and calls the part of *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3d. Cir. 1991), which suggests otherwise "dictum." *Register v. PNC Fin. Servs.*, 477 F.3d 56, 74 (3d Cir. 2007), holds that it is an element, citing *Jordan*. But, as indicated, *Jordan* holds that extraordinary circumstances is not an element of a breach of fiduciary duty claim, although it is an element of a reporting and disclosure claim. 116 F.3d at 1011-12. Here, Claim V alleges that the faulty disclosures are both a violation of the disclosure rules and a breach of fiduciary duty.

Plaintiffs expect that additional discovery will show that El Paso actively concealed the draconian reductions which it was putting in place so as to satisfy even an extraordinary circumstances requirement. Plaintiffs have already uncovered indications of such concealment. For example, the presentation by Mercer to El Paso stated that cash balance plans are "popular with employers"

because of "Masking a cut in pension plan benefits." Ex. 5 (EPTO 3505). In line with this El Paso made no disclosures even after an August 14, 1996 presentation by Mercer told El Paso that the "Impact on Employees" would be a "36% average reduction in pension benefits at age 60." Ex. 7 (EPTO 3669). Professor Stratman's report found that El Paso's communications only gave examples of employees who were "winners" under the new formula, Ex. 6 at 7, even though Plaintiffs' experts found that the benefit reductions were even worse than the 36% average reductions that Mercer described. As El Paso indirectly recognizes, the *Amara* plaintiffs found proof in emails and other communications obtained in discovery that CIGNA's concealment of benefit reductions was deliberate. See Defs. Br. at 9-10 and 534 F.Supp.2d at 343.

**Conclusion**

For the foregoing reasons, Plaintiffs request that the Court order a continuance until it rules on the other pending motions and discovery is complete or deny El Paso's motion for summary judgment.

DATED: June 6, 2008

Respectfully submitted,

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**Exhibits**

1. Excerpts from deposition of Alice Ballesteros taken on Feb. 25, 2008
2. Excerpts from deposition of Gary Muckelroy taken on January 30, 2008
3. Newsletter about putting Summary Plan Description online through Intranet
4. Excerpts from deposition of Wayne Tomlinson taken on January 29, 2008
5. November 1995 Mercer presentation on cash balance plans "masking" reductions
6. Expert report of Plaintiffs' communications expert, Professor James Stratman
7. August 1996 Mercer presentation showing 36% reductions
8. Expert report of Plaintiffs' actuarial expert, Claude Poulin
9. Expert report of Plaintiffs' statistical expert, Robert Bardwell
10. Expert report of Defendants' expert, Ian Altman
11. October 1996 Program Highlights brochure
12. Rule 56(f) Affidavit of Stephen R. Bruce

**Certificate of Service**

The undersigned hereby certifies that, on this 6th day of June 2008, a true and correct copy of Plaintiffs' Memorandum in Support of a Continuance Under Rule 56(f) and in Opposition to Defendants' Motion for Partial Summary Judgment on Claim V, with Exhibits 1 through 12, and this Certificate of Service was served through the CM/ECF electronic filing system on the following attorneys for the Defendants:

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