No. 10-1385

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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

Plaintiffs-Appellants,

v.

EL PASO CORPORATION and EL PASO PENSION PLAN,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
The Honorable Walker D. Miller
Case No. 1:04-cv-02686

BRIEF OF APPELLEES

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Oral Argument Is Not Requested

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Defendants-Appellees El Paso Corporation and El Paso Corporation Pension Plan (improperly sued as El Paso Pension Plan) (collectively, "El Paso") state that they are nongovernmental corporate parties to this appeal. El Paso Corporation, which is a publicly held corporation, does not have a parent corporation nor does any publicly held corporation own 10% or more of its stock. El Paso Corporation Pension Plan is a qualified retirement plan that is sponsored by El Paso Corporation.

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PRIOR OR RELATED APPEALS

None.

STATEMENT OF THE ISSUES

1. Whether the District Court properly held that Plaintiffs' wear-away claim is governed by ADEA § 4 (i), not ADEA § 4(a).

2. Whether the District Court properly held that the Amended Plan does not violate ADEA § 4(i)(1)(A).

3. Whether summary judgment on Plaintiffs' ADEA claim should be affirmed for the following independent reasons, all of which were raised before the District Court:

   a. Plaintiffs failed to timely exhaust their administrative remedies;

   b. Plaintiffs never suffered a decrease in pension accrual;

   c. The so-called wear-away does not occur "because of" age;

   d. Plaintiffs did not suffer a disparate impact; and

   e. El Paso established the ADEA's "equal cost/equal benefit" affirmative defense.

4. Whether the District Court properly held that the Amended Plan complies with ERISA § 204(b)(1)(B)'s anti-backloading provision.

5. Whether the District Court properly held that El Paso's 204(h) notice complied with ERISA's requirements at the time the pension plan was amended.

6. Whether the District Court properly dismissed Plaintiffs' SPD claim because they failed to establish that they significantly relied on or were possibly prejudiced by the allegedly faulty SPD.

7. Whether summary judgment on Plaintiffs' SPD claim should be affirmed for the alternate reason – presented to the District Court – that the SPD satisfied ERISA's requirements.

8. Whether the District Court abused its discretion in denying Plaintiffs' Rule 56(f) request for additional discovery relating to their SPD claim.

STATEMENT OF THE CASE

This appeal involves El Paso's conversion of its pension plan from a final average pay formula to a cash balance formula. Plaintiffs-Appellants ("Plaintiffs") alleged five claims for relief in their Complaint:

I. Age Discrimination in Pension Benefit Freeze in violation of ADEA § 4(a) and (b), 29 U.S.C. § 623(a), (b) (the "wear-away claim");

II. Conditioning Payment of Additional Annual Accruals Violates ERISA Sections 203(a) and 204(b)(1)(B), 29 U.S.C. §§ 1053(a) and 1054(b)(1)(B) (the "anti-backloading" and "forfeiture" claims);

III. Reduced Rate of Benefit Accrual Based on Age in violation of ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H) (the *"Cooper"* claim);

IV. Untimely, Improper, and Inadequate ERISA 204(h) Notice in violation of ERISA § 204(h), 29 U.S.C. § 1054(h) (the "§ 204(h) claim"); and

V. Inadequate Summary Plan Descriptions in violation of ERISA §§ 102 and 404(a)(1), 29 U.S.C. §§ 1002, 1104(a)(1) (the "SPD" and "breach of fiduciary duty" claims).

App. 109-124.[1]

The District Court dismissed Plaintiffs' claims in a series of Orders spanning five years of litigation:

- On March 22, 2007, the District Court dismissed Claim III pursuant to Fed. R. Civ. P. 12(b)(6). App. 42-44.
- On March 19, 2008, the District Court dismissed Claims II and IV pursuant to Fed. R. Civ. P. 12(c). App. 51-60.
- On January 21, 2009, the District Court granted judgment in El Paso's favor on Claims I and V pursuant to Fed. R. Civ. P. 56. App. 77-84.
- On August 28, 2009, after passage of the Lilly Ledbetter Fair Pay Act, the District Court reinstated Claim I under Fed. R. Civ. P. 59(e). App. 86-93.
- On July 26, 2010, the District Court again granted judgment in El Paso's favor on Claim I pursuant to Fed. R. Civ. P. 56. App. 94-105.

Plaintiffs appeal the District Court's dismissal of portions of Claims I, II, IV, and V. Plaintiffs do not challenge the District Court's dismissal of Claim III. Plaintiffs do not address their forfeiture claim (part of Claim II) or their fiduciary duty claim (part of Claim V) anywhere in their Opening Brief. Therefore, they

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[1] Throughout this Answer Brief, references to "App. ___" are to Appellants' Appendix, while references to "Supp. App. ___" are to El Paso's Supplemental Appendix.

have abandoned those claims.

STATEMENT OF FACTS

A. The Parties

Plaintiffs are retired employees of El Paso Corporation who are participants in the El Paso Corporation Pension Plan. App. 109 ¶ 1, 1203-1212. Wayne Tomlinson retired on April 30, 2007 and started receiving pension benefits on May 1, 2007 at age 55. App. 1210. Alice Ballesteros retired on August 17, 2008 and started receiving pension benefits on October 1, 2008 at approximately age 57. App. 1203. Gary Muckelroy retired on July 31, 2008 and started receiving pension benefits on August 1, 2008 at age 57. App. 1207.

Mr. Tomlinson is the only Plaintiff who filed a charge of discrimination before commencing this action. App. 71, 77. He filed his charge of discrimination on July 16, 2004, and he filed his intake questionnaire with the EEOC on June 16, 2004. App. 71, 77, 945, 1444.

B. The Pension Plan

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 increased along with participants' years of service and the average of their final years of pay. App. 70, 113 ¶¶ 15-16.

Effective January 1, 1997, El Paso converted its pension plan to a cash balance plan ("Amended Plan"). App. 58, 1101, 1106, & 1123 (§ 4.1). Under the

Amended Plan's cash balance formula, a participant's monthly pension is based upon pay credits and interest credits accumulated over time. App. 70, 1123-24 (§ 4.1(a)). Each quarter the participant earns "pay credits," based on a percentage of his or her salary, and "interest credits," based on the yield of a five-year U.S. Treasury Bond. *Id.* Under the Amended Plan, pay credits increase with age. The older a participant, the higher the percentage of pay that is credited to his or her cash balance account each quarter. App. 1124 (§ 4.1(a)(ii)).

The Amended Plan provided for a five-year transition period from the final average pay formula to the cash balance formula. App. 70, 1124-25 (§ 4.1(b)) & 1194 ¶ 6. On January 1, 2007 (the start of the transition period), each eligible participant (including Plaintiffs) was given a cash balance account with a balance equivalent to their benefit under the final average pay formula as of December 31, 1996. App. 1123 § (4.1(a)).[2]

The value of a participant's pension benefits under the final average pay formula is generally referred to in the Amended Plan as a participant's "Minimum

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[2] At the time of the plan conversion to a cash balance formula in 1997, "there was no ERISA provision governing the creation of an opening cash balance." *Sunder v. U.S. Bancorp Pension Plan*, 586 F.3d 593, 600 (8th Cir. 2009). "Absent such a provision, [El Paso] was free to set the opening cash balance as it wished, as long as the calculation did not decrease already accrued benefits in the original plan." *Id.* Although Plaintiffs allege in their Opening Brief that "the accounts did not, in fact, reflect the full value of [their prior] benefits," they have never alleged a claim for improper decrease of accrued benefits under ERISA § 204(g), 29 U.S.C. 1054(g). Opening Brief at 6.

Benefit." App. 1124-25 (§ 4.1(b)); 1478 (39:3-10)). The value of a participant's Minimum Benefit can be calculated at different points in time. For example, it 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. App. 1121 (§ 3.1); 1123 (§ 4.1).

During the five-year transition period – January 1, 1997 to December 31, 2001 – eligible participants (including Plaintiffs) accrued pension benefits under both the new cash balance formula and the old final average pay formula. App. 70; 1194 ¶ 6; 1125 (§ 4.1(b)); App. 1477 (26:14-19). At the end of the five-year transition period, each participant's "accrued benefit" under the final average pay formula (*i.e.* their Minimum Benefit payable at age 65) was frozen. App. 70; 114 ¶¶ 20-21; 1121 (§§ 3.1, 4.1(b)(i)); 1194 ¶ 6; 1485 (84:15-18). On the other hand, benefits under the cash balance formula were not frozen. App. 1194 ¶ 6. When a participant elects to receive retirement benefits, he or she is entitled to receive the greater of (1) the benefit calculated under the cash balance formula or (2) the Minimum Benefit payable at that time. App. 1123 (§ 4.1).

On average, the higher a participant's age at the end of the transition period, the higher his or her Minimum Benefit was at the end of the transition period. App. 1481 (63:3-5); 1487 (91:17-20); 1488 (97:6-17). Moreover, during the five-

year transition period, older participants' Minimum Benefits grew much faster than their cash balance benefits did. App. 1489 (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. App. 1195 ¶ 8; 1489 (118:7-12).

C. The So-Called Wear-Away Period

When participants are entitled to the "greater of" two different pension formulas, the period of time it takes one formula to catch up to the other formula is called a wear-away period, presumably because the formula that is catching up wears away at the difference between the two formulas over time. 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 their cash balance accounts at the end of the transition period. App. 116-17 ¶¶ 32-35; 1479 (49:8-20); 1483 (73:14-18); 1484 (75:2-5, 14-17).

Plaintiffs allege that during this so-called wear-away period, the value of their accrued benefits (*i.e.*, those pension benefits payable at age 65) did not increase even though their cash balance accounts did increase. App. 116-17 ¶¶ 32-35. According to Plaintiffs, the benefit payable at age 65 stays the same until the

cash balance account catches up to and exceeds the Minimum Benefit.[3]

Importantly, Plaintiffs' own statistical expert, Robert Bardwell, Ph.D, 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." App. 1479 (49:13-20); 1485 (84:15-22); 1489 (118:1-6). It remains undisputed, however, that the actual value of the Minimum Benefit to which a participant is entitled at any given point in time grows, even after the transition period, as the individual ages towards (1) "normal retirement age" (age 65) or (2) age 60 plus 30 years of service. App. 1124-25 (§ 4.1(b)(i)); 1128-29 (§ 4.3(b)); 1132 (§ 4.5(b)). Specifically, in sections 4.3(a), 4.3(b) and 4.5(b), the Amended Plan sets forth formulas that are applied to participants who seek "Early Retirement" before age 65 or before age 60 plus 30 years of service. App. 1128 (§ 4.3(a)), 1128-29 (§ 4.3(b)); 1132 § (4.5(b)).[4] Under the terms of those formulas, a participant's Minimum Benefit payable at any point in time (even after the close of the transition period) increases each year that a participant gets closer to either (1)

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[3] The April 18, 2007 IRS letter cited by Plaintiffs concerned only the supplemental early retirement benefit, which is not at issue here. App. 510-11. Moreover, the IRS issued a favorable determination letter regarding the Amended Plan's tax qualification status on April 21, 2009. Supp. App. 16-21. "[I]t is well established that ... agency determinations are subject to judicial notice." *Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000).

[4] Early Retirement occurs when a participant retires after reaching age 55 with 10 years of service but before reaching "normal retirement age" or age 65. *Compare* App. 1121 (§ 3.1) *with* App. 1121 (§ 3.2(a)).

age 65 or (2) age 60 plus 30 years of service. App. 1216-17 ¶¶ 12-13. The benefit also increases as they are eligible for an Early Retirement Supplement. Consistent with the notion that the value of the Minimum Benefit continues to grow even after the close of the transition period, the Amended Plan guarantees participants the greater of their cash balance benefit "or the Minimum Benefit ***payable as of such date***." App. 1123 (§ 4.1) (emphasis added); App. 114 ¶ 21.[5]

El Paso retained Michael Ward, Ph.D., to test statistically whether participants' immediately payable benefits (as opposed to their "accrued benefits" payable at age 65) actually do grow as the Amended Plan dictates they should.[6] Dr. Ward's unchallenged calculations prove several unassailable facts, all of which are consistent with the terms of the Amended Plan 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. App. 1215 ¶ 10. All three Plaintiffs retired in their 50s. App. 1203, 1207, 1210.

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[5] *See* also App. 1128 (§ 4.3(a)); 1132 (§ 4.5(a)) (pertaining to retirement before reaching age 65 or "normal retirement date.")

[6] In contrast, Dr. Bardwell based his analysis on the lack of change of the "accrued benefit," meaning the value of the hypothetical benefit that is payable only upon reaching "normal retirement age" or age 65. App. 1219 ¶ 22-23.

b. Second, over 99% of El Paso's employees (like Plaintiffs) retire before reaching age 65. App. 1218 ¶ 16.

c. Third, 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. App. 1218 ¶ 18-20.[7]

Regarding the named Plaintiffs, the value of their Minimum Benefits grew faster than the value of their cash balance benefits from the time the transition period closed until the time they actually started to receive retirement benefits. App. 1195 ¶ 9; 1197-1200 (¶ 14-22); 1201.

D. Written Communications Regarding The Plan Conversion

1. The Section 204(h) Notice

In October 1996, El Paso notified participants of the upcoming changes to the Plan by way of a letter and a twelve-page brochure. App. 50; 861-78. These documents informed participants that the Plan amendments would take effect on January 1, 1997, explained the mechanics of the cash balance approach and the

[7] Plaintiff's expert Dr. Bardwell testified that he does not dispute the accuracy of Dr. Ward's calculations. App. 1485 (85:4-12); 1489 (120:6-22); 1490 (128:11-23, 129:2-21).

five-year transition period, and gave examples of benefit accruals. App. 861-78.

In a January 11, 1996 "Employee Update," El Paso informed participants that the rate at which their benefits would accrue under the cash balance formula would be lower than under the final average pay formula. App. 1405. In a December 2001 "Notice of Plan Changes," El Paso also unambiguously informed participants that their accrual of benefits would effectively cease while their cash balance accounts caught up to their Minimum Benefits. App. 810.

In 1999, El Paso also provided individual account statements to participants (including Plaintiffs). Those statements compared, in bar graph form, each participant's benefits under the cash balance formula to his or her Minimum Benefit over time (until age 65). App. 1423-34; 1450-61; 1532 (78:16-81:7). The bar graph shows individual cash balance accounts trailing Minimum Benefits for a period of many years. *Id.*

2. **The Summary Plan Description**

El Paso distributed the relevant SPD to participants in August 2002. App. 71, 122 ¶ 56; 1239-81. Plaintiffs' deposition testimony establishes that they did not consult the SPD, except that Mr. Tomlinson may have done so for the limited purpose of finding specific formulas that were, in fact, contained in the SPD. App. 82; 1055-56 (104:14-106:18); 1503-04 (132:14 – 136:25); 1524-25 (71:4-75:2); 1527 (174:25-175:17); 1530 (63:17-64:6).

SUMMARY OF THE ARGUMENT

Plaintiffs argue that they can sustain their wear-away claim under ADEA § 4(a), even though this Court recently foreclosed that theory in *Jensen v. Solvay Chemicals, Inc.*, 625 F.3d 641, 659-61 (10th Cir. 2010) ("compliance with § 4(i) satisfies § 4, period.") (emphasis added). The District Court correctly found that the Amended Plan complies with ADEA § 4(i), because pay credits under the cash balance formula increase with age and interest credits are the same for all participants. App. 97-105. There are several additional reasons that the ADEA claim fails, all of which were fully briefed before the District Court and are argued in detail below.

In arguing that El Paso's Amended Plan violates ERISA's anti-backloading 133 1/3% rule, Plaintiffs ignore the overwhelming federal authority that holds that an amended pension plan is to be evaluated for compliance with the 133 1/3% rule as though the amendment has been in effect since the inception of the plan. It is undisputed that the cash balance formula complies with the 133 1/3% rule.

Through their ERISA § 204(h) claim, Plaintiffs seek to impose disclosure obligations on El Paso that § 204(h) itself did not require at the time the plan was amended. The District Court properly rejected Plaintiffs' argument that El Paso's 204(h) notice was required to meet the more stringent requirements of an amendment to § 204(h) that did not go into effect until over four years after the

plan was amended. The District Court correctly concluded that El Paso's notice satisfied the requirements in effect at the time the plan was amended. App. 57-58; 76-77.

Regarding the SPD claim, the District Court properly found that Plaintiffs had not presented *any* evidence demonstrating that they detrimentally relied on or were prejudiced by the allegedly faulty SPD. App. 81-84. This Court can affirm summary judgment on the SPD claim on this basis or on the independent basis that the SPD did, in fact, meet ERISA's requirements for SPDs.

Finally, Plaintiffs failed to meet their burden under Fed. R. Civ. P. 56(f) of specifically showing how additional discovery relating to their SPD claim could preclude summary judgment.

STANDARD OF REVIEW

Motions for summary judgment and motions for judgment on the pleadings are reviewed *de novo*. *See Scruggs v. ExxonMobil Pension Plan*, 585 F.3d 1356, 1361 (10th Cir. 2009); *McHenry v. Utah Valley Hosp.*, 927 F.2d 1125, 1126 (10th Cir. 1991). Orders denying requests for additional discovery are reviewed for abuse of discretion. *See Garcia v. United States Air Force*, 533 F.3d 1170, 1179 (10th Cir. 2008).

ARGUMENT

I. Because Plaintiffs' Wear-Away Claim Relates To Benefit Accrual, The District Court Properly Held The Claim Is Governed By ADEA § 4(i), Not ADEA § 4(a).

Plaintiffs asserted Claim I – their wear-away claim – under ADEA § 4(a), 29 U.S.C. § 623(a), as well as ADEA § 7(b), 29 U.S.C. 626(b).[8] They did not assert it under ADEA § 4(i). App. 116-118. The District Court correctly found that Plaintiffs' wear-away claim was not cognizable under ADEA § 4(a). App. 98-105. Further, it is undisputed that the Amended Plan complies with ADEA § 4(i).

A. *Jensen* Forecloses Plaintiffs' Argument That ADEA § 4(a) Governs Their Wear-Away Claim.

Two provisions of ADEA § 4 are relevant to Plaintiffs' claim. ADEA § 4(i)(1)(A) prohibits "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age ...." 29 U.S.C. § 623(i)(1)(A). ADEA § 4(i)(4) provides 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). The legislative history of ADEA § 4(i)(4) confirms that "the requirements contained in section 4(i) related to an employee's right to benefit accruals with respect to an employee benefit plan ... shall constitute the entire

[8] 29 U.S.C. § 626(b) does not contain any independent prohibitions on age discrimination. Instead, it is merely the enforcement mechanism through which ADEA claims are brought.

extent to which ADEA affects such benefit accrual and contribution matters with respect to such plans." H.R. Rep. No. 99-1012, at 382 (1986) *reprinted in* 1986 U.S.C.C.A.N. 3868, 4027.[9]

Recently, in *Jensen*, this Court construed ADEA § 4(i) in the context of a wear-away claim. *See Jensen*, 625 F.3d at 659. Resolving the issue raised by Plaintiffs here, the *Jensen* Court broadly held that "Plaintiffs' claim is raised under § 4, and compliance with § 4(i) satisfies § 4, period." *Id.* at 660 (emphasis added). Seeking to escape that holding, Plaintiffs argue that the *Jensen* Court limited its holding to wear-aways caused by early retirement subsidies. Opening Brief at 29. However, that limitation is nowhere to be found in the language of the *Jensen* opinion, and the *Jensen* holding did not turn on the fact that the wear-away claim in that case related to an early retirement benefit. *See Jensen*, 625 F.3d at 660.[10]

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[9] Although Plaintiffs cite to a 1990 amendment to the ADEA, this Court has already made clear that "[t]he 1990 Amendment ... did not repeal § 4(i)(4), which states that compliance with subsection (i) constitutes compliance with § 4 insofar as benefit accrual is concerned." *Jensen*, 625 F.3d at 661. Consistent with that holding, the District Court properly interpreted the 1990 amendment's legislative history, from which Plaintiffs quote, "to mean simply that where a plan does not comply with section 4(i) ... an employer may still avail itself of the affirmative defenses provided in section 4(f)(2)." App. 104.

[10] Plaintiffs also argue that *Jensen* was incorrect, pointing to congressional testimony by the Internal Revenue Service's ("IRS") General Counsel from 1999 and a form letter that the IRS sent to cash balance plan sponsors. Opening Brief at 27-28. The congressional testimony and form letter – which are certainly not entitled to *Chevron* deference – are not persuasive, because, among other things, they pertain to the IRS' interpretation and enforcement of the Internal Revenue

It is true that the plaintiffs in *Jensen* argued that ADEA § 4(i)(4) does not apply to early retirement benefits, and it is also true that this Court rejected that argument. *Id.* But the key to the *Jensen* Court's holding was that the wear-away claim in that case – like all wear-away claims – relates to benefit accruals in a pension plan. This Court found that ADEA § 4(i)(4) precluded claims under any other section of the ADEA because "Plaintiffs do not contest that their ADEA wear-away claim relates to benefit accrual under [Solvay's] Plan." *Id.* (quoting and agreeing with defendant's argument).

Nothing in the language of the ADEA itself distinguishes between wear-away claims related to early retirement subsidies and wear-away claims related to "greater of" provisions associated with a conversion to a cash balance plan.[11] In both cases, the wear-away claim alleges that the "accrued benefit" of older employees ceases to grow, resulting in an allegedly impermissible period of zero accrual that impacts older employees more than younger employees. The plain language of ADEA § 4(i)(4) encompasses exactly that type of claim, for the very simple reason that the claim relates "to benefit accrual under such plan." 29 U.S.C. § 623(i)(4).

Code ("IRC"), not the ADEA. *See Christensen v. Harris Cty*. 529 U.S. 576, 587 (2000).

[11] Here, Plaintiffs allege the wear-away is caused by the Amended Plan providing the "greater of" the cash balance formula or the Minimum Benefit. The wear-away period of zero accrual (of the benefit payable at age 65) lasts while the cash balance formula catches up to the Minimum Benefit formula.

The EEOC guidance cited by Plaintiffs strongly supports the District Court's holding and this Court's reasoning in *Jensen*. *See* 52 Fed. Reg. 45360, 45361 (11/27/87) ("Accordingly, after the effective date of section 4(i), sections 4(a)(1) and 4(f)(2) will no longer apply to ... benefit accrual issues.").

The other federal courts that have interpreted ADEA § 4(i) have reached the same outcome without regard to the source of the alleged wear-away. *See, e.g., Hurlic v. Southern Cal. Gas Co.*, 539 F.3d 1024, 1037 (9th Cir. 2008); *Engers v. AT&T Pension Benefit Plan*, No. 98-3660, 2010 U.S. Dist. LEXIS 56881, at *9 (D.N.J. June 7, 2010) (unpublished); *Northwest Airlines, Inc. v. Phillips*, 594 F. Supp. 2d 1075, 1088 (D. Minn. 2009).

B. Plaintiffs Do Not Dispute That Their Wear-Away Claim Relates To Benefit Accrual

Plaintiffs' wear-away claim "relates to benefit accrual because it challenges the fact that benefits do not increase for some period of time." *Hurlic*, 539 F.3d at 1037. Indeed, Plaintiffs described their claim in their Opening Brief as follows: "The use of this 'greater of' formulation thus **created a period of zero accruals**…. [T]hese 'wear-away' periods would last over 10 years **before benefit accruals would resume**…." Opening Brief at 7 (emphasis added; internal citations omitted); *see also id.* at 21; App. 116-117 ¶¶ 32-35.

It is undisputed that Plaintiffs' wear-away claim relates to benefit accruals. The plain language of ADEA § (4)(i)(4), the legislative history of that section, the

EEOC's guidance interpreting that section, and this Court's holding in *Jensen* all make clear that the only section of the ADEA that regulates claims relating to benefit accruals is ADEA § 4(i). Therefore, the District Court was correct in ruling that Plaintiffs' claim cannot be sustained under ADEA § 4(a). App. 98.

C. Plaintiffs Did Not Plead Their Wear-Away Claim Under ADEA § 4(i)

Plaintiffs pled their wear-away claim under ADEA § 4(a), not ADEA § 4(i). App. 117 ¶ 38. The only reference to § 4(i) in their Complaint is in Claim III, which Plaintiffs have abandoned on appeal. App. 120 ¶ 48. Plaintiffs did not seek to replead their wear-away claim under ADEA § 4(i) at any time. Therefore, El Paso was entitled to judgment as a matter of law on their wear-away claim. *See Hurlic*, 539 F.3d at 1037 (wear-away claim "must be brought under ADEA § 4(i), not the generic anti-discrimination provision of ADEA § 4(a)"); *Jensen v. Solvay Chemicals, Inc.*, No. 2:06cv00273, slip op. at 30 (D. Wy. Aug. 3, 2009) (unpublished district court opinion) (wear-away claim "must be brought under ADEA § 4(i), not ADEA § 4(a)").

II. The District Court Properly Held That The Plan Complies With ADEA § 4(i)

In their Opening Brief, Plaintiffs ask the Court to "hold that § 4(i) is applicable to the practice of wear-aways in the 'age-65 annuity.'" Opening Brief at 28. El Paso does not dispute that § 4(i) regulates Plaintiffs' wear-away claim.

The controlling issue, though, is that the Amended Plan does not *violate* ADEA § 4(i). App. 104.

A. Because Plaintiffs Concede That They Are Not Entitled To Relief Under ERISA § 204(b)(1)(H), They Are Not Entitled To Relief Under ADEA § 4(i)(1)(A) Either

ADEA § 4(i)(1)(A) and ERISA § 204(b)(1)(H) were both enacted as part of the 1986 Consolidated Omnibus Reconciliation Act. The accompanying legislative history states that "the provisions of the ADEA, ERISA, and the Code that are amended to prevent the reduction or cessation of benefit accruals on account of the attainment of age are to be interpreted in a consistent manner...." H.R. Rep. No. 99-1012, at 378-79 (1986), *reprinted in* 1986 U.S.C.A.A.N. 3868, 4023-24.

Thus, *Hurlic* and its progeny – which Plaintiffs overlook in their Opening Brief – instruct that ERISA § 204(b)(1)(H) and ADEA § 4(i)(1)(A) must be given the same meaning.[12] *See Hurlic*, 539 F.3d at 1036 ("Congress has made clear that the provisions should be interpreted to have an identical meaning."); *Engers*, 2010 U.S. Dist. LEXIS 56881, at *12; *Jensen*, slip op. at 24; *Rosenblatt v. United Way of Greater Houston*, 590 F. Supp. 2d 863, 872 (S.D. Tex. 2008).[13]

In dismissing Claim III, the District Court correctly held that the phrase "rate

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[12] Indeed, in Claim III of their Complaint, Plaintiffs acknowledge that the two provisions are identical. App. 120 ¶ 48.

[13] The *Rosenblatt* court's superlative analysis of the claim under ADEA § 4(a) is unnecessary under *Jensen* and *Hurlic*.

of ... benefit accrual" in ERISA § 204(b)(1)(H) applies only to "what an employer puts into a participants account" (*i.e.,* the inputs) and is not equivalent to the "accrued benefit" (*i.e.,* the benefit payable at age 65 or the output). App. 42-44.[14] This holding – which Plaintiffs do not appeal and which has therefore become final – dooms their wear-away claim under ADEA § 4(i). If a plan "does not violate ERISA § 204(b)(1)(H)(i), it follows that the [p]lan does not violate ADEA § 4(i)(1)(A)." *Hurlic*, 539 F.3d at 1036; *see also Jensen*, slip op. at 24; *Stansbury v. Comm'r of Internal Revenue*, 102 F.3d 1088, 1090 (10th Cir. 1996) (ruling that was not appealed became final).

Following *Hurlic*, the District Court correctly ruled that a period of zero accrual of the "accrued benefit" (*i.e.* the benefit payable at age 65) does not violate ADEA § 4(i)(1)(A) because that section of the ADEA does not make periods of zero accrual of the "accrued benefit" unlawful. App. 102. The phrase "benefit accrual" in ADEA § 4(i)(1)(A) – like its ERISA counterpart – refers only to the inputs to a pension formula, <u>not</u> the output of that formula (the "accrued benefit" payable at age 65). *See Engers*, 2010 U.S. Dist. LEXIS 56881, at *12 ("29 U.S.C. § 623(i)(1)(A) refers to the benefit accrual that is the input to a plan."); *Jensen*, slip op. at 24 ("[T]he phrase 'rate of an employer's benefit accrual,' as used in ADEA §

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[14] The District Court's holding is consistent with the holding of every Court of Appeals that has construed ERISA § 204(b)(1)(H). *See, e.g., Hurlic*, 539 F.3d at 1029-32; *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56 (3d Cir. 2007); *Drutris v. Rand McNally & Co.*, 499 F.3d 608 (6th Cir. 2007).

4(i), like in ERISA § 204(b)(1)(H), refers to the inputs to the plan, rather than the outputs.").

It is undisputed that the inputs to the Plan – *i.e.,* the pay and interest credits in the cash balance formula – do not discriminate based on age. In fact, the District Court found – and Plaintiffs do not dispute – that the cash balance formula provides for continuous inputs that are favorable to older workers:

> ….El Paso gives older employees as many interest credits as younger employees and gives higher pay credits to employees based on age and years of service (capped at 7% when age and service equal 65).

App. 102, 104-105; *see also* App. 79; 1124 § 4.1(a)(ii).

Other courts that have analyzed wear-away claims under ADEA § 4(i) have reached the same result. *See, e.g., Hurlic*, 539 F.3d at 1037 ("[T]he wear-away claim is not cognizable under ADEA § 4(i)."); *Engers*, 2010 U.S. Dist. LEXIS 56881, at *13 ("[T]he undisputed evidence shows that, during the wear-away period, employees accrue benefits in their cash balance accounts continuously."); *Jensen*, slip op. at 24 ("The older employee would always accrue pay credits at an equal or higher rate than the younger employee"). In fact, no court has ever held that a wear-away violates the ADEA.

In arguing that the District Court's holding is "in conflict" with its earlier determinations, Plaintiffs mischaracterize the District Court's prior rulings and take its language out of context. Opening Brief at 23-24. Importantly, the District

Court did not address the merits of any claim under ADEA § 4(i) in *any* of its earlier Orders. *See* App. 42 (analyzing "cost incurred" affirmative defense); App. 56 (analyzing ERISA anti-backloading claim); App. 63 (considering Motion for Class Certification); App. 70-71 (describing Plaintiffs' allegations in "Background" section of Order); and App. 91 (analyzing timeliness of wear-away claim). To the extent that the District Court referred to "frozen" benefits or "*de facto* benefit freezes" in its earlier Orders, the Court was referring to the alleged impact of the Plan conversion on a participant's "accrued benefit" – the benefit payable at age 65, or the output. At no time did the District Court ever find that the inputs to the cash balance formula favor younger workers.

B. Plaintiffs' Claim Involves Only The "Accrued Benefit"

Plaintiffs repeatedly characterize the wear-away period they complain of as the failure of the "accrued benefit" or benefit payable at age 65[15] to increase. *See, e.g.,* Opening Brief at 26 (stating that "'**the age-65 annuity**' does not increase") 28 ("Plaintiffs submit that this Court should hold that § 4(i) is applicable to the practice of wear-aways in '**the age-65 annuity**' . . . "[A]ccruals of the **age-65 annuity** were designed to cease for older employees for extremely lengthy periods"); 30 (referring to "the receipt of additional benefits at **age-65**") (emphasis

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[15] *See* ERISA § 3(23)(A) (defining "accrued benefit" as the benefit payable at normal retirement age); *Jensen*, slip op. at 21 ("[B]enefit accrual does not carry the same meaning as "accrued benefit," which refers to the 'outputs' after compounding.").

added).

Further, Plaintiff's expert, Dr. Bardwell, conceded that Plaintiffs' wear-away claim pertains *only* to the benefit payable at age 65, or the "accrued benefit." *See* App. 1479 (49:13-20); 1489 (118:1-16). That is why the *Engers* Court specifically rejected Dr. Bardwell's analyses: he "did not analyze inputs to the Plan….[l]ost benefits are outputs." *Engers*, 2010 U.S. Dist. LEXIS 56881, at *12.

Plaintiffs' final argument appears to be that it is an unfair conundrum that, on the one hand, compliance with ADEA § 4(i) constitutes compliance with the ADEA as a whole when it comes to benefit accrual claims, but, on the other hand, § 4(i) does not make it unlawful for the "accrued benefit" to experience a period of zero accrual. Opening Brief at 25. But that is for Congress to decide, and Congress made itself clear when it enacted ADEA § 4(i)(4). Just like Congress was well within its power to make it unlawful to discharge a 40-year-old worker because of age, but did not make it unlawful to discharge a 39-year-old worker because of age, Congress was well within its powers to decide to make it unlawful to discriminate with respect to "inputs" but not with respect to "outputs."

III. In The Alternative, The Court Should Uphold Summary Judgment on Claim I For A Host Of Other Independent Reasons.

Several additional, independent reasons – all of which were fully briefed before the District Court – support the affirmation of summary judgment on Plaintiffs' ADEA claim. *See MacKenzie v. Denver*, 414 F.3d 1266, 1273 (10th

Cir. 2005) (judgment may be affirmed on any grounds for which there is a sufficient record).

A. Plaintiffs Failed To Timely Exhaust Their Administrative Remedies.

The ADEA claim was originally dismissed for failure to timely exhaust administrative remedies. App. 77-81. In its August 28, 2009 Order, the District Court reinstated Claim I in light of the enactment of the Lilly Ledbetter Fair Pay Act of 2009 ("Ledbetter Act"). *See* Pub. L. No. 111-2. However, the District Court should not have done so because the Ledbetter Act does not apply to pension claims.

1. The Ledbetter Act Recognizes That There Are Differences Between Compensation Benefits And Retirement Benefits

The Ledbetter Act specifically provides that "[n]othing in this Act is intended to change current law treatment of when pension distributions are considered paid." P.L. 111-2, § 2(4). Section 2(4) appears to codify *Florida v. Long*, 487 U.S. 223, 239 (1988), in which the Supreme Court held that pension cases and paycheck cases are not alike for purposes of applying the statute of limitations. The Supreme Court heavily relied on the fact that pensions are funded on a fixed actuarial basis – which does not require any ongoing decision-making – in refusing to apply the continuing violation doctrine to pension cases. *Compare*

Bazemore v. Friday, 478 U.S. 385 (1986)[16] with *Long*, 487 U.S. at 239; *see also Maki v. Allete, Inc.*, 383 F.3d 740, 744 (8th Cir. 2004) ("Pension checks, however, are based on a pension structure that is applied only once, when the employee retires, and the pension checks merely flow from that single application.").

Indeed, the Ledbetter Act's legislative history – which cites *Long* and *Maki* with approval – states that "pension distributions would be considered *paid* upon entering retirement and *not* upon the issuance of each annuity check." H.R. Rep. No. 110-237, at *18 n.79 & 80 (emphasis added); *see also Zimmelman v. Teachers' Retirement Sys. of the City of New York*, No. 08 Civ. 6958, 2010 U.S. Dist. LEXIS 29791, at *29-30 (S.D.N.Y. March 8, 2010) (unpublished) ("[I]t would be difficult to conclude that each of Plaintiff's monthly retirement benefit payments should be considered a new, allegedly discriminatory action that reset the 300-day filing period."). The EEOC recently agreed with the holding of *Zimmelman*. *See Brakeall v. Jackson*, Agency No. 2009-0061-R07, 2010 EEOCPUB LEXIS 3781, at *8 (Nov. 30, 2010) ("The legislative history of ... the Ledbetter Act supports differentiating between wage-based claims and claims based on pension payments.").

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[16] The Supreme Court has limited *Bazemore's* continuing violation doctrine to facially discriminatory pay plans. *See AT&T v. Hulteen*, 129 S. Ct. 1962, 1972 (2009). The District Court properly found that *Bazemore* did not apply to the Amended Plan, because the Amended Plan is facially non-discriminatory, as evidenced by the fact that pay credits are more generous for older workers than younger workers. App. 79-80.

2. The District Court Erred In Holding That A Discrete Act Occurred Each Time Plaintiffs Accrued A Pay Credit

In its August 28, 2009 Order, the District Court held that the Ledbetter Act "may apply" to Plaintiffs' wear-away claim, because the phrase "affected by application of a discriminatory compensation or other practice" "could possibly include the accrual of pension benefits." App. 91-92.

However, there are only two operative dates under which pension claims accrue under the ADEA: (1) the date the plan is amended; and (2) the date a participant retires. The starting point of the analysis is that a pension plan conversion is a discrete act. App. 79-81 (holding that the plan conversion was a discrete act that triggered statute of limitations); *see also National R.R. Passenger Co. v. Morgan*, 536 U.S. 101, 111-12 (2002) (holding that each discrete incident of discriminatory treatment constitutes its own "unlawful employment practice" for which administrative remedies must be exhausted). The date a participant retires is also a meaningful date because the legislative history of the Ledbetter Act recognized that pension benefits are considered paid when an individual enters retirement. H.R. Rep. No. 110-237, at *18 n.79 & 80.

Plaintiffs failed to timely exhaust administrative remedies with respect to either of those operative dates. Mr. Tomlinson is the only named Plaintiff who filed an administrative charge with the EEOC. As the District Court found, even giving him the benefit of the earliest possible filing date – June 16, 2004 – his

charge would have to encompass discriminatory conduct occurring in the previous 300 days, or after August 20, 2003. App. 73 (citing 29 U.S.C. § 626(d)(2)). Therefore, he did not file his charge within 300 days of the discrete act of El Paso's amendment of the pension plan on January 1, 1997. App. 1101, 1106. It is also undisputed that Mr. Tomlinson filed his only charge several years before he retired in 2007. App.1210; *see Martinez v. Potter*, 347 F.3d 1208, 1210-11 (10th Cir. 2003) (holding that claims occurring after the filing of an EEOC charge are barred unless independently exhausted).

B. Plaintiffs Did Not Suffer A Decrease In Pension Benefits.

It is undisputed that Plaintiffs received more money when they actually retired than they would have received if they had retired at the end of the transition period. In fact, each Plaintiff's Minimum Benefit grew faster than the actual value of his or her cash balance benefit from the time the transition period closed until the time he or she actually started receiving retirement benefits. App. 1197-1200 ¶¶ 14-22; 1201.

For example, Mr. Tomlinson's lump sum Minimum Benefit grew by $212,916.19 from the end of the transition period until he started receiving his pension. By contrast his cash balance account only grew by $78,952.80. App. 1199-1200 ¶¶ 20-22 & 1201. Mr. Tomlinson's annuity under the Minimum Benefit formula grew by $1,270.43 per month from the end of the transition period

until his pension starting date, whereas his cash balance annuity only grew by $551.82 per month. *Id.* The other Plaintiffs experienced similar growth in their Minimum Benefits relative to their cash balance accounts after the close of the transition period. App. 1197-1198 ¶¶ 14-16 & 1201 (Ballesteros); App. 1198-1199 ¶¶ 17-19 & 1201(Muckelroy).

In this case, Plaintiffs argue that older employees Minimum Benefits payable at age 65 stopped growing after the transition period. But that is irrelevant because all three named Plaintiffs retired in their 50s, and all three Plaintiffs received far greater pension benefits than they would have received if they had retired at the close of the transition period. Therefore, they did not suffer periods of zero accrual in the pension benefits that were actually paid to them.

Instead of attempting to rebut El Paso's calculations, Plaintiffs merely hypothesized that El Paso had "confused" actual growth of their Minimum Benefits with an increase in present value. *See* App. 337-344. But it is a mathematical certainty that Plaintiffs are incorrect.[17] Instead, their pensions grew by operation of formulas contained in the pension plan that cause the Minimum Benefit to grow as a participant ages toward either age 65 or age 60 plus 30 years of service or becomes eligible for a supplemental early retirement benefit. App.

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[17] Plaintiffs' expert's present value calculation explained only an increase of approximately $5,000 of the over $190,000 by which Ms. Ballesteros' Minimum Benefit grew following the close of the transition period. App. 457-58.

1123 (§ 4.1); 1124 (§ 4.1(b)(i)); 1128-29 (§ 4.3(a)-(b)); & 1132 (§ 4.5); 1217 ¶ 13.

Putting the debate about *why* their pensions grew aside, the record remains undisputed that Plaintiffs were each paid approximately $200,000 more in pension benefits when they actually retired than they would have been paid if they had retired the day after the transition period closed. Plaintiffs' expert, Dr. Bardwell, admitted that he did not even attempt to compute the rate of change of the Plaintiffs' retirement benefits at any point in time other than their accrued benefit payable at age 65. App. 1479 (49:13-20); 1485 (84:15-22); 1489 (118:1-6). Thus, it remains undisputed that Plaintiffs did not experience periods of zero or low accrual after the transition period.

C. The So-Called Wear-Away Period In The Age 65 "Accrued Benefit" Does Not Occur "Because Of" Age.

The District Court properly found that "the wear away effect correlates not to age but to the size of the accrued benefits under the old plan, which is affected by both salary and years of service." App. 80. However, there is no violation of the ADEA where a disparate impact is caused by factors that are "analytically distinct from, yet correlated with, age." *Northwest Airlines*, 594 F. Supp. 2d at 1086. Thus, any correlations between years of service and age or between salary and age are not enough to establish a claim that the Amended Plan violates § 4(a) of the ADEA. *Id.*; *see also Kentucky Retirement Sys. v. EEOC*, 554 U.S. 135, 143 (2008) ("age and pension status remain analytically distinct concepts"); *Hazen*

Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) (finding that years of service is analytically distinct from age); *EEOC v. McDonnell Douglas Corp*., 191 F.3d 948, 952 (8th Cir. 1999) ("employment decisions motivated by factors other than age (such as salary, seniority, or retirement eligibility), even when such factors correlate with age, do not constitute age discrimination").

Plaintiffs' own expert, Dr. Bardwell, conceded that there is no way to tell whether age would impact the wear-away period if it were not correlated with salary and years of service. App. 1480 (53:7-16). Because the wear-away period occurs due to factors that are analytically distinct from, although correlated with, age, Plaintiffs cannot prove that the wear-away period occurs "because of age" and, therefore, they cannot establish a claim under ADEA § 4(a).

D. Plaintiffs Did Not Suffer A Disparate Impact.

To establish a claim for disparate impact under the ADEA, a plaintiff must establish an *adverse* impact. *See Smith v. City of Jackson*, 544 U.S. 228, 243 (2004); *see also Pippin v. Burlington Resources Oil and Gas Co.*, 440 F.3d 1186, 1198 (10th Cir. 2006). El Paso was certainly not obligated to offer a transition period. It could have converted directly to a cash balance formula. If it had, there would be no wear-away because there would be nothing for the cash balance formula to catch up to. As Plaintiffs concede, a participant experienced a wear-away period only if his or her Minimum Benefit was greater than the cash balance

account at the end of the transition period. App. 116-17 ¶ 32-35; 337; 1479 (49:8-20); 1483 (73:14-18); 1484 (75:2-5, 14-17).

Plaintiff's expert, Dr. Bardwell, acknowledged that if El Paso had immediately converted to a cash balance benefit only, rather than providing the transition period as it did, Plaintiffs' pension benefits would have been lower than they were under the "greater of" formula that produced their actual pension benefits. App. 1479 (46:7-12); 1483 (70:12-22). Therefore, participants who experienced a wear-away period are in a better position than they otherwise would have been had El Paso simply converted directly to a cash balance plan and not provided a transition period and a Minimum Benefit. Accordingly, Plaintiffs did not suffer a disparate impact under ADEA § 4(a)(2).[18]

E. El Paso Established The ADEA's "Equal Cost/Equal Benefit" Affirmative Defense.

El Paso is also entitled to the "equal cost or equal benefits" affirmative defense. ADEA § 4(f)(2)(B) provides that it shall not be unlawful for an employer to "observe the terms of a bona fide employee benefit plan" where, for each benefit, "the actual amount of payment made or cost incurred on behalf of an older

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[18] In *George v. Duke Energy Retirement Cash Balance Plan*, 560 F. Supp. 2d 444, 464 (D.S.C. 2008), the district court did not consider the fact that if participants experience a wear-away period, that necessarily means that their Minimum Benefit is greater than their cash balance benefit and, therefore, they are receiving larger benefits than they otherwise would if the Company did not provide a transition period. Moreover, the *George* court did not analyze the growth in actually payable pension benefits of named Plaintiffs who retired before reaching age 65.

worker is no less than that made or incurred on behalf of a younger worker..." 29 U.S.C. § 623(f)(2)(B)(i) (emphasis added); *see also* 29 C.F.R. § 1625.10 (no violation of ADEA § 4(a) "[w]here an employee benefit plan provides the same level of benefits to older workers as to younger workers"). "Put more simply, a benefit plan is ADEA compliant if it either provides equal benefits to employees or is of equal cost to an employer." *Erie County Retirees Assoc. v. County of Erie*, 140 F. Supp. 2d 466, 470 (W.D. Pa. 2001) (emphasis added).

Here, El Paso established the affirmative defense because participants who experience a wear-away, as Plaintiffs define it, have higher pension benefits paid to them when they retire than younger employees who only have a cash balance benefit and thus do not experience a wear-away. App. 116-17 ¶ 32-35; 301; 1218 ¶¶ 17-20; 1479 (49:8-20); 1481 (63:3-5); 1483 (73:14-18); 1484 (75:2-5, 14-17); 1487 (91:17-20); 1488 (97:6-17); 1489 (118: 7-12 & 23-25, 119:1-3).[19] Indeed, Plaintiffs concede that "older employees' minimum benefits exceed their cash balance benefits" because "their benefits grew faster than their cash balance accounts during the five year transition periods." App. 339. Therefore, it is undisputed that the value of Plaintiffs' pension benefits is higher than it would be if there had been no transition period at all and is higher than younger employees

[19] El Paso properly preserved its right to assert the affirmative defense under ADEA § 4(f)(2)(B)(i) by denying Paragraph 31 of Plaintiffs' Complaint, which alleged that the affirmative defense did not apply. App. 116 ¶ 31; 129 ¶ 31.

who only have cash balance benefits.

El Paso anticipates that Plaintiffs will respond to this argument by arguing that El Paso's cost of providing the benefit is lower for older workers than for younger workers. While that issue is subject to debate, it is irrelevant because the statute is satisfied if either the cost is equal or the benefit is equal. It is undisputed that the benefit provided by El Paso to older employees is at least as large as the benefit provided to similarly situated younger employees.

IV. The District Court Properly Held That The Amended Plan Complies With ERISA § 204(b)(1)(B)'s Anti-Backloading Protections.[20]

ERISA § 204(b)(1) includes three "anti-backloading" provisions. *See* 29 U.S.C. § 1054(b)(1)(A)-(C). "A plan need only comply with one of the 'anti-backloading' provisions." *Id.* (citing 29 U.S.C. § 1054(b)(1)(A)-(C)). Here, the only provision at issue is the 133 1/3% rule. *See* ERISA § 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B); *see also* Opening Brief at 31. The 133 1/3% rule "requires that the value of the benefit accrued in any one year may not exceed the value of a benefit accrued in any previous year by more than 33%." *Register*, 477 F.3d at 71.

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[20] In Claim II, Plaintiffs also alleged that the Amended Plan violated the nonforfeitability rules set forth in ERISA § 203(a), 29 U.S.C. § 1053(a). App. 119-20 ¶ 43-44. In its March 19, 2008 Order, the District Court dismissed Plaintiffs' forfeiture claim. App. 56-57. In their Opening Brief, Plaintiffs do not address the merits of their forfeiture claim at all. Therefore, they have abandoned that claim. *See Tran v. Trustees of the State Colleges of Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004).

A. When A Plan Is Amended, Only The Amended Plan Is Considered For Purposes Of ERISA § 204(b)(1)(B)

According to Plaintiffs, the rate of benefit accrual during the time that the cash balance benefit lags behind the Minimum Benefit is 0%. Once the cash balance benefit catches up and passes the Minimum Benefit, there will be positive benefit accrual. Plaintiffs allege that this violates the rule that benefits cannot grow 33 1/3% more in one year than in any prior year, because any positive rate of accrual at all is more than 33 1/3% greater than a 0% rate of accrual. Opening Brief at 39-40. Critically, Plaintiffs do not allege that accrual of benefits under the cash balance formula, standing alone, runs afoul of the 133 1/3% rule.

The flaw in Plaintiffs' argument is their disregard of ERISA § 204(b)(1)(B)(i) and the case law applying it to exactly the situation before this Court. ERISA § 204(b)(1)(B)(i) states that, in applying the 133 1/3% rule, "any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years." 29 U.S.C. § 1054(b)(1)(B)(i).

In *Register*, the Third Circuit considered the application of that provision to a similar anti-backloading claim. The claim occurred in the context of a wear-away created by a "greater of" formula, like the one at issue here. *Register*, 477 F.3d at 72. Applying § 204(b)(1)(B)(i), the *Register* Court reasoned: "Thus, once there is an amendment to the prior plan, only the new plan formula is relevant when ascertaining if the plan satisfies the [133 1/3% rule]." *Id.* The Third Circuit

held that the anti-backloading claim failed because, under the dictates of § 204(b)(1)(B)(i), Plaintiffs "never would have accrued a benefit under the old plan and would have started to accrue benefits under the cash balance formula from the beginning of their employment." *Id.*

Plaintiffs seek to rely on Treas. Reg. 1.411(b)-1(a) to exempt themselves from ERISA § 204(b)(1)(B)(i). 26 C.F.R. § 1.411(b)-1(a) . That regulation states that separate formulas in the same pension plan must be aggregated for purposes of the 133 1/3 percent rule. However, every court to consider that argument has found that Treas. Reg. 1.411(b)-1(a) does not apply to plan amendments involving "greater of" formulas that create so-called wear-aways. *Register*, 477 F.3d at 72; *Hurlic*, 539 F.3d at 1035; *Engers*, 2010 U.S. Dist. LEXIS 56881, at *24; *George*, 560 F. Supp. 2d at 472; *Amara v. CIGNA Corp.*, 534 F. Supp. 2d 288, 322 (D. Conn. 2008); *Custer v. Southern New England Telephone Co.*, No. 3:05cv1444, 2008 U.S. Dist. LEXIS 5067, at *33-34 (D. Conn. Jan. 24, 2008) (unpublished). *Wheeler v. Pension Value Plan for Employees of the Boeing Co.*, No. 06-cv-500, 2007 U.S. Dist. LEXIS 65840, at *38 (S.D. Ill. Sept. 6, 2007) ("A participant in the Plan does not receive an accrued benefit calculated under two co-existing formulas" but rather "under two separate and mutually exclusive formulas set out in the Plan") (unpublished). In the face of this overwhelming authority, Plaintiffs cite no opinion in which a court applied the aggregation rule, rather than the

amendment rule, to a conversion from a traditional defined benefit plan to a cash balance plan.[21]

B. The District Court Properly Rejected Revenue Ruling 2008-7

Plaintiffs further assert that the District Court erred in not following IRS Revenue Ruling 2008-7. Opening Brief at 34-40. Rather than "brush[ing] aside" the revenue ruling, as Plaintiffs characterize it, the District Court considered – and rejected it – twice: (1) in its March 19, 2008 Order granting El Paso's Motion for Judgment on the Pleadings; and (2) again, in its January 21, 2009 Order denying Plaintiffs' Motion to Reconsider. App. 56; 74-75.

In Revenue Ruling 2008-7, "the IRS indicated that a plan would violate the 133 1/3 percent rule if it allowed participants to continue to accrue benefits under a pre-conversion formula for a period of time before they become frozen." *Hurlic*, 539 F.3d at 1034; *see also* Rev. Rul. 2008-7. The *Hurlic* Court rejected Revenue Ruling 2008-7, finding that Treas. Reg. § 1.411(b)-1(a), on which the ruling heavily relies, was not implicated by a nearly identical plan amendment. *Id.* Finding that *Register*'s analysis still applied, even though the plan provided a

[21] Plaintiffs' reliance on *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004) and *Battoni v. IBEW Local Union No. 102 Employee Pension Plan*, 594 F.3d 230, 235-37 (3d Cir. 2010) is misplaced, because, as Plaintiffs concede, those cases were decided under ERISA § 204(g), 29 U.S.C. § 1054(g) – which is ERISA's anti-cutback provision – and do not involve claims under ERISA § 204(b)(1)(B), ERISA's anti-backloading provision. Opening Brief at 33. Plaintiffs' have not asserted an anti-cutback claim in this case.

transition period – exactly like the Amended Plan here – the Ninth Circuit noted:

> It would be an odd result indeed to allow a pension plan which converts to a cash balance formula to freeze pre-conversion benefits immediately but forbid a plan from providing for a grace period in which participants can continue to accrue additional benefits before they are frozen.

Id.

Like the *Hurlic* Court, the District Court appropriately gave the revenue ruling *Skidmore*, rather than *Chevron*, deference, finding that it was "entitled to respect" but only to the extent that it had the "power to persuade." App. 74 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). After consideration, District Court ultimately found the revenue ruling unpersuasive. Every court to consider the issue has reached a different result than the revenue ruling, including every case decided before the revenue ruling was issued and every case decided after the revenue ruling was issued. App. 75.

Plaintiffs urge this Court to impose a stricter standard of deference than *Skidmore* requires by implying that the revenue ruling should be binding. Opening Brief at 35-36. However, this Court has held that revenue rulings are not binding. *See IHC Health Plans, Inc. v. Comm'r*, 325 F.3d 1188, 1194 n.11 (10th Cir. 2003). Other federal Courts of Appeal have uniformly held that revenue rulings are entitled to *Skidmore*, not *Chevron*, deference. *See, e.g., Hurlic*, 539 F.3d at 1034; *Kornman & Assoc. Inc. v. United States*, 527 F.3d 443, 455 (5th Cir. 2008);

Aeroquip-Vickers, Inc. v. Comm'r, 347 F.3d 173, 180 (6th Cir. 2003); *see also* 26 C.F.R. § 601.601(d)(2)(v)(d) ("Revenue Rulings ... do not have the force and effect of Treasury Department Regulations"). The cases cited by Plaintiff are inapposite, as they do not involve IRS revenue rulings. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 162 (2007); *Nat'l Cable & Telecomm'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). As such, the District Court accorded the revenue ruling the proper level of deference.[22]

V. The District Court Properly Held That El Paso's 204(h) Notice Complied With ERISA's Requirements At The Time.

Plaintiffs allege that El Paso violated ERISA § 204(h), 29 U.S.C. § 1054 (h), because El Paso failed to "disclose the freeze in benefits for older, longer-service employees" "or "disclose that the new formula masks reductions in the rate of future benefit accruals." Opening Brief at 44; App. 7 ¶ 26; 121 ¶ 54.

A. The District Court Properly Held That The 2001 Amendment To ERISA § 204(h) Does Not Apply

In their Opening Brief, Plaintiffs contend that an amendment to ERISA § 204(h), which imposed new, more stringent notice requirements for plan amendments taking effect on or after June 7, 2001, applies, even though the amendment to the pension plan at issue was effective on January 1, 1997. Opening

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[22] Plaintiffs also ignore the fact that Revenue Ruling 2008-7 does not apply to "moratorium plans," like the Amended Plan, and that it applies for purposes of IRS tax qualification rules only, not ongoing ERISA litigation. App. 75 n.4, 213; Supp. App. 2-3, 5-9.

Brief at 41-44 (citing P.L. 107-16 § 659). In so arguing, Plaintiffs remarkably assert, without reference to any authority, that the Amended Plan did not "tak[e] effect" until December 31, 2001, which was in reality the date that the five-year transition period ended. *Id.*

El Paso adopted its plan amendment on December 12, 1996 and the amendment became effective on January 1, 1997. App. 1101 & 1106 (noting effective date of January 1, 1997); 1177 (containing a signature date of December 12, 1996); 861 & 868 (listing January 1, 1997 as Plan effective date); Opening Brief at 3. Indeed, starting on January 1, 1997, very real changes went into effect. As Plaintiffs acknowledge in their Complaint, they began to accrue benefits under both the old formula and the cash balance formula beginning on January 1, 1997. App. 114 ¶ 20. They became entitled to the greater of their cash balance benefit or their Minimum Benefit throughout the transition period. App. 70; 114 ¶¶ 20-21. Also, employees hired after January 1, 1997 accrued pension benefits only under the cash balance formula. App. 1124-24 (§4.1(b)(i)).

Although Plaintiffs assert that the amendment did not "tak[e] effect" until the Minimum Benefit was frozen, they offer no evidence that Congress intended for such an arbitrary result, considering that ERISA § 204(h) governs all sorts of plan amendments, not just amendments that provide for a transition period and/or freeze benefits. Contrary to Plaintiffs' assertion, the amendment "took effect" for

purposes of ERISA § 204(h) on the effective date of the amendment itself – January 1, 1997 – not the end of the transition period that was created by the amendment.

A Treasury Department tax attorney's recent informal comments during a webinar, as recounted in a BNA Pension & Benefits Daily article cited by Plaintiffs, are not entitled to any deference. Opening Brief at 42; *see also United States v. Southern Union Co.*, 643 F. Supp. 2d 201, 213 (D.R.I. 2009) (rejecting conclusory statements contained in EPA informal guidance documents as having "little if any persuasive value"). Even if the comments were entitled to some deference, they relate to the Pension Protection Act of 2006, not the 2001 amendment to ERISA § 204(h). Finally, Plaintiffs appear to cite to Treas. Reg. 1.411(b)-1(a) in support of their argument; however, that regulation relates to ERISA's anti-backloading provisions, not ERISA § 204(h).

B. The District Court Properly Held That El Paso's October 1996 Letter and Brochure Satisfied The Notice Requirements In Force At The Time

At the time of the Plan amendment, ERISA § 204(h)(1)(A) required El Paso to provide a written notice "setting forth the plan amendment and its effective date…." 29 U.S.C. § 1054(h)(1)(A). The Treasury Regulations in force at the time indicated that the notice need only contain "a summary of the amendment ... if the summary is written in a manner calculated to be understood by the average plan

participant and contains the effective date." 26 C.F.R. § 1411 (d)-6T (1996). Importantly, "the summary need not explain how much the individual benefit of each participant ... will be affected by the amendment." *Id.*

The very first line of the October 1996 letter set forth the amendment's effective date: January 1, 1997. App. 861. The remainder of the letter appropriately explained the Amended Plan, including how the opening balance in each participant's cash balance account would be determined; that the cash balance account would be credited on a quarterly basis with contributions based on (1) age and service and (2) interest; and that the five-year transition period would allow active participants to continue to accrue benefits under the old final average pay formula and the new cash balance formula until December 31, 2001, at which time participants' accrued benefits under the final average pay formula would be frozen and no additional benefits would accrue under that formula; and that participants would be always entitled to the greater of their Minimum Benefit or the cash balance formula at the time of retirement. App. 861-62.

While the October 1996 letter, by itself, satisfied the requirements of ERISA § 204(h) in effect at the time, El Paso went one step further by distributing a Program Highlights brochure in October 1996, which explained, in greater detail, the precise mechanics of the Amended Plan. App. 867-78. The brochure explained, among other things, how the cash balance plan functioned, how pay

credits would be allocated on the basis of age plus years of service, the "special transition" period for participants who were active as of December 31, 1996, and the different forms of benefit payment under the Amended Plan. App. 870; 873; 875. To help participants better understand how the Amended Plan operated, the brochure also contained a glossary of "key" terms and provided three examples of hypothetical benefit accruals under the cash balance formula. App. 871-73; 878.

Plaintiffs contend that the October 1996 brochure[23] was inadequate for various reasons, most of which were not presented to the District Court. Specifically, Plaintiffs never argued in their District Court briefing that (1) the October 1996 brochure cannot function as a 204(h) notice because it was prepared and distributed before El Paso adopted the Amended Plan (Opening Brief at 46-47)[24]; (2) the October 1996 brochure was not "written in a manner calculated to be understood by the average plan participant" (*id.* at 46-47)[25]; or (3) El Paso violated

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[23] Although El Paso asserts that both the October 1996 letter and the brochure separately satisfy the requirements of ERISA § 204(h) at the time, Plaintiffs only discuss the brochure, and not the letter, on pages 46-51 of their Opening Brief.

[24] Plaintiffs cite no authority for the proposition that a notice that otherwise complies with ERISA § 204(h) should be invalidated because it was distributed shortly before the adoption of the plan amendment. Nor can they establish that they suffered any harm because the notice was distributed two months earlier than the plan went into effect. *See Hurlic*, 539 F.3d at 1038.

[25] The statements cited by Plaintiffs are not misleading because, as discussed in Section III.B above, their actually payable benefits did, in fact, continue to increase after the end of the transition period. Opening Brief at 48-49. Moreover, Plaintiffs cannot rely on their communications expert's testimony on this issue, as it was not

its duty to issue a corrective notice as promptly as possible (*id.* at 50). App. 169-173; 198i-198m; 241-244. Therefore, these arguments should not be considered on appeal. *See Parker v. Town of Chelsea*, 263 Fed. Appx. 740, 744 (10th Cir. 2008) (unpublished); *Reeder v. Wasatch Cty. School Dist.*, 359 Fed. Appx. 920, 922 (10th Cir. 2009) (unpublished).

In asserting that the October 1996 letter and brochure did not satisfy ERISA § 204(h) because it did not provide Participants with notice of the benefit reductions or wear-aways, Plaintiffs seek to impose obligations on El Paso that the plain language of ERISA did not require at the time. Opening Brief at 44-46.[26] At direct odds with Plaintiffs' assertion, the Treasury Regulations in effect at the time stated that an employer's summary of a plan amendment "need not explain how much the benefit of each participant ... will be affected by the amendment." 26 C.F.R. § 1411 (d)-6T (1996).

In *Register*, the Third Circuit rejected a similar argument that a 204(h) notice was flawed because it failed to explain "that the conversion would significantly reduce[] the rate of future pension plan benefit accruals for each plan participant," finding instead that "[t]he brochure set forth the plan amendment and the effective

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presented to the District Court and opines about an ultimate issue that was for the District Court to decide.

[26] In *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149, 2152 (2010), the Supreme Court recently reiterated the importance of adhering to the plain text of ERISA.

date. That explanation was all that was required." *Register*, 477 F.3d at 73; *see also Osberg v. Foot Locker, Inc.*, 656 F. Supp. 2d 361, 373 (S.D.N.Y. 2009) (rejecting assertion that defendants "were required under § 204(h) to notify participants of a significant reduction in the rate of future benefit accrual"); *Custer*, 2008 U.S. Dist. LEXIS 5067, at *40-41 (following *Register*).

Although Plaintiffs cite *Jensen* for the proposition that El Paso was required to include examples of benefit reductions in its 204(h) notice, *Jensen* was decided under the 2001 amendment to ERISA § 204(h) and its implementing regulations, which now require that notices include examples of benefit reductions. *See Jensen*, 625 F.3d at 641. More significantly, even under these more stringent requirements of section 204(h) as amended in 2001, this Court rejected the argument that a 204(h) notice must "disclos[e] the duration of wear-away periods or even ... us[e] the term "*wear-away*." *Id.* at 656.

Plaintiffs' reliance on *Hurlic* is also misplaced, because it was undisputed in that case that no 204(h) notice had been distributed at all. The Ninth Circuit was not analyzing what the notice should or should not contain, but was instead analyzing whether the plaintiffs *suffered any harm* due to the failure to issue any notice at all. *Hurlic*, 539 F.3d at 1038.

Although the *Hurlic* Court stated that the plaintiffs were entitled to receive notice of the "wear-away provision," the court was referring to the fact that the

employees are entitled to know that the amended plan has a "greater of" formula. *Id* at 1037. Any other holding would have been in conflict with the statute, which did not require notice of *the impact of* an amendment. Thus, the *Hurlic* Court defined the wear-away provision as follows:

> The wear-away provision provides that a participant's accrued benefit is an age 65 single-life annuity equal to the greater of: 1) the actuarial equivalent of his or her retirement account under the cash balance formula; or 2) the actuarial equivalent of his or her frozen accrued benefit under the pre-conversion formula.

Id. at 1027.

El Paso did in fact summarize the identical provision of its Amended Plan in the "Special Transition Benefit" section of the October 1996 brochure. App. 873. That provision specifically described the "greater of" feature of the Plan, and even provided an illustrative example. App. 873.

Plaintiffs also complain that the October 1996 brochure was not titled "204(h) notice." Opening Brief at 49-50. As the District Court correctly found, "Plaintiffs have provided no legal authority establishing that a notice under section 204(h) had to identify the applicable ERISA provision in order for the notice to be effective ..." App. 58. Nor have Plaintiffs proffered any authority in support of their assertion that El Paso's intent plays any role in the Court's analysis. Opening Brief at 49. Finally, El Paso's issuance of a notice in December 2001 – which merely reminded participants that the transition period was coming to an end –

does not retroactively invalidate the effectiveness of the October 1996 notice. App. 810. For what it is worth, however, the December 2001 "Notice of Plan Changes" did state very clearly that "accruals under the Plan may effectively cease until the participant's cash balance benefit exceeds the minimum benefit ...." App. 810.

VI. The District Court Properly Held That Plaintiffs Did Not Significantly Rely On And Were Not Prejudiced By The Allegedly Faulty SPD

Plaintiffs allege that El Paso's August 2002 SPD was deficient because it did not disclose "wear-aways and benefit reductions" in violation of ERISA § 102, 29 U.S.C. § 1022. Opening Brief at 53; App. 121-122 ¶ 55-57.[27]

A. Plaintiffs Did Not Demonstrate Significant Reliance

To secure relief on the basis of a faulty SPD, Plaintiffs "must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description." *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (internal quotations omitted); *see also Lee v. Union Elec. Co.*, 789 F.2d 1303, 1308 (8th Cir. 1986) (analyzing ERISA § 102 claim); *Govoni v. Bricklayers, Masons and Plasterers Int'l Union of America*, 732 F.2d 250, 252 (1st Cir. 1984) (same);

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[27] In Claim V, Plaintiffs also alleged that El Paso violated its fiduciary duty by failing to disclose the reductions and other disadvantages of the cash balance amendments" in violation of ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). App. 122 ¶ 57. In their Opening Brief, Plaintiffs fail to address the merits of their breach of fiduciary duty claim at all. Therefore, they have abandoned that claim. *Tran*, 355 F.3d at 1266.

It is undisputed that "Plaintiffs' deposition testimony establishes that they did not consult the SPD, except for the limited purpose of finding specific information that was contained in the SPD." App. 82; *see also* App. 1503-04 (132:14 – 136:25) (Tomlinson testimony); App. 1424-25 (71:4-75:2) (Muckelroy testimony); App. 1530 (63:17-64:6) (Ballesteros testimony).[28] There is no evidence that Plaintiffs detrimentally relied on the allegedly faulty SPD in any way. *See Mauser v. Raytheon Co. Pension Plan for Salaries Employees*, 239 F.3d 51, 55 (1st Cir. 1991) (stating that plaintiff "could not demonstrate the requisite level of reliance" where he had no memory of reading the SPD); *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579 (11th Cir. 1992) ("There is no evidence in the record that [plaintiff] ever read or relied on the summary.")

In asserting that "the District Court recognized that Plaintiffs 'could have heard about the contents of the SPD from other employees' if periods of wear-away and benefit reductions had been understandably disclosed," Plaintiffs misread the District Court's language. Read in context, the District actually stated:

> In response, Plaintiffs assert that it is not established that Plaintiffs ever received the SPD and contend that Plaintiffs could have heard about the contents of the SPD

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[28] As the District Court noted, Plaintiffs did not assert a claim that El Paso failed to properly distribute the SPD. App. 82; 122 ¶ 55-57. To the contrary, in their Complaint, Plaintiffs admit that El Paso "distributed a Summary Plan Description ('SPD') in August 2002 to employees." App. 122 ¶ 56. It is also undisputed that Plaintiffs were told, in writing, where on El Paso's intranet the SPD could be found. App. 1515 (200:19-23); 1526 (108:25-109:6); 1533 (83:18-20).

> from other employees. Plaintiffs miss the point. Regardless of the reason, if Plaintiffs did not ever read the SPD, they cannot have been injured by any reliance upon allegedly inadequate information contained therein.

App. 82.

Although Plaintiffs allege that they are not required to read the SPD, because the rumor mill could come into play in some circumstances, the cases they cite for this proposition are inapposite because they did not analyze reliance. Rather, in conflict with the Tenth Circuit, the Second Circuit has rejected the reliance standard and only applies a "likely prejudice" standard. *See Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 112 (2d Cir. 2003);[29] *Estate of Ritzer v. Nat'l Org. of Indus. Trade Unions Ins. Trust Fund*, 822 F. Supp. 951, 955 (E.D.N.Y. 1993).[30] Moreover, because Plaintiffs provided no testimony about any rumors they actually heard from anyone – instead their counsel merely speculated in briefing that such a thing could have happened – Plaintiffs failed to establish *any* reliance or prejudice at all.

B. Plaintiffs Were Informed Of The Wear-Away Effect Through Other Sources

The District Court also correctly held that Plaintiffs could not establish

[29] Moreover, Plaintiffs incorrectly attribute the quoted language on page 57 of their Opening Brief to *Burke*, when in fact the Second Circuit was merely quoting from a district court opinion in adopting a "likely prejudice" standard. *Id.* at 113.

[30] Unlike here, there is no indication in those cases that the plaintiffs actually received the omitted information from sources other than the SPD.

prejudice "because they were informed of the reduction in the benefits accrual rate and of the wear-away effect through other sources." App. 82. For example, in an January 11, 1996 "Employee Update," El Paso stated that "[u]nder the cash balance plan, employees will earn future benefits at a lower rate than under the current plan." App. 1405. In 1999, well before the close of the transition period, "each employee received an individualized account statement that showed, in bar graph form, a comparison of the participant's benefit in the cash balance plan and the previous plan over time until age 65." App. 83; 1423-34; 1450-61; 1532 (78:16-81:7). As the District Court explained: "the bar graph shows that the cash balance benefit does not exceed the participant's frozen previous benefit even at age 65." App. 83.

Similarly, the December 2001 "Notice of Plan Changes" stated that "accruals under the Plan may effectively cease until the participant's cash balance benefit exceeds the minimum benefit ...." App. 810. For its part, the October 1996 letter stated that "[t]he hard truth is that those who are not prepared may have to postpone retirement. Or, they may have to retire with less money than they had anticipated." App. 83 n.7; App. 861-62.[31]

On summary judgment, the Court was not, as Plaintiffs allege, bound by their self-serving assertion that "disclosures from other sources were inadequate."

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[31] Plaintiffs do not dispute that they received these communications. App. 263 ¶ 4.

Opening Brief at 59. Rather, the District Court correctly found "no prejudice to Plaintiffs from the alleged failure to disclose in the SPD information that was already disclosed, and even illustrated individually, before the SPD was ever issued." App. 83; *see also Weinreb v. Hospital for Joint Diseases Orthopaedic Institute*, 404 F.3d 167, 171-72 (2d Cir. 2005) (finding no prejudice from complete failure to issue SPD where plaintiff received notice from other sources); *Burns v. Marley Co. Pension Plan*, 663 F. Supp. 2d 135, 145 (E.D.N.Y. 2009) (same).

Importantly, Plaintiffs "offered no evidence of action they would have taken or not taken, or otherwise avoidable losses incurred, because of the allegedly inadequate SPD." App. 83. Plaintiffs point only to a statement written by their counsel in a brief – – as opposed to deposition testimony or an affidavit. Opening Brief at 58 (citing App. 273). However, "the nonmovant must do more than refer to allegations of counsel contained in a brief to withstand summary judgment." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992).

Finally, Plaintiffs' reliance on *Hurlic* and *Amara* is misplaced because those courts did not consider whether the plaintiffs could show prejudice even though they had received information missing from an SPD from other sources. Opening Brief at 58-59.

VII. In The Alternative, The Court Should Affirm Summary Judgment On The SPD Claim Because The SPD Satisfied ERISA's Disclosure Requirements

In alleging that the SPD was defective because it failed to disclose "reductions in the rate of benefit accrual" and "lengthy wear-away periods," Plaintiffs seek to impose obligations that ERISA § 102 and its implementing regulations do not require. Opening Brief at 53.

A. ERISA § 102 Does Not Require Disclosures Of Wear-Aways Or Reductions In The Rate Of Benefit Accrual

Section 102 of ERISA requires disclosures concerning how a current plan operates. The statute does not impose disclosure requirements concerning changes to a plan. *See* 29 U.S.C. § 1022(b). Instead, Congress chose to place the disclosure requirements concerning plan amendments in ERISA § 204(h). "Where Congress includes particular language in one section of a statute but omits it in another ... it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

ERISA § 102(b) does require disclosures of "circumstances which may result in disqualification, ineligibility, or *denial or loss of benefits*." 29 U.S.C. § 1022(b) (emphasis added). However, the phrase "denial or loss of benefits" does not support Plaintiffs' claim, because the *failure to earn additional benefits* during the so-called wear-away period is not a *denial* of benefits, or a loss of benefits, or

even a reduction in benefits. Rather, the wear-away, as Plaintiffs define it, is a temporary halt on the accrual of *additional* benefits (payable at age 65).

Courts have construed ERISA § 102(b) in a manner that is consistent with that reading. *See Stahl v. Tony's Building Materials, Inc.*, 875 F.2d 1404, 1407-8 (9th Cir. 1989) (SPD not required to disclose that future benefits may cease to accumulate after the expiration of a collective bargaining agreement); *Allen v. Honeywell Retirement Earnings Plan*, 382 F. Supp. 2d 1139, 1169-70 (D. Ariz. 2005) (no obligation to disclose rate used to calculate benefit offset); *Custer*, 2008 U.S. Dist. LEXIS 5067, at *36-37 (SPD not required "to comment on how the operation of the plan would affect certain participants as compared to other participants" and "inform participants of potential legal challenges to the plan").

In *Jensen*, this Court rejected the argument that wear-aways must be disclosed under the regulation implementing ERISA § 102. *See Jensen*, 625 F.3d at 657-58 (analyzing 29 C.F.R. § 2520.102-3 and distinguishing authorities cited by Plaintiffs, including *Humphrey v. United Way of Tex. Gulf Coast,* 590 F. Supp. 2d 837, 847 n.6 (S.D. Tex. 2008) and *Amara*, 534 F. Supp. 2d at 340).

B. The SPD Reasonably Apprises Participants About Their Rights And Obligations Under The Amended Plan

An SPD need not "anticipate every possible idiosyncratic contingency that might affect a particular participant's or beneficiary's status." *Lorenzen v. Employees Retirement Plan of the Sperry and Hutchinson Co., Inc.,* 896 F.2d 228,

236 (7th Cir. 1990); *see also Stahl*, 875 F.2d at 1408. In this case, El Paso's SPD explains with clarity and in detail how the Amended Plan operates. App. 1239-81. Here, as in *Custer*, the SPD "explains how the plan is funded" (App. 1275); "how eligibility is determined" (App. 1246); "how each participant's opening cash account balance is calculated" (App. 1251-52); "how participants earn service credits and interest credits" (App. 1250-53); "how the annuity is paid out" (App. 1253-55); "the effect on the spouse after a participant's death" (App. 1257-58); and "various tax consequences of the plan" (App. 1256).[32] *Custer*, 2008 U.S. Dist. LEXIS 5067 at *36.

Most significantly, as in *Custer*, the SPD explains, in detail the "greater of" feature of the plan. App. 1259. Specifically, the SPD states:

> If you are eligible to receive a Minimum Benefit from the ***CBP Select*** (Five-Year El Paso Transition Benefit), you will continue to accrue benefits under the Minimum Benefit formula until December 31, 2001, or the date you terminate employment, whichever occurs first. After December 31, 2001, your Minimum Benefit will be frozen, and you will earn benefits only under your El Paso Cash Account Benefit. When you terminate employment, the benefit you receive from ***CBP Select*** will be the greater of the Minimum Benefit or the El Paso

[32] To be entitled to substantive relief on their SPD claim, Plaintiffs must also demonstrate the presence of extraordinary circumstances. *See Register*, 477 F.3d at 74 (extraordinary circumstances "generally involve acts of bad faith on the part of the employer, attempts to actively conceal a significant change in the plan, or commission of fraud"). Here, Plaintiffs cannot show extraordinary circumstances in light of the numerous communications that El Paso distributed to employees regarding the plan conversion. *See* Section VI.B above.

Cash Account Benefit.

Id. Consequently, "[t]here is no question that the SPD reasonably apprises the participants and beneficiaries of their rights and obligations under the plan." *Custer*, 2008 U.S. Dist. LEXIS 5067 at *36.

VIII. The District Court Did Not Abuse Its Discretion In Denying Plaintiffs' Rule 56(f) Request For Additional Discovery Relating To Their SPD Claim.

Plaintiffs fail to acknowledge that this Court "review[s] the district court's denial of a Rule 56(f) request for an abuse of discretion." *Garcia*, 533 F.3d at 1179. While Plaintiffs alleged that they needed further discovery relating to their SPD claim, they failed to meet their burden of stating, *with specificity*, how the additional discovery could preclude summary judgment. App. 879-83.[33] A party may not invoke Rule 56(f) "by simply stating that discovery is incomplete but must state with specificity how the additional material will rebut the summary judgment motion," which Plaintiffs categorically failed to do. *Libertarian Party v. Herrera*, 506 F.3d 1303, 1308 (10th Cir. 2007)) (internal quotations omitted).

Notably, the partial stay of discovery referred to by Plaintiffs was the product of a stipulation submitted by the parties and adopted by the District Court.

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[33] Contrary to their assertion, in their Rule 56(f) motion, Plaintiffs did not seek discovery relating to "documentary evidence on employee complaints and El Paso's response to the complaints" nor do they explain how such discovery would have precluded summary judgment on their SPD claim. Opening Brief at 52-53; App. 879-83.

Supp. App. 10-15; Opening Brief at 52-53. Plaintiffs were not obligated to agree to a stay of discovery on the SPD claim. In fact, in entering into that stipulation, Plaintiffs stated that "depending on whether [a motion for summary judgment on the SPD claim] is filed, *and the basis for it*, Plaintiffs may ask that some of the discovery which is deferred in this submission ... be moved to the category of discovery which is not deferred...." Supp. App. 11 (emphasis added). None of the discovery identified by Plaintiffs could possibly have impacted the District Court's ruling.

The District Court found that (1) Plaintiffs had not relied on the SPD to their detriment; and (2) Plaintiffs had not been prejudiced by anything contained in or omitted from the SPD. App. 81-84. As discussed in Section VI above, these findings were based on Plaintiffs' own admissions concerning their lack of meaningful review of the SPD and based on their own admissions that they had received other documents containing the disclosures that they said were missing from the SPD. *Id.* No documents or testimony could possibly negate Plaintiffs' own admissions or alter the contents of the disclosures that they admitted receiving.

Similarly, Plaintiffs offered no showing of how El Paso's intent could impact the analysis of the SPD claim. As a result, the District Court certainly did not "exceed[] the bounds of the rationally available choices given the facts and the

applicable law in the case at hand" when it found that the evidence sought by Plaintiffs "would not alter [its] analysis here, as it would shed no light on the issues of reliance or prejudice." *Valley Forge Ins. Co. v. Health Mgmt. Partners, LTD*, 616 F.3d 1086, 1096 (10th Cir. 2010) (internal quotations omitted); App. 83-84. Because the District Court did not abuse its discretion, its denial of Plaintiffs' Rule 56(f) request for further discovery relating to their SPD claim should be affirmed.

CONCLUSION

For the reasons discussed above, El Paso respectfully requests that the Court affirm the entry of judgment in El Paso's favor.

Respectfully submitted,

s/Darren E. Nadel

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)

Pursuant to Fed. R. App. 32(a)(7)(C), the undersigned counsel certifies:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced, serif typeface using Microsoft Word 2003 in Times New Roman 14 point font in text and footnotes.

s/Darren E. Nadel
Darren E. Nadel

Dated: January 31, 2011

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing BRIEF OF APPELLEES, as submitted in digital form, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Trend MICRO Office Scan, Virus Scan Engine/Pattern 9.205.1002/7.795.00, and according to the program, is free of viruses. I also certify that no privacy redactions were required in the foregoing BRIEF OF APPELLEES.

s/Darren E. Nadel
Darren E. Nadel

Dated: January 31, 2011

CERTIFICATE OF SERVICE

I certify that on January 31, 2011, I electronically filed the foregoing BRIEF OF APPELLEES with the Clerk of the United States Court of Appeals for the Tenth Circuit using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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One (1) hard copy is being sent to Plaintiffs' counsel identified above by overnight delivery and seven (7) hard copies are being sent to the Clerk of the United States Court of Appeals for the Tenth Circuit by overnight delivery.

I further certify that two (2) hard copies of APPELLEES' SUPPLEMENTAL APPENDIX were sent by overnight delivery to the Clerk of the United States Court of Appeals for the Tenth Circuit and that one hard copy was served in the same manner on Plaintiffs' counsel.

s/Darren E. Nadel
Darren E. Nadel

INDEX TO ADDENDUM

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3. *Jensen v. Solvay Chemicals, Inc.*, No. 06-CV-273 ABJ (D. Wy. Aug. 3, 2009) (unpublished district court opinion)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE WALKER D. MILLER

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

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

Plaintiffs,

v.

EL PASO CORPORATION, and
EL PASO PENSION PLAN,

Defendants.

ORDER ON MOTION TO DISMISS

Miller, J.

This matter is before me on a motion filed by Defendants El Paso Corporation and El Paso Pension Plan (collectively El Paso) on March 30, 2005, requesting dismissal of some or all of Plaintiffs' claims, a more definite statement of Plaintiffs' Second Claim, or an order striking Plaintiffs' jury demand. Upon review of the parties' filings, I conclude oral argument is not required. For the reasons that follow, the motion will be granted to the extent it seeks dismissal of Plaintiffs' Third Claim, and otherwise denied.

Background[1]

This case arises out of El Paso Corporation's conversion of its pension plan from

[1] As is appropriate in the context of a motion to dismiss, the following facts are taken from Plaintiffs' allegations.

a final average pay formula, to a cash balance formula. Under the old plan, the amount of a retiree's monthly pension was based upon their years of credited service and a final average of salary. Under the new plan, this amount is based upon the amount of credits employees accumulate throughout their years of service. Each participating employee is given a hypothetical account, and each quarter the employee earns "pay credits" based upon a percentage of their salary, and "interest credits" based upon the yield of a five-year U.S. Treasury Bond. *See generally, Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 61-63 (3d Cir. 2007) (comparing and contrasting traditional defined-contribution plans, traditional defined-benefit plans, and cash balance plans).

During a transition period between January 1, 1997, and December 31, 2001, participating employees accrued benefits under both the new and old plans, and retiring employees could elect whichever option benefitted them the most. Once this transition period expired retirees could still choose either option, but the old plan was "frozen" at whatever benefits the employee had earned as of December 31, 2001.

In this putative class action,[2] Plaintiffs allege that El Paso set the initial cash balance accounts for older, longer-service employees at levels significantly below the value of their accumulated annuities under the old plan. Thus, Plaintiffs allege that the freezing of old plan accruals discriminated against older workers in violation of the Age Discrimination in Employment Act (ADEA). In addition, Plaintiffs claim that the new plan violates various provisions of the Employee Retirement Income Security Act

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[2] Plaintiffs propose a class defined as any persons who: (1) are current or former El Paso employees; (2) participated in the pension plan on or after the January 1, 2002 date on which the plan was fully converted to a cash balance formula; and (3) will be over age 40 as of the date of judgment.

(ERISA).

Standard of Review

Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is only appropriate "when it appears beyond doubt that the plaintiff could prove no set of facts entitling it to relief." Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). The court "must accept as true all well-pleaded facts, and construe all reasonable allegations in the light most favorable to the plaintiff." *United States v. Colorado Supreme Court*, 87 F.3d 1161, 1164 (10th Cir. 1996).

Discussion

1. Statute of Limitations

It is undisputed that the Plaintiffs are required to file a charge of age discrimination with the EEOC within three hundred days of the date the alleged unlawful practice occurred, *see* 29 U.S.C. § 626(d)(2); *Cruz v. Bd. of Educ.*, 537 F. Supp. 292, 294 (D. Colo. 1982), but the parties disagree on when this limitations period began to run. According to El Paso, this court is bound by *Raymond v. Mobil Oil Corp.*, 7 F.3d 184 (10th Cir. 1993), to find that Plaintiffs' ADEA claim accrued the date the new plan amendments were adopted — January 1, 1997.

I disagree. In *Raymond*, the Tenth Circuit did not significantly discuss this issue, but rather adopted the reasoning from a case it found to be materially indistinguishable — *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209 (5th Cir. 1992). *Id.* at 186. And while *Christopher* Court found the date of accrual to be the date the new plan was announced, it did so because the announcement in that case told the employees all

they needed to know in order to maintain their claim for constructive discharge. *Christopher*, 950 F.2d at 1214-1215; *see also First Nat'l Bank & Trust Co. v. Farmland Indus., Inc.*, 3 F.3d 1366, 1369 (10th Cir. 1993) ("A limitations period begins to run from the time a cause of action first accrues, which is generally the time that a suit may first be maintained thereon."). In contrast it is not clear in this case, when Plaintiffs knew or should have known enough to maintain an ADEA claim against El Paso. Although Plaintiffs' Complaint indicates that in October of 1996, Plaintiffs received a brochure saying something about a new "cash balance" formula (Complaint, Docket No. 1, at ¶ 17), Plaintiffs claim that this brochure said nothing about a freeze in accruals under the old plan, and that until they commenced this action, they never received an actual copy of the new plan. At this stage of the case, I cannot conclude that there exists no set of facts where it would be reasonable to receive such a brochure and not inquire further. Therefore, dismissal of Plaintiffs' ADEA claim based upon time limitations would be inappropriate.

2. The Bona Fide Plan Exception

Next, El Paso argues that Plaintiffs' ADEA claim is barred because their plan is exempt from suit as a bona fide plan under 29 U.S.C. § 623(f). This subsection makes it permissible for employers:

> to observe the terms of a bona fide employee benefit plan — (i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under [29 C.F.R. § 1625.10].

Id.[3] According to El Paso, paragraph 23 of the Complaint establishes that the new plan meets the "cost incurred" prong of this test, since it clearly indicates that older workers actually receive higher pay credits than younger employees do. El Paso does not, however, cite any caselaw indicating that a cash balance formula like the one implemented here is immune from suit as a bona fide plan. And, 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. Therefore, I conclude that El Paso has failed to demonstrate entitlement to relief, and its motion will therefore be denied as to this issue.

3. Plaintiffs' Claim that Cash Balance Plans Violate ERISA (Claim Three)

Under El Paso's cash balance plan, as with all cash balance plans, if a younger worker is given the same amount of interest credits as an older worker, the younger worker will, by the time she reaches normal retirement age, have realized a greater benefit from her interest credits than the older worker did by the time he reached normal retirement age (sometime earlier). According to Plaintiffs, this aspect of El Paso's cash balance plan violates ERISA. Specifically, Plaintiffs' point to 29 U.S.C. § 1054(b)(1)(H), which provides that plans do not comply with ERISA "if, under the plan,

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[3] 29 C.F.R. § 1625.10 in turn provides that plans will be considered compliant with § 623(f)(2) if "the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage."

an employee's benefit accrual is ceased, or the *rate of an employee's benefit accrual* is reduced, because of the attainment of any age." (emphasis added) In response, El Paso argues that Plaintiffs' Claim should be dismissed because it is entirely dependant upon a faulty interpretation of § 1054(b)(1)(H).

There has been a great deal of litigation over the meaning of the words "rate of . . . benefit accrual" in the context of cash balance plans, and the courts do not always agree. The majority have held that the phrase refers to what an employer puts into a participants account. Under this interpretation, so long as an employer gives older employees at least as many interest credits as it does a younger employee, § 1054(b)(1)(H) is not violated, and the disparity that Plaintiffs complain of is simply the unsurprising result of the time-value of money. *See Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56 (3d Cir. 2007); *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636 (7th Cir. 2006); *Drutis v. Quebecor World (USA), Inc.*, 459 F. Supp. 2d 580 (E.D. Ky. 2006); *Laurent v. PriceWaterhouseCoopers LLP*, 448 F. Supp. 2d 537 (S.D.N.Y. 2006); *Hirt v. Equitable Ret. Plan for Employees, Managers & Agents*, 441 F. Supp. 2d 516 (S.D.N.Y. 2006); *Register v. PNC Fin. Servs. Group, Inc.*, No. 04-CV-6097, 2005 WL 3120268, (E.D. Pa. Nov. 21, 2005); *Tootle v. ARINC, Inc.*, 222 F.R.D. 88 (D. Md. 2004); *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812 (S.D. Ind. 2000). Under the minority interpretation, however, "rate of . . . benefit accrual" is equivalent to "accrued benefit" — a term defined in § 1002(23)(A) as an amount "expressed in the form of an annual benefit commencing at normal retirement age," and the disparity described above constitutes a violation of § 1054(b)(1)(H). *See Parsons v. AT&T Pension Benefit Plan*, No.

3:06CV552 (JCH), 2006 WL 3826694 (D. Conn. Dec. 26, 2006) (slip op.); *In re Citigroup Pension Plan ERISA Litig.*, — F. Supp. 2d — , 2006 WL 3613691 (S.D.N.Y. Dec.12, 2006); *In re J.P. Morgan Chase Cash Balance Litig.*, 460 F. Supp. 2d 479 (S.D.N.Y. 2006); *Richards v. FleetBoston Fin. Corp.*, 427 F. Supp. 2d 150 (D. Conn. 2006); *Cooper v. IBM Pers. Pension Plan*, 274 F. Supp. 2d 1010 (S.D. Ill. 2003) (abrogated by *Cooper*, 457 F.3d at 636).[4]

Having thoroughly considered the alternatives, I am convinced by those courts that have adopted the majority interpretation. In particular, I agree with the Third and Seventh Circuits that the minority interpretation results in an untenable discrepancy, making it permissible for a younger employee in a defined-contribution plan to benefit from the time-value of money, while making it illegal for a younger employee in a cash balance plan to do the same. *See Register*, 477 F.3d at 69; *Cooper*, 457 F.3d at 638; *see also Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."). Therefore, Plaintiffs' Third Claim will be dismissed.

4. <u>El Paso's Motion for a More Definite Statement</u>

Next, El Paso argues that Plaintiffs' Second Claim is so vague and unintelligible that it cannot reasonably be expected to respond absent an order for a more definite statement. An order for a more definite statement is only appropriate when the complaint "is so vague or ambiguous that a party cannot reasonably be required to

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[4] Due to the developing nature of the caselaw regarding this issue, both parties have submitted multiple supplements to their original briefs, and have filed multiple motions for leave to do so. In considering this issue, I have considered each of these supplements, and the motions for leave will therefore all be granted.

frame a responsive pleading." Fed. R. Civ. P. 12(e). In this case, I agree with Plaintiffs that El Paso's six-page brief on this issue demonstrates that it is fully capable of framing a response to Claim Two, and a more definite statement is therefore unnecessary.

5. The Pension Plan as a Party

El Paso further argues that Plaintiffs have failed to make any cognizable claims against the Pension Plan itself, and that the Plan should therefore be dismissed. I disagree. Although Plaintiffs' Complaint could be more precise in identifying which claims are brought against which defendants, it is clear that Plaintiffs seek a declaration that the Pension Plan itself violates various ERISA provisions. Accordingly, it makes sense to name the Plan as a defendant, as is a common practice in this type of litigation. *See e.g.*, *Register*, 477 F.3d at 56 (naming the plan as a defendant); *Cooper*, 457 F.3d at 636 (same).

6. Exhaustion of Administrative Remedies

In addition, El Paso argues that Plaintiffs' Complaint should be dismissed because Plaintiffs failed to exhaust their administrative remedies prior to bringing this lawsuit. In *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1206 (10th Cir. 1990), the Tenth Circuit held that "exhaustion of administrative (i.e., company- or plan-provided) remedies is an implicit prerequisite to seeking judicial relief [regarding ERISA claims]." However, the Court additionally held that a claim under 29 U.S.C. § 1140[5] was an exception to this rule. *Id.* at 1205.

[5] § 1140 generally prohibits punishing an employee for the purpose of interfering with the attainment of any benefit.

In this case, the parties dispute the scope of the exhaustion requirement delineated in *Held*. According to Plaintiffs, the exhaustion requirement only applies when "a plaintiff [is] alleging a statutory violation as opposed to a mere denial of benefits." *Id.* at 1204 (appearing to approve of such a holding in *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1994)). According to El Paso, however, the exhaustion requirement also applies whenever a statutory claim is "'so closely intertwined with a serious issue requiring interpretation of a benefit plan that a trial court could properly stay the statutory action pending resolution of the issue by the plan fiduciaries.'" *Id.* at 1205 (quoting with apparent approval from *Zipf v. Am. Tel. & Tel.*, 799 F.2d 889, 894 n.6 (3d Cir. 1986)).

Even if I accept El Paso's interpretation, however, I still find that it has not demonstrated entitlement to relief. Although El Paso argues in perfunctory fashion that "Plaintiffs' claims are predicated, at least in part, on non-statutory claims" (Defs.' Motion, Docket No. 10, at 37 n.12), El Paso makes no effort to explain how this is so, and it also fails to develop an argument as to why this case involves a serious issue requiring interpretation of a benefit plan. El Paso's motion to dismiss will therefore be denied on this issue.

7. <u>El Paso's Motion to Strike Plaintiffs' Jury Demand</u>

Finally, El Paso moves to strike Plaintiffs' jury demand. El Paso concedes, however, that this request is entirely dependant upon dismissal of Plaintiffs' ADEA claim. As discussed above, I find that dismissal of the ADEA claim is inappropriate, and I will therefore deny El Paso's motion to strike as well.

Accordingly, it is ordered:

1. Defendants' motion for leave to file a response brief, filed November 15, 2006 (Docket No. 86), is granted and the attached brief has been considered in ruling on Defendants' motion to dismiss Claim Three.

2. Defendants' motion for leave to file a reply brief, filed November 16, 2006 (Docket No. 87), is granted and the attached brief has been considered in ruling on Defendants' motion to dismiss Claim Three.

3. Defendants' motion for leave to file a response brief, filed December 20, 2006 (Docket No. 93), is granted and the attached brief has been considered in ruling on Defendants' motion to dismiss Claim Three.

4. The motion filed by Defendants on March 30, 2005 (Docket No. 10), requesting dismissal of some or all of Plaintiffs' claims, a more definite statement of Plaintiffs' Second Claim, and an order striking Plaintiffs' jury demand, is granted to the extent it seeks dismissal of Plaintiffs' Third Claim, and is otherwise denied.

5. This case remains pending for trial on Plaintiffs' First, Second, Fourth, and Fifth Claims.

DATED at Denver, Colorado, on March 22, 2007.

BY THE COURT:

s/ Walker D. Miller
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
SENIOR JUDGE WALKER D. MILLER

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

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

Plaintiffs,

v.

EL PASO CORPORATION, and
EL PASO PENSION PLAN,

Defendants.

ORDER ON MOTION TO ALTER OR AMEND JUDGMENT

Miller, J.

This matter is before me on the Plaintiffs' Motion to Alter or Amend Judgment Entered on January 23, 2009 (doc no 313). Defendants oppose the motion. For the reasons that follow, the motion will be granted.

The facts of this case are fully set forth in my most recent order (doc no 311) disposing of Plaintiffs' claims. In short, this case arises out of El Paso Corporation's conversion of its defined benefit pension plan, in particular one based on a final average pay formula to one based on a cash balance formula. Under the old plan, the amount of a retiree's monthly pension was based upon their years of credited service and a final average of salary. Under the amended plan, this amount is based upon the amount of credits employees accumulate throughout their years of service. A five-year transition period was used before full implementation of the amended plan whereby participating employees accrued benefits under both the new and old plans, and retiring employees

could elect whichever option benefitted them the most. Once this transition period expired retirees could still choose either option, but the old average pay plan was "frozen" at whatever benefits the employee had earned as of December 31, 2001. Benefits would continue to accrue under the new cash balance formula.

Plaintiffs' motion to amend concerns my ruling on Plaintiffs' claim that the "wear away" period for some workers, meaning the time that overall benefits did not grow until the cash balance benefits caught up to and exceeded the "frozen" benefits due under the old formula, violates the Age Discrimination in Employment Act (ADEA). I granted summary judgment in favor of Defendants based on my conclusion that none of the Plaintiffs had filed a timely charge of discrimination within 300 days of the alleged discriminatory act. Plaintiffs argue that the passage of the Lilly Ledbetter Fair Pay Act of 2009, P.L. 111-2, (the "Ledbetter Act") which was signed into law shortly after my order, modifies the time limit for when a charge of discrimination needs to be filed.

Standard of Review

A motion to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e) should be granted only to address (1) an intervening change in the controlling law; (2) new evidence previously unavailable; or (3) the need to correct clear error or prevent manifest injustice. *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). Such a motion is not an appropriate vehicle to "revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id. See also Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) ("A Rule 59(e) motion to alter or amend the judgment should be granted only 'to correct manifest errors of law or to present newly discovered evidence'") (citations omitted). Because the Ledbetter Act is

a change in the controlling law, which appears to be retroactive in application, it is appropriate for me to consider the effect of this statute on my previous ruling.

Discussion

As I previously noted, Wayne Tomlinson is the only named plaintiff to file a charge discrimination with the Equal Employment Opportunity Commission ("EEOC"), a prerequisite to suit under the ADEA. There is no dispute that even giving Mr. Tomlinson the benefit of the earliest possible filing date, June 16, 2004, his charge would have to encompass discriminatory conduct occurring in the previous 300 days, or after August 20, 2003. 29 U.S.C. § 626(d)(2) (aggrieved employee must file a charge with the EEOC within 300 days of the alleged unlawful discriminatory practice). I concluded that the discriminatory act triggering the need to file a charge was the amendment to the plan, which occurred effective January 1, 1997 and was complete in December 2001. It was undisputed that Mr. Tomlinson understood before 2001 that the wear away effect would occur in his case and that he received notification in September 1999 which clearly showed, in bar graph form, the time it would take for his cash balance account to catch up to his frozen pre-conversion benefit. Plaintiffs argued that the discriminatory act occurred each time benefits were calculated. I rejected this argument in part based on the decision of the United States Supreme Court in *Ledbetter v. Goodyear Tire and Rubber Company*, 550 U.S. 618 (2007), which concerned discrimination in pay. Relying on *Ledbetter,* I held that "Plaintiffs' cause of action was triggered by the adoption of the cash balance plan, which was complete no later than December 31, 2001. Because the discriminatory act and Mr. Tomlinson's actual knowledge of that act and its alleged disparate effect on older workers occurred more than 300 days before he filed his

charge of discrimination, this claim is time-barred." January 21, 2009 Order (doc no 313).

The Ledbetter Act was passed in response to the *Ledbetter* decision, which Congress determined was unduly restrictive with respect to the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices. P.L. 111-2, Sec. 2 Findings. It amends the ADEA, and other non-discrimination statutes, by adding the following language:

> For the purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting whole or in part from such a decision or other practice.

29 U.S.C. § 626 (3). The Act takes effect as if enacted on May 28, 2007 and is intended to apply to all claims pending on or after that date. P.L. 111-2, Sec. 6 Effective Date.

Defendants argue that the Ledbetter Act is not intended to apply to pensions, as supported by the Supreme Court's holding in *Florida v. Long*, 487 U.S. 223 (1988), and that Plaintiffs still have not identified a discrete discriminatory act occurring within 300 days of the charge of discrimination that would support a claim.

The authority provided by both Plaintiffs and Defendants persuades me that my reliance on the *Ledbetter* decision may have been misplaced. The legislative history of the Ledbetter Act, as well as the reasoning in *Florida v. Long*, demonstrates the differences between pension and paycheck cases. As noted in *Long*,

> In a salary case . . . each week's paycheck is compensation for work presently performed and completed by an employee. Further, the employer does not fund its payroll on an actuarial basis. By contrast, a pension plan, funded on an actuarial basis, provides benefits fixed under a contract between the employer and retiree based on a past assessment of an employee's expected years of service, date of retirement, average final salary, and years of projected benefits. In the pension fund context, a continuing violation principle in every case would render employers liable for all past conduct . . . . We cannot recognize a principle of equitable relief that ignores the essential assumptions of an actuarially funded pension plan.

487 U.S. at 239. In *Long*, the Supreme Court refused to apply a continuing violation principle to a pension plan, distinguishing the case from the “pattern and practice” analysis of *Bazemore v. Friday*, 478 U.S. 385 (1986).[1] *Id.* Similarly, the Ledbetter Act expressly provides that it is not “intended to change current law treatment of when pension distributions are considered paid,” P.L. 111-2 Section 2 Findings, at (4). This indicates that the Congress understood that there are significant differences between compensation and retirement benefits. This is borne out in the legislative history, in which *Long* is cited for the proposition that while a paycheck scheme is applied to every paycheck, a pension structure is applied only once, when the employee retires, and the pension checks merely flow from that single application. H.R. Report 110-237 at 18. Similarly, the policy justifications for enacting the Ledbetter Act include the difficulty of detecting pay discrimination, since pay-setting decisions are unlikely to be viewed as discriminatory and information about comparators is generally confidential. *Id.* at 7.

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[1]The Supreme Court has recently confirmed that *Bazemore* is a limited holding. *A T & T Corp. v. Hulteen*, 129 S. Ct. 1962, 1972 (2009). *Hulteen*, however, does not shed any light on the issue before me, which is whether the Ledbetter Act applies in these circumstances.

Here, by contrast, 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.

I note, however, that this case does not concern payment of retirement benefits pursuant to a retirement plan, which was the focus of *Long*, but rather the rate of accrual of benefits. The Ledbetter Act preserves the existing law concerning when a discriminatory pension distribution or payment occurs, i.e., upon retirement, not upon the issuance of each check. Mr. Tomlinson's charge of discrimination, however, was filed when he was an active employee and did not concern payment of retirement benefits. Accordingly, it does not appear that either *Bazemore* or *Long* is controlling here.

In the absence of further authority indicating otherwise, I conclude that the plain language of the Ledbetter Act may apply in these circumstances and that my previous analysis regarding the timeliness of the charge of discrimination cannot stand. The Act covers "wages, benefits, or other compensation," which appears to include employer contributions to a pension plan. It provides that a discriminatory act occurs when an individual is "affected" by the application of a discriminatory compensation decision or other "practice," which could plausibly include the accrual of pension benefits. There does not appear to be any dispute that Mr. Tomlinson accrued a pay credit within 300 days of his charge of discrimination, since he did not retire until several years after his charge. Because that 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, and could plausibly bring it within the

ambit of the Ledbetter Act. In addition, Defendants do not contest that Plaintiffs' ADEA claim may have been pending on May 28, 2007, the effective date of the Ledbetter Act, since this lawsuit was initiated in 2004. Therefore, the portion of my order granting Defendants' Motion for Summary Judgment on Plaintiffs' Claim 1, violation of the ADEA, is inconsistent with the Act and must be reversed.

Because it will now be necessary to consider the claim on the merits, I conclude that Defendants should be permitted to file a new motion for summary judgment. In particular, I note that the relatively recent arguments and authority contained in *Hurlic v. Southern Calif. Gas Co.*, 539 F.3d 1024 (9th Cir. 2008) would be pertinent. I note also that the Supreme Court recently addressed the framework for analyzing ADEA claims in *Gross v. FBL Fin. Servs., Inc.*, 129 S.Ct. 2343 (2009), which may affect the resolution of Plaintiffs' ADEA claim.

Accordingly, it is ordered:

1. Plaintiffs' Motion to Alter or Amend Judgment (doc no 313) is granted. My January 21, 2009 order (doc no 311) on Plaintiffs' Motion to Reconsider and Motions for Summary Judgment is amended to deny Defendants' Motion for Summary Judgment on Plaintiffs' ADEA claim (Claim 1). I do not find that Plaintiffs' ADEA claim is barred for failure to timely file a charge of discrimination with the EEOC. The Clerk's Judgment (doc no 312) shall be vacated.

2. Plaintiffs' Motion to Strike Amended Motion for Summary Judgment on ADEA Claim (doc no 331) is granted. Defendants' Amended Motion for Summary Judgment on ADEA Claim (doc no 324) shall be stricken. The

Motion for Leave to File Excess Pages (doc no 327) is denied as moot.

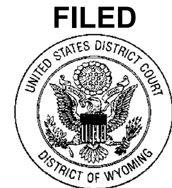
3. Defendants may file a renewed motion for summary judgment on the ADEA claim (Claim 1), within 20 days of the date of this order. Response and reply briefs shall be filed in accordance with the Federal Rules of Civil Procedure and the Local Rules of this court.

DATED at Denver, Colorado, on August 28, 2009.

BY THE COURT:

s/ Walker D. Miller
United States Senior District Judge

FILED



3:28 pm, 8/3/09
Stephan Harris
Clerk of Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

WADE JENSEN, and DONALD D. GOFF, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

SOLVAY CHEMICALS, INC., SOLVAY AMERICA, INC. and SOLVAY AMERICA COMPANIES PENSION PLAN,

Defendants.

Case No. 06-CV-273-J

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON CLAIM V

This matter came before the Court on Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment on Claim V. The Court, having read the filings, and being fully advised in the premises, **FINDS** and **ORDERS** as follows:

BACKGROUND

Solvay America is a holding company that wholly owns Solvay Chemicals. Named

Plaintiff Wade E. Jensen ("Jensen") is currently employed with Solvay Chemicals in Green River, Wyoming. Jensen began his employment with Solvay Chemicals in September, 1991. Named Plaintiff Donald Goff was employed with Solvay Chemicals in Green River, Wyoming from February 1982 until September 15, 2005.

Plaintiffs filed this suit in response to the conversion ("the Conversion") of the Solvay America Companies Pension Plan ("Pension Plan") from a final average pay ("FAP") formula to a cash balance ("CB") formula. Before and after the Conversion, Solvay America funded 100% of the Pension Plan. No employee contributions were ever permitted or required. Plan assets are held in a trust. Solvay America bears the risk of any shortfall resulting from fluctuation in the Pension Plan's investments or actuarial gains or losses.

Until December 31, 2004, the Pension Plan was a traditional defined benefit pension plan utilizing a FAP formula. Under the terms of the FAP formula, participants were eligible to earn a single life annuity commencing at age 65, which was equal to 1.1% of the employee's highest average compensation (calculated from the highest salary earned over 60 consecutive months during the previous 120-month period) plus 0.6% of the employee's highest average compensation in excess of Social Security covered compensation times the employee's years of service, up to a maximum of 35 years.

Effective January 1, 2005, most existing Pension Plan participants were converted

from the FAP formula to a CB formula. Participants who were at least 50 years of age and had at least 10 years of credited service were afforded a one-time option to either opt into the new CB formula or to remain under the terms of the FAB formula ("grandfather" eligible). All new participants after the Conversion entered the Pension Plan under the CB formula.

The reason for the Conversion is described by Defendants as follows. In the late 1990s and in early 2000, a number a market activities exposed concerns with Solvay America's various benefit plans. Pension contributions fluctuated widely from $8 million in 1996 down to zero in 2000 and back up again later. Then, financial markets and interest rates were declining, which increased the funding costs of the Pension Plan. From 2001 to 2003, a combination of poor investment returns and low interest rates caused annual Pension Plan contributions to skyrocket from about $6.5 million to about $24.8 million. Beginning in early 2003, a review was conducted in an effort to reduce the Pension Plan's significant funding volatility caused by unforeseen market changes. Later that year, the Towers Perrin ("Towers") actuarial firm was engaged to analyze the retirement benefits provided in comparison to the benefits provided by other companies in the industry sector. Towers presented various alternatives, including the options of converting the Pension Plan to a CB formula and enhancing features of a separate savings plan ("Savings Plan"), which is a defined contribution 401(k) plan, as a means of addressing market volatility.

The law firm of Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury") was also retained to provide legal advice regarding converting the Pension Plan to a CB formula. In November 2003, Pillsbury advised that it "believe[d] that cash balance designs satisfy the current rules for tax-qualified plans and do not inherently violate age discrimination laws." Pillsbury updated its advice in 2004. Certain employees of Solvay Management Services, Inc. worked on the Conversion (these employees are referenced collectively as the "Conversion Team"). Members of the Conversion Team relied on Towers' and Pillsbury's advice in making decisions regarding the change of the Pension Plan, in formulating the plan to implement the Conversion to a CB formula, in drafting the documents effectuating the Conversion, and in drafting the communications materials related to the Conversion, including a notice describing the Pension Plan changes and their effects on participants' accounts ("204(h) Notice" or "the Notice") and the Notice documents that provided a summary of the material modifications to the Pension Plan ("SMM").

The Conversion had several effects on the Pension Plan and the Savings Plan. The Pension Plan's FAP formula was changed to a CB formula, under which existing participants received an opening account balance to which interest and pay credits were contributed on a quarterly basis. The opening account balance was calculated based on the benefit that the individual had accrued as of December 31, 2004 under the FAP formula. The opening

account balance equaled the actuarial present value of this accrued benefit calculated with a 5% discount rate and adjusted for mortality based on the Internal Revenue Service's GAR 94 table. The CB formula's quarterly pay credits increased as a participant's age and years of service increased. Interest credits under the CB formula varied yearly based on 30-year treasury bond yields.

Under the terms of the CB formula, participants would always be entitled to receive a benefit amount not less than that calculated under the FAP formula as of December 31, 2004. Participants' accounts under the CB formula were also portable. Unlike the FAP formula, if a participant chose to leave employment before age 55, the participant could take a distribution from the CB account. The CB formula also provided participants with additional survivorship benefits. Unlike the FAP formula, participants under the CB formula could designate a beneficiary other than a spouse to receive the benefits on the participant's death. The beneficiary could also receive 100% of the benefits that the participant would have received.

Because the Pension Plan changes would take effect January 1, 2005, written information regarding the changes to the Pension and Savings Plans was mailed to participants on September 17, 2004, more than 45 days before the Pension Plan changes took effect. These materials included: (1) 204(h) Notice; (2) Future Choice Brochure; and (3)

Personalized Statement of Estimated Opening Account balances. The Defendants assert that the 204(h) Notice, along with the Future Choice Brochure, also acted as an SMM.

The 204(h) Notice provided a description of the former FAP formula, including a description of the early retirement subsidy. It provided, in pertinent part, as follows:

> Under the current plan, you earn a life annuity commencing at age 65 equal to a percentage of average earnings prior to retirement for each year of service (1.1% of average earning plus 0.6% of average earnings in excess of Social Security covered compensation). Generally, this benefit cannot be taken as a lump sum. The current plan also allows you to retire as early as age 55 and receive a life annuity commencing on your early retirement date but reduced to reflect the earlier retirement. The current plan formula includes an early retirement subsidy.

The 204(h) Notice provided a chart showing examples of how the early retirement subsidy is calculated, under the heading "Early Retirement Benefits." The 204(h) Notice provided that, "[e]arly retirement factors are not considered in this calculation," and "the starting account balance does not include the value of the early retirement subsidy." It also described the relationship between the two formulas, provided that participants will never receive a lower benefit than the amount earned under the FAP formula as of December 31, 2004, and noted that the CB formula will not include early retirement subsidies, stating that, "[t]he benefit you earn after December 31, 2004 under the new [CB] formula will not include early retirement subsidies." The 204(h) Notice also described the CB formula, its structure of crediting benefits, and the calculation of participants' opening account balances.

The 204(h) Notice also informed participants of the potential for "wear away" in layman's terms. Specifically, the 204(h) Notice provided a narrative explaining that some participants' "monthly benefit may not increase at the same rate or at all in some years" and that this may be due to "changes in prevailing interest rates" or because "the staring account balance . . . does not take into account early retirement subsidies." The 204(h) Notice provided an illustrated chart that displayed the phenomenon of wear away through a hypothetical employee. After the illustrative chart, the 204(h) Notice provided:

> In this example, while the lump sum in the new plan continues to increase with pay and interest credits at each age, the actuarial equivalent monthly annuity will be no greater than the monthly annuity earned as of December 31, 2004 until this employee reaches age 61, when she will begin to earn an additional annuity benefit under the new plan formula.

The 204(h) Notice provided two additional tables that were explained to be "designed to help [participants] understand how the plan changes may affect your future benefits." The tables provided sixteen examples for participants of wide-ranging ages and years of service that listed benefits they would receive at ages 55 and 65 under the FAP and CB formulas and included a description of the underlying assumptions. The 204(h) Notice explained, "[a]lthough they are not personalized, the examples will help you understand the potential impact of the formula changes on your plan benefits."

Like the 204(h) Notice, the Future Choice Brochure was distributed to all participants.

In combination with the 204(h) Notice, it served as an SMM. It discussed the new terms of the Pension and Savings Plan and included examples of how the new terms credit participants with benefits. It also described the CB formula, its structure of crediting benefits, and the calculation of participants' opening account balances. The brochure included a section with frequently asked questions and a section that informed participants of the upcoming on-site meetings and the rollout of the on-line benefits and investment tools. The Future Choice Brochure stated that individuals that are "age 50 or over, with at least 10 years of credited plan service as of January 1, 2005" would have "a one-time option to remain in the current pension plan and 401(k) Savings Plan or move into" the CB Plan. For individuals with a choice, "a Decision Guide that includes more information" about their options was included in the back pocket of the Future Choice Brochure.

Each person automatically transferring into the CB Plan also received a Personalized Statement of Estimated Opening Account Balance. This statement provided participants with an estimate of their opening balance under the CB formula and a description of how it was calculated, including a description of underlying assumptions.

The Pension Plan and Savings Plan changes were also presented to participants in live, on-site meetings in September and October 2004, using a standardized PowerPoint presentation. In the meetings, the material terms of both the former FAP formula and the CB

formula were presented. The presentations of those who spoke at the on-site meetings were consistent with the PowerPoint slides shown to participants.

On January 1, 2005, the changes to the Pension Plan and Savings Plan became effective. Of the 468 participants who were 50 years of age or older with at least 10 years of service who were given the option to choose between plans, 118 chose to switch to the CB formula. All other existing eligible employees, and those hired after January 1, 2005, began participating in the new CB formula.

On March 16, 2005, Goff (age 49 at that time) submitted an intake questionnaire to the Wyoming Labor Standards Department of Employment ("Labor Standards") alleging that the Conversion violated the ADEA because he "lost 2/3 of [his] pension" while employees who were over the age of 50 were allowed to stay under the FAP formula. Likewise, Jensen (age 43 at that time) submitted an intake questionnaire alleging that he "was not old enough to keep [his] old plan." On March 28, 2005, Labor Standards informed both Goff and Jensen individually that each charge "does not establish the basis for a claim of discrimination" because ADEA "does not prohibit an employer from favoring an older employee over a younger one."

On July 21, 2005, Goff and Jensen filed new charges of discrimination with the Equal Employment Opportunity Commission ("EEOC"), "on . . . behalf of all other present and

former employees of Solvay America, Inc., and its subsidiary, Solvay Chemicals, Inc., who were ages 40 through 49 on January 1, 2005." Without waiting for EEOC's determination, Goff and Jensen filed this suit, as a result, the EEOC closed the charges.

On March 6, 2006, Plaintiffs' counsel submitted a letter to Solvay America that "concern[ed] the retirement benefits that Jensen and others are due under [ERISA]" and listed allegations regarding the claims presently before the Court. In the letter, Jensen's counsel asserted claims similar to those alleged in the Complaint.

Solvay America referred the letter to the Pension Plan Administrative Committee ("PPAC"), which contacted Pillsbury to obtain a legal analysis of Jensen's claims. On April 10, 2006, the PPAC sent a letter to Plaintiffs' counsel stating that it was treating the March 7, 2006 letter as claims for benefits under the Pension Plan. Pillsbury provided the PPAC with a memorandum providing legal analysis of the issues raised by Jensen's letter. After its detailed analysis of each of Jensen's claims, Pillsbury concluded in its memorandum that "the arguments in Jensen's Administrative Claim letter do not provide a sound legal basis for relief." Towers also provided advice regarding these issues.

On August 31, 2006, the PPAC sent Plaintiffs' counsel a letter denying Mr. Jensen's claim. This letter was based on the advice of Pillsbury and Towers concerning the legality of the conversion to a CB formula. Plaintiffs never appealed the initial adverse claim

determination.

Plaintiffs bring suit against Defendants alleging violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, and the Age Discrimination in Employment Act of 1964 ("ADEA"), 29 U.S.C. §§ 621-634, resulting from the Conversion. Essentially, Plaintiffs assert that such plan conversions are inherently age discriminatory and that they did not receive adequate information about the effects of the Conversion.

STANDARD OF REVIEW

Summary judgment is proper when there is no genuine issue of material fact to be resolved at trial. Fed. R. Civ. P. 56(c); *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). Thus, a district court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Nelson v. Geringer*, 295 F.3d 1082, 1086 (10th Cir. 2002). "An issue of material fact is genuine where a reasonable jury could return a verdict for the party opposing summary judgment." *Seymore v. Shawver & Sons, Inc.*, 111 F.3d 794, 797 (10th Cir. 1997).

In applying these standards, the district court will view the evidence in the light most

favorable to the party opposing summary judgment. *Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir. 1996). The movant bears the initial burden of demonstrating the absence of evidence to support the non-moving party's claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). When the non-moving party bears the burden of proof at trial, the burden then shifts to it to demonstrate the existence of an essential element of its case. *Id.* To carry this burden, the non-moving party must go beyond the pleadings and designate specific facts to show there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *Ford v. West*, 222 F.3d 767, 774 (10th Cir. 2000). The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient to create a "genuine" issue of disputed fact. *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir. 1997).

MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT ON CLAIM V

In their Motion for Summary Judgment, Defendants ask the Court to dismiss with prejudice Plaintiffs' class and collective action claims in Plaintiffs' Complaint numbered One through Six, which are brought under ERISA and the ADEA. Defendants assert that (1) The Conversion does not unlawfully discriminate based on age; (2) Plaintiffs' ADEA § 4(a) claim fails as a matter of law; (3) Plaintiffs' anti-backloading claim is unsustainable; (4) Plaintiffs' forfeiture claim also fails; (5) Plaintiffs' 204(h) Notice claim fails as a matter of law; (6)

Plaintiffs' Sixth Claim for Relief similarly fails; and (7) Plaintiffs are not entitled to liquidated damages.

Plaintiffs agree with the Defendants' general contention that an employer is "free" to decide whether to offer employee benefits. Plaintiffs that once on employer offers a benefit, it is held to the rules that it has adopted and disclosed to employees and to certain minimum standards established by ERISA to protect the anticipated retirement benefits and improve the equitable character of such plans. Plaintiffs ask the Court to deny Defendants' request for summary judgment because they assert material issues of fact remain for the finder of fact in this case.

<u>(1) Plaintiffs' Fourth Claim for Relief</u>

Defendants' Arguments

Defendants dispute Plaintiffs' Fourth Claim for Relief, that the Conversion was inherently age discriminatory in violation of ERISA § 204(b)(1)(H) and its mirror provision, ADEA § (4)(i). They point out that every appeals court addressing this issue has rejected Plaintiffs' theory, holding that cash balance conversions similar to this one are not inherently age discriminatory and do not violate ERISA § 204(b)(1)(H) as a matter of law in advance of trial.

Defendants contend that under ERISA, a defined benefit plan is age discriminatory "if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." ERISA § 204(b)(1)(H)(i), 29 U.S.C. § 1054(b)(1)(H)(i). Defendants take issue with Plaintiffs' allegation that the Conversion reduced the rate of participants' "benefit accrual" because of age, and thereby there is a violation of ERISA. (Compl. ¶¶ 57-62). Plaintiffs argue that "[t]he rate of benefit accrual in a defined benefit plan is determined by the increase in the 'accrued benefit.'" (Compl. ¶ 57). Defendants take issue with Plaintiffs' interpretation that the term "benefit accrual" has the same meaning as "accrued benefit." Defendants ask the Court to reject Plaintiffs' definition of "rate of benefit accrual" and conclude that it refers to the benefit "inputs" the Pension Plan credits to participants' accounts. In doing such, the Defendants assert will lead the Court to conclude that Plaintiffs cannot raise a fact issue that the CB formula is age discriminatory because under the CB formula because the Pension Plan allots the same interest credit to all participants regardless of age. Defendants further assert that under the CB plan, "pay credits" are allotted to participants that actually increase with age and years of service. Therefore, Defendants contend that the CB formula's "rate of benefit accrual" properly defined, is not only non-discriminatory, but actually favors older, longer-serviced employees.

Defendants next argue that ERISA § 204(b)(1)(H) does not prohibit the effects of the time value of money. They point out that because a younger person has more years until retirement, the younger employee will have more time to accrue pay credits and interest in his or her account; therefore, the concept of time value of money is not a form of discrimination.

Defendants argue that numerous courts have determined that other cash balance conversions comply with ERISA notwithstanding the presence of wear away, freezes in participants' benefits, and the use of a "greater of" final average pay or cash balance formula.

In further support of their argument, Defendants assert that Plaintiffs' mirror ADEA § 4(i) claim fails as a matter of law for the same reasons as their ERISA § 204(b)(1)(H)(i) claim. Defendants argue that the language in ADEA § 4(i) prohibiting "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age" is nearly and purposefully identical to language in ERISA § 204(b)(1)(h)(i). Defendants then make the same arguments as above regarding the rate of benefit accrual and that the CB formula favors older, longer-serviced employees. Therefore, Defendants contend that because Plaintiffs cannot recover under ERISA § 204(b)(1)(H)(i), Plaintiffs cannot recover under ADEA § 4(i).

Plaintiffs' Arguments

Plaintiffs contend that Solvay is not entitled to summary judgment on Plaintiffs' Fourth Claim for two reasons: (1) Plaintiffs' claim of age discrimination in the rate of benefit accrual is based on the particular facts and circumstances of Solvay's conversion and (2) Solvay's arguments on ADEA § 4(i) are misguided for the same reasons as are its arguments on ERISA § 204(b)(1)(H).

First, Plaintiffs argue that their claim of age discrimination in the rate of benefit accrual is based on the particular facts and circumstances of Solvay's conversion. Plaintiffs assert that Defendants mischaracterize their Complaint by stating that the "gravamen of Plaintiffs' Complaint lies in their allegation that the Conversion was inherently age discriminatory;" when in reality, Plaintiffs state that their Fourth Claim is based on the particular characteristics of Solvay's plan, not the inherent characteristics of all such plans. Plaintiffs contend that their experts have shown that under Solvay's transition design, older employees are offered much lower future monthly retirement benefits, in large part because of the designed-in periods of "wear away" in which they are not earning any additional monthly benefits at all.

Plaintiffs assert that they maintain that Congress has consistently used the term "benefit accrual" in ERISA to refer to the change in the accrued benefit. They point out that

the Treasury Department has adopted this position in applying the anti-backloading rules in ERISA §§ 204(b)(1) & (h).

Plaintiffs cite two problems with Defendants' arguments that the differences are due solely to the "time value of money." First, Plaintiffs contend that recent events show the historical truth that money does not have a time value, not only can stocks and bonds lose money over time, but even savings accounts do not necessarily increase. Plaintiffs further contend that in this instance, the credits that Solvay's cash balance formula offers are merely bookkeeping notations that Solvay reserves the right to alter. Plaintiffs contend that such credits do not represent deposits to any employee's actual account and cannot be compared to the "time value of money."

Second, Plaintiffs argue that none of the appellate decisions upon which Defendants rely has decided that a plan designated to produce wear away periods for older employees is exempt from the prohibition against discrimination based on age, or is subject to a test that can be satisfied with fictitious cash balance "inputs." Plaintiffs contend that they have offered evidence that older participants have longer wear away periods under the plan through the submission of actuarial and statistical expert reports and will further offer such evidence at trial. As a result, Defendants assert there are genuine issues of material facts for trial regarding their Fourth Claim for Relief.

Analysis

The Court will begin by laying out the legal background surrounding the issues before it. "ERISA does not mandate that employers provide any particular benefits." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91 (1983). "[E]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate" pension and welfare plans. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). "An employer is free to move from one legal plan to another legal plan, provided that it does not diminish vested interests." *Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006).

Under ERISA, there are two types of pension plans, defined contribution plans and defined benefit plans. *Register v. PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 61 (3d Cir. 2007). A defined contribution plan is "a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses." 29 U.S.C. § 1002(34). Although both "employees and employers may contribute to the plan . . the employer's contribution is fixed and the employees receives whatever level of benefits the amount contributed on his behalf will provide." *Hughes Aircraft Co. V. Jacobson*, 525 U.S. 432 (1999). "The employee bears the investment risks and the employer does not guarantee a retirement benefit to the employee." *Register*, 477 F.3d at 61-62.

In a defined benefit plan, participants "have no claim to any particular asset that composes a part of the plan's general asset pool, but, instead, receive an annuity based on the retiree's earnings history, usually the most recent or highest paid years, and the number of completed years of service to the company." *Id.* The employer bears the investment risk under a defined benefit plan. *Id.*

A cash balance plan is a defined benefit plan by statutory definition. *Drutis v. Rand McNally & Co.*, 499 F.3d 608, 612 (6th Cir. 2007). "Nevertheless, a cash balance plan differs from a traditional defined benefit plan in that traditional defined benefit plans define an employee's benefit as a series of monthly payments to begin at retirement, but cash balance plans define the benefit in terms of a stated account balance, albeit a "hypothetical" account. Thus cash balance plans are like defined contribution plans in that both define the employee's benefit in terms of a stated balance." *Register*, 477 F.3d at 62. For this reason, cash balance are described as "hybrid," "they create a benefit structure that simulates that of defined contribution plans, but employers do not deposit funds in actual investment accounts, and employers, not employees, bear the market risks." *Hirt v. Equitable Ret. Plan*, 533 F.3d 102, 105 (2d Cir. 2008). Further, employers credit individual participants' CB accounts with bookkeeping notations. *Register*, 477 F.3d at 62. CB accounts are, thus, known as "hypothetical" accounts, notwithstanding that the notation represents a promise to pay a real

benefit.

The Court now turns to the Defendants' request for summary judgment on Plaintiffs' Fourth Claim for Relief. The Court agrees with Defendants in that the gravamen of Plaintiffs' Complaint lies in their allegation that the Conversion was inherently age discriminatory. For that reason, the Court analyzes Plaintiffs' Fourth Claim for Relief first. Plaintiffs' Fourth claim for relief fails for the following reasons.

Under ERISA, a defined benefit plan is age discriminatory "if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age. ERISA § 204(b)(1)(H)(i). Plaintiffs allege that the Conversion reduced the rate of participants' "benefit accrual" because of age, and thereby violates ERISA § 204(b)(1)(H). (Comp. ¶¶ 57-62). Plaintiffs predicate their argument on the notion that "[t]he rate of benefit accrual in a defined benefit plan is determined by the increase in the 'accrued benefit'." (Compl. ¶ 57). In essence, Plaintiffs assert that the term "benefit accrual" has the same meaning as "accrued benefit." This is further supported by the testimony of Plaintiffs' actuarial expert witness, Claude Poulin, who testified that "benefit accrual" is assessed by a consideration of the Pension Plan's "outputs" to participants, rather than the "inputs" credited to participants' hypothetical accounts. (Defs.' Ex. 28, Poulin Dep. Tr. 67:7-10; 68:10-19).

Although the Tenth Circuit has not addressed Plaintiffs' argument, it has been rejected as a matter of law by all five federal appellate courts that have addressed it. *Hurlic v. S. Cal. Gas Co.*, 539 F.3d 1024, 1029-32 (9th Cir. 2008); *Hirt*, 533 F.3d at 107; *Drutis*, 499 F.3d 614; *Register*, 477 F.3d at 68-69; *Cooper*, 457 F.3d at 639. This line of cases holds that cash balance plans, such as the one at the heart of the case before this Court, do not violate ERISA's age discrimination provision because they do not discriminate against older workers. The proper reading of ERISA §204(b)(1)(H)(i) is to look at the "inputs" that an employer makes to a cash balance plan, rather than the "outputs" employees will receive at retirement in determining whether the "benefit accrual" is age discriminatory under ERISA. Further, such a definition for "benefit accrual" does not carry the same meaning as "accrued benefit," which refers to the "outputs" after compounding. Specially, this Court finds that the CB plan at issue in this case does not violate ERISA's age discrimination provision because the rate of benefit accruals does not decline as an employee's age increases. Plaintiffs have put forth no evidence that the CB plan is discriminatory in such a way. In fact, the CB formula actually favors longer-service employees because it allots "pay credits" to participants that increase with age and years of service. This Court follows that majority of the circuits which have looked at this issue and finds that the CB plan at issue does not reduce the rate of an employee's benefit accrual because of age and, therefore, does not violate ERISA §

204(b)(1)(H)(i).

Plaintiffs also incorrectly treat the time value of money as age discrimination in alleging that "[f]uture interest credits under a cash balance pension plan are greater for younger participants *due to the effect of compounding hypothetical interest credits until retirement*. As a result, younger employees accrue more retirement benefits from a particular year's hypothetical pay credit than older employees." (Compl. ¶ 58). This allegation has been uniformly rejected as the basis for a claim under ERISA § 204(b)(1)(H). "Nothing in the language or background of § 204(b)(1)(H)(i) suggests that Congress set out to legislate against the fact that younger workers have (statistically) more time left before retirement, and thus a greater opportunity to earn interest on each year's retirement savings." *Cooper*, 457 F.3d 639. "Treating the time value of money as a form of discrimination is not sensible." *Id.* Additionally, "the 'rate of benefit accrual' refers to the employer's contribution to a plan, and therefore any difference in output as a result of time and compound interest does not violate § 204(b)(1)(H)(i)." *Drutis*, 499 F.3d at 614; *see also Hirt*, 533 F.3d at 108 (holding "[t]he fact that the ultimate benefit might grow to be larger for younger couples – who have more time until normal retirement age than their older counterparts – would not be relevant to the comparison of accrual rates"); *see also Register*, 477 F.3d at 70 (holding "[t]he circumstance that the same contribution in the form of interest credits may result in a more valuable annuity

for a younger employee is not discrimination in whole or in part based on age; rather it is the completely appropriate consequence of the application of an age-neutral principle to an accumulating amount of the time value of money"). The Court therefore holds that there has been no violation of ERISA § 204(b)(1)(H) for the reason that the ERISA statute does not protect against allegations of compound interest or the time value of money. In the instant case, under the Pension Plan, the pay credits and interest credits are applied to each employee's hypothetical cash balance account in an age neutral fashion.

ADEA § 4(i) disallows disparate treatment of employees by employers because of age. Plaintiffs' argument is that the implementation of the CB formula resulted in a "wear away" effect of the plan benefit, which resulted in disparate treatment of class members. "Wear away" is a phenomenon unique to cash balance conversions in which a participant does not earn additional benefits until his hypothetical account balance catches up to or "wears away" the frozen accrued benefit under the old plan. Defendants argue that ADEA § 4(i), like ERISA § 204(b)(1)(H), bars discrimination with regard to the inputs to the benefit formula, not the output of the plan.

The Court restates that ERISA does not provide any relief for Plaintiffs on their claim that the CB plan discriminated against older employees. Moreover, because Plaintiffs cannot recover on this claim under the applicable ERISA provisions, it follows that Plaintiffs cannot

assert a claim under the mirror ADEA provisions.

The Court finds that ADEA § 4(i) is a "mirror" provision to ERISA § 204(b)(1)(H)(i). ADEA § 4(i) prohibits "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age." 29 U.S.C. § 623(i). "In enacting these amendments, Congress intended that [ADEA § 4(i) and ERISA § 204(b)(1)(H)(i)] be interpreted in a consistent manner to have an identical meaning and to prevent any differences in language to create an inference that a difference exists between them." *Rosenblatt v. United Way of Greater Houston*, 590 F. Supp. 2d 863, 872 (S.D. Tex. Dec. 23, 2008) (citing the 1986 Ominbus Budget Reconciliation Act, Pub. L. No. 99-509, 1986 U.S.C.C.A.N. (100 Stat.) 3868, 4023-24); *see also Hurlic*, 539 F.3d at 1036-37. Moreover, the phrase "rate of an employee's benefit accrual," as is used in ADEA § 4(i), like in ERISA § 204(b)(1)(H), refers to the inputs to the plan, rather than the outputs. Because Plaintiffs cannot recover under ERISA § 204(b)(1)(H)(i), they are likewise not entitled to relief under ADEA § 4(i). *Id.* A contrary interpretation would render ERISA § 204(b)(1)(H)(i) meaningless as Plaintiffs would be able to seek relief under ADEA § 4(i) despite their similarity in construction. *Id.* Accordingly, Plaintiffs have failed to state a disparate treatment claim in violation of ADEA § 4(i).

The Court finds that even if Plaintiffs' ADEA § 4(i) claim is considered separately

from their ERISA § 204(b)(1)(H)(i) claim, the structure and terms of the Pension Plan establish that the Pension Plan does not violate ADEA's age discrimination rules. Under the terms of the CB formula, an older employee who was similarly situated to a younger employee in terms of salary and years of service, would always have a higher opening account balance. The older employee would always accrue pay credits at an equal or higher rate than the younger employee, such that the CB formula does not discriminate based on age.

In sum, Plaintiffs have failed to raise a genuine issue of material fact as to their Fourth Claim for Relief under either ERISA § 204(b)(1)(H)(i) or ADEA § 4(i). Such claims fail as a matter of law. The Court therefore enters judgment in the Defendants' favor as a matter of law on Plaintiffs' Fourth Claim for Relief.

(2) Plaintiffs' First Claim for Relief

Defendants' Arguments

Defendants ask the Court to grant summary judgment in their favor on Plaintiffs' First Claim for Relief, which alleges that the Conversion to the CB formula froze retirement benefits and created periods of "wear away" that were age discriminatory in violation of ADEA § 4(a), 29 U.S.C. § 626(a). Defendants describe "wear away" as a phenomenon often associated with conversions to a CB formula where if a plan promises some or all of the

participants a benefit equal to the greater of their accrued benefit under the prior plan or the amount they have accumulated in their CB account, and if their opening account balance under the CB formula is set at an amount less than their accrued age 65 annuity benefit under the prior formula, they will accrue no increasing age 65 annuity benefits for a period of time while their accrued benefit under the CB formula "catches up" with their accrued benefit under the prior formula. Defendants assert that despite wear away's effect on the age 65 annuity accrued benefit (the output), the balances in the participants' CB accounts continues to grow each year because of the continuing pay credit and interest credit inputs into the CB accounts.

Defendants point out that courts that have considered age discrimination claims related to wear away, as well as claims that cash balance plans are age discriminatory under ADEA § 4(a), have largely dismissed them as a matter of law in advance of trial.

Defendants argue that ADEA § 4(i) precludes Plaintiffs' claim under § 4(a). They point out that ADEA § 4(i)(4) provides that "[c]ompliance with the requirements of [ADEA § 4(i)] with respect to an employee pension benefit plan shall constitute compliance with the requirements of [ADEA § 4] relating to benefit accrual under such plan." 29 U.S.C. § 623(I)(4). They further contend that courts analyzing this provision have held that allegations involving "wear away" periods due to the conversion to a CB formula must be brought under

§ 4(i), not the generic anti-discrimination provision of ADEA § 4(a), such that compliance with ADEA 4(i) constitutes compliance with all of ADEA § 4. Defendants further contend that if Plaintiffs were allowed to maintain their putative § 4(a) claim, it would render § 4(i) superfluous and entitle Plaintiffs to relief beyond that legally intended.

Defendants point out that Plaintiffs' ADEA § 4(a) allegations fall squarely within ADEA § 4(i) because Plaintiffs allege, "Solvay America set the Initial Account Balances for older, longer-service workers below the value of their early retirement benefits and applied the aforementioned preretirement mortality discount," . . . "[i]t can take years after December 31, 2004 for the cash balance accounts of older, longer-service employees to move ahead of the value of the benefits earned before the changes." (Compl. ¶ 42). Defendants ask the Court to dismiss Plaintiffs' § 4(a) claim because the wear away provision of the Plan relates to benefit accrual, thus the wear away provision need only satisfy the requirements of ADEA § 4(i). Defendants make other persuasive alternative arguments as to why this Court should grant them summary judgment on their ADEA§ 4(a) claim, which the Court finds are not necessary to consider.

Plaintiffs' Arguments

Plaintiffs contend that summary judgement on their First Claim for Relief under ADEA § 4(a) should not be granted. They argue that ADEA § 4(i) does not preclude the application

of the prohibition on age discrimination in ADEA § 4(a). As a basis for their argument, Plaintiffs contend that ADEA § 4(i) places early retirement benefits outside of its scope. They assert that by contracts, ADEA § 4(a) prohibits age discrimination in all employee benefits, including early retirement benefits, without limitation. Plaintiffs cite to cases, which they contend lend support to their argument. Plaintiffs also attempt to save their claim by making other arguments, which the Court need not address.

Analysis

ADEA § 4(a) provides the basis for Plaintiffs' disparate impact claim. ADEA § 4 provides:

> (a) It shall be unlawful for an employer –
>
> > (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 . . .

29 U.S.C. § 623(a)(2). Plaintiffs' First Claim for Relief asserts a violation of the ADEA 4(a) (disparate impact) by stating that the implementation of the Conversion to a CB formula resulted in "wear away", which in turn meant that long-term employees had benefit accruals frozen for several years. (Compl. ¶¶ 38-48).

Plaintiffs' claim for wear away cannot be brought under ADEA § 4(a) because it relates to benefit accrual and is therefore precluded by ADEA § 4(i)(4). ADEA § 4(i)(4)

provides that "[c]ompliance with the requirements of [ADEA § 4(i)] with regard to an employee pension benefit plan shall constitute compliance with the requirements of [ADEA § 4] relating to benefit accrual under such plan." 29 U.S.C. § 623(i)(4). Therefore, allegations involving "wear away" periods due to conversion to a CB formula "must be brought under ADEA § 4(i), not the generic anti-discrimination provision of ADEA § 4(a)." *Hurlic*, 539 F.3d at 1037; *see also Northwest Airlines, Inc.*, 594 F. Supp. 2d 1075, 1088 (D. Minn. 2009). Thus, "the wear-away provision need satisfy only the requirements of ADEA § 4(i)." *Hurlic*, 539 F.3d at 1037.

Plaintiffs' ADEA § 4(a) allegations fall squarely within § 4(i). Plaintiffs allege that "because Solvay America set the Initial Account Balances for older, longer-service workers below the value of their early retirement benefits and applied the aforementioned preretirement mortality discount," "[i]t can take years after December 31, 2004 for the cash balance accounts of older, longer-service employees to move ahead of the value of the benefits earned before the changes." (Compl. ¶ 42). This allegation is virtually identical to that rejected in *Hurlic*, where:

> Plaintiffs' wear-away claim protests the fact that under the "greater of" provision, actual benefits payable (as compared to the hypothetical account balance) do not increase until the amount payable under the cash balance formula exceeds that payable under the pre-conversion formula. This claim thus relates to benefit accrual because it challenges the fact that benefits do not increase for some period of time.

539 F.3d at 1037.

The Court adopts the logic employed in *Hurlic* and finds that Plaintiffs' claims for wear away relates to benefit accrual under the plan. Plaintiffs' claim therefore must be brought under ADEA § 4(i), not ADEA § 4(a). However, as previously established, Plaintiffs' claims fail under § 4(i). Therefore, Plaintiffs' First Claim for Relief fails as a matter of law. The Court therefore enters judgment in the Defendants' favor as a matter of law on Plaintiffs' First Claim for Relief.

(3) Plaintiffs' Second Claim for Relief

Defendants' Arguments

Defendants point out that Plaintiffs allege in their Second Claim for Relief that the CB formula's rate of crediting benefits to participants violates the 133 1/3% anti-backloading rules in violation of ERISA § 204(b)(1)(B). ERISA § 204(b)(1)(B) requires that the value of the benefit accrued in any year may not exceed the value of a benefit accrued in any previous year by more than 33%. Defendants contend that Courts addressing similar anti-backloading claims have dismissed them as a matter of law, thus this Court should similarly dismiss such a claim in this case.

Defendants claim that Plaintiffs' theory is that "[w]hen a plan has two or more benefit

formulas, e.g., a frozen benefit formula and an on-going benefit formula, 'the accrued benefits under all such formulas must be aggregated in order to determine whether or not the accrued benefits under the plan for participants satisfy one of the alternative [accrual] methods.' 26 C.F.R. 1.411(b)-1(a)." (Compl. ¶ 51). Defendants assert that such a theory is flawed because the regulation invoked by Plaintiffs does not apply in cases of plan amendments. Rather, the governing regulation states, "any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years." 26 C.F.R. 1.411(b)-1(b)(2)(ii)(A). Defendants contend that once there is an amendment to the prior plan, only the new plan formula is relevant when ascertaining if the plan satisfies the 133 1/3% test. So, looking at the CB formula, Defendants argue that participants accrue benefits steadily, on a quarterly basis, throughout their career. Defendants argue that had the CB formula been in effect for all of the other Plan years, at no time will the value of the benefit accrued in any year exceed the value of a benefit accrued in any previous year by more than 33%.

Plaintiffs' Arguments

Plaintiffs assert that summary judgment should not be granted to Solvay on Plaintiffs' anti-backloading claim because genuine issues of material fact exist. First, Plaintiffs assert that the pay and interest credits are not actually "payable" at either normal retirement age or early retirement age as ERISA § 204(b)(1)(B) requires. Second, Plaintiffs argue that Solvay

and its actuarial expert admit that there were no benefit accruals for many participants in the "age 65 annuity benefit" during the first year after the conversion because of the pre-retirement mortality discount that Solvay applied in establishing opening account balances. Third, Plaintiffs contend that the variable interest crediting rates used by the Defendants can lead to further violations of the anti-backloading rules.

Analysis

Backloading is "a term of art describing a plan's use of a benefit accrual formula that postpones the bulk of an employee's accrual to [the employee's] later years of service." *In re Citigroup Pension Plan ERISA Litig.*, 470 F. Supp. 2d 323, 333 (S.D.N.Y. 2006). Backloading postpones the time which employers must make contributions to the employee's account, but also provides an incentive for the employee to stay with the company until retirement to reap potentially large retirement benefits. H.R. Rep. No. 93-807 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4670, 4688. Because cash balance plans calculate benefits on the basis of career pay history, the 133 1/3% rule applies to this type of plan. *See* U.S.C. § 1054(b)(1)(B). A cash balance plan satisfies the requirements of the 133 1/3% rule if:

> under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan

year.

29 U.S.C. § 1054(b)(1)(B). In other words, as explained by the Third Circuit, "the value of the benefit accrued in any year may not exceed the value of a benefit accrued in any previous year by more than 33%." *Register*, 477 F.3d at 71.

29 U.S.C. § 1054(b)(1)(B)(i) states that "any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years." Thus, once there is an amendment to the prior plan, only the new plan formula is relevant for a backloading analysis, and "we must assume that, for purposes of applying the 133-1/3 percent rule, there was never a prior plan." *See Hurlic*, 539 F.3d at 1035. Since the amended plan is therefore treated as being in effect for all other plan years, there can be no violation of the anti-backloading provisions through reference to the terms of a prior plan. *See, e.g., Finley v. Dun & Bradstreet Corp.*, 471 F. Supp. 2d 485, 494 (D.N.J. 2007) ("Plaintiff must calculate the entire accrual history as if the [current cash balance plan terms] had been in effect for every year, and thus that the [prior plan terms] had never been in effect."); *Allen v. Honeywell Ret. Earnings Plan*, 382 F. Supp. 2d 1139, 1160 (D. Ariz. 2005) ("[O]ne does not compare the new formula with the old formula; rather, the backloading question must be answered by considering the new formula on a stand-alone basis."); *Wheeler v. Pension Value Plan for Employees of the Boeing Co.*, No. 06-cv-500-DRH, 2007 WL 2608875, at *11-12 (S.D. Ill.

Sept. 6, 2007).

Plaintiffs have failed to establish any basis on which their Second Claim for Relief should survive in light of *Register* and its progeny, including *Hurlic*. The allegations contained within Plaintiffs' Complaint include the assertion that 26 C.F.R. § 1.411(b)-1(a) allows for aggregation of pre-amendment and CB formulas when determining anti-backloading rules. (Compl. ¶ 51). The Court rejects such premise and finds that Plaintiffs' Second Claim for Relief fails as a matter of law. The Court notes that this line of cases has developed since Plaintiffs' filed their Complaint in this matter. Plaintiffs' attempts to skirt the newly developed case law and ignore controlling law requiring that "[a]ny amendment to that plan which is in effect for the current plan year shall be treated as if it were in effect for all other plan years." 26 C.F.R. § 1.411(b)-1(b)(2)(ii)(A). "Thus, once there is an amendment to the prior plan, only the new plan formula is relevant when ascertaining if the plan satisfies the 133 1/3% test." *Register*, 477 F.3d at 72. Under the CB formula in the instant case, participants accrue benefits steadily, on a quarterly basis, throughout their career. (Defs.' Ex. 3, Pension Plan ¶ 12.2(c) & (d)). That participants may experience wear away because of pre-mortality discounts or other discounts in calculating their opening account balances is irrelevant. Plaintiffs also failed to establish why IRS Revenue Ruling 2008-7 is relevant for the Court's consideration of ERISA anti-backloading rules, where this argument has been

squarely rejected in other cash balance decisions. *See Hurlic*, 539 F.3d at 134; *Tomlinson*, 27 2007 WL 891378 (D.Colo. Mar., 2007).

Thus, the Court finds that Plaintiffs have failed to raise a genuine issue of material fact regarding the 133 1/3% anti-backloading rule. Therefore, Plaintiffs' Second Claim for Relief fails as a matter of law. The Court therefore enters judgment in the Defendants' favor as a matter of law on Plaintiffs' Second Claim for Relief.

<u>(4) Plaintiffs' Third Claim for Relief</u>

Defendants' Arguments

Defendants dispute Plaintiffs' allegation in their Third Claim for Relief that the CB formula violates ERISA § 203(a), because it does not include, and therefore requires participants to forfeit, early retirement subsidies that were available under the FAP formula. Again, Defendants point to courts which have dismissed such claims as a matter of law in asking the Court to find that Plaintiffs' claim here likewise fails because participants do not forfeit any accrued benefits. Specifically, Defendants assert that the CB plan's provision granting participants the "greater of" the benefits under the previous plan or the CB formula does not inherently violate ERISA's non-forfeiture provisions because with such a "greater of" provision, participants have an unconditional right to claim the maximum benefits under

the plan. Defendants assert that participants do not forfeit any accrued benefits because they have a right to the CB credits unless and until those credits surpass their FAP formula minimum benefits. Moreover, Defendants assert that the benefits that have yet to accrue, or benefits which are under the new Plan and early retirement subsidies, cannot be forfeited.

Plaintiffs' Arguments

Plaintiffs contend that lump sum distributions of the cash balance accounts while participants are under wear away cause part of the participants' accrued benefits to be lost or "forfeited" in violation of ERISA § 203(a). Plaintiffs contend that when a participant is entitled to an immediate or a deferred monthly benefit at age 55 or over, Solvay offers a lump sum distribution, even if it has a lesser value than the participants' monthly retirement benefit. Plaintiffs argue that they do not have an unconditional right to claim the maximum benefits available under the plan, as Defendants assert. Plaintiffs also dispute Defendants' contention that participants cannot forfeit any accrued benefits because they do not have a right to the CB credits unless and until those credits surpass their FAP formula frozen benefits. Instead, Plaintiffs argue that Defendants have been inviting participants to exercise their right to take a lump sum distribution of the cash balance credits while they are still in a period of wear away. Defendants also dispute Defendants' assertion that any early retirement subsidies had not yet accrued. Instead, Plaintiffs argue that since 1984, § 204(g)(2) has required that early

retirement benefits be treated as part of the accrued benefit that must be protected against loss or forfeiture by plan amendment. Plaintiffs' argue that Defendants have been eliminating or reducing participants' early retirement benefits by removing all mention of them from the Plan document and its disclosures and offering less valuable lump sum distributions of the cash balance accounts in lieu of those benefits.

Analysis

Plaintiffs' Third Claim for Relief alleges that the Defendants has forfeited part of participants' accrued benefits by making lump sum distributions with lesser actuarial value while participants are still under the periods of wear away in violation of ERISA § 203(a). 29 U.S.C. § 1053(a). More concisely, Plaintiffs allege that the CB formula violates ERISA § 203(a) because it does not include, and therefore requires participants to forfeit, early retirement subsidies that were available under the FAP formula.

ERISA § 203(a) requires that "[e]ach pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age." 29 U.S.C. § 1053(a). The Supreme Court held that "the statutory definition of 'non-forfeitable' assures that an employee's claim to the protected benefit is legally enforceable, but it does not guarantee a particular amount or a method for calculating the benefit." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). "It is the claim to the

benefit, rather than the benefit itself that must be 'unconditional' and 'legally enforceable' against the plan." *Id.*

Under the terms of the Pension Plan, qualifying participants are always entitled to the greater of their December 31, 2004 FAP benefits or their CB benefits. Because the terms of the Pension Plan state that participants' "[a]ccrued [b]enefit shall not be less than the [a]ccrued [b]enefit defined in Section 1.1 as of December 31, 2004 . . ." participants never forfeit any benefits that were accrued under the terms of the pre-Conversion Pension Plan. (Defs.' Ex. 3, Pension Plan ¶ 12.2). The Court finds that the terms of the Amended Pension Plan do not grant participants a claim to the CB formula benefits during any time in which those benefits are less than the participant's December 31, 2004 FAP benefits. *Id.* Therefore, participants do not forfeit any CB benefits while those benefits are less than the participant's minimum FAP benefits. "Section 203(a) gives [participants] a non-forfeitable claim to [their] accrued benefit, but the balance of the hypothetical cash account does not become part of [their] accrued benefit until it surpasses the value of the frozen Traditional Plan benefit. Thus, the plan does not require a forfeiture of an accrued benefit, nor is the receipt of accrued benefits conditional." *Richards v. Fleetboston Fin. Corp.*, 427 F. Supp. 2d 150, 170; *see also Tomlinson,* 2007 WL 891378 (rejecting plaintiffs' forfeiture claim that "the right to receipt of cash balance accruals is conditioned on foregoing receipt of previously-earned benefits in

annuity form").

Plaintiffs fail to establish how the Pension Plan's offer of benefits in the form of a lump sum changes the analysis. Participants are always entitled to at least the annuity benefit equal to their December 31, 2004 FAP benefits because of the Pension Plan's "greater of" provision. (Defs.' Ex. 3, Pension Plan ¶ 12.2). The additional choice of taking a lump sum actuarial equivalent does not force participants to forfeit their protected benefits. Likewise, the Pension Plan's greater of provision prevents a forfeiture even though the participants' opening account balances do not include early retirement subsidies. (Compl. ¶¶ 54-55).

Moreover, because any early retirement subsidies under the FAP formula had not yet accrued, they, therefore, could not be forfeited. "Benefits already earned under an old plan may not be taken away, but benefits expected but not yet accrued are not similarly protected." *Campbell v. BankBoston, N.A.*, 327 F.3d 1, 8 (1st Cir. 2003); *see also Sunder v. U.S. Bank Pension Plan,* 2007 WL 541595, at *12-13 (E.D. Mo. Feb. 16, 2007) (finding that early retirement subsidies are only expected future benefits and have not yet accrued).

Thus, the Court finds as a matter of law that the Plaintiffs' forfeiture claim fails. The Court therefore enters judgment in the Defendants' favor on Plaintiffs' Third Claim for Relief.

<u>(5) Plaintiffs' Fifth Claim for Relief</u>

In addition to Defendants' Motion for Summary Judgment, Plaintiffs also submitted their Motion for Partial Summary Judgment on Claim V. In Plaintiffs' Partial Motion for Summary Judgment on Claim V, Plaintiffs ask the Court to grant summary judgment in their favor on the issue of whether Defendants violated ERISA § 204(h) and Treasury Regulation 54.4980F-1. In their Motion for Summary Judgment, Defendants ask the Court to rule in their favor on the same issue. The Court will address both motions jointly below.

Defendants' Arguments

Defendants contend that Plaintiffs' 204(h) Notice claim, that Defendants failed to disclose required information to participants, fails as a matter of law. Defendants ask the Court to examine the "four corners" of the 204(h) Notice document and find that it is written in a manner calculated to be understood by the average plan participant and it includes all the information ERISA requires.

Defendants contend that ERISA requires and the Notice contains: (1) a description of the benefit formula before the amendment and under the plan as amended; (2) a description of how any early retirement subsidies are calculated from the accrued benefit before and after the amendment; (3) the effective date of the amendment; (4) sufficient information so participants can determine the approximate magnitude of the expected reduction in their benefit, which is satisfied with the inclusion of at least one illustrative example showing the

approximate magnitude of the reductions; and (5) the assumptions used in the illustrative examples. 26 C.F.R. § 54.4980F-1, Q&A (11). Defendants also assert that the Notice was provided to participants in writing on September 2004, which is more than the mandated 45 days in advance of the Conversion.

Defendants dispute Plaintiffs' attempts to impose additional requirements not required by ERISA. First, Defendants argue that the Notice adequately disclosed wear away. Specifically, Defendants assert that although the Notice does not specifically include the technical term "wear away," which is not required, the Notice included a narrative explaining the potential for wear away in layman's terms and an explanatory chart, which satisfies the requirements of 26 C.F.R. § 54.4980F-1. Defendants further contend that there is no requirement that individualized reductions or examples of wear away be included in the Notice. They contend that Tables A and B of the Notice provided sixteen different illustrations, with side-by-side comparisons under the old and new plan for retirement at both age 55 and 65, which sufficiently provide the approximate magnitude of the expected reductions in Pension Plan benefits. Defendants assert that these examples clearly disclose that participants' monthly benefit under the new formula was almost always smaller then that under the old formula.

Defendants also contend that in addition to Tables A & B, the second page of the

Notice includes summary descriptions of the benefit formula, including early retirement benefit subsidies, under the old and new plans. They add that the third page of the Notice further describes and calculates early retirement benefits with a detailed disclosure of wear away in the example and states that participants may notice that "their monthly benefit may not increase at the same rate or at all in some years" and that participants may experience "flat or small monthly benefit increases." (Defs.' Ex. 7, 204(h) Notice). Additionally, Defendants assert that requiring the Notice to comply with the additional requirements that Plaintiffs request would compel disclosure of technical jargon, unworkable calculations, and a seemingly endless number of individualized examples.

Next, Defendants assert that, assuming the Court finds that the Notice failed to include the required information, Plaintiffs cannot establish extraordinary circumstances or an egregious failure to obtain substantive relief. Furthermore, Defendants contend that they worked with Towers and Pillsbury to ensure that sufficient information was included in the Notice and that there had been no evidence presented that they acted in bad faith.

Plaintiffs' Arguments

Plaintiffs ask the Court to grant partial summary judgment in their favor and to find as a matter of law that the Notice was inadequate. They argue that because the potential wear

away was not disclosed to participants in language which was calculated to be understood by the average plan participant, the Notice was insufficient under 204(h) and the associated Treasury Department Regulations. Plaintiffs also assert that Defendants did not disclose the early retirement reduction factors, the general classes of employees subject to wear aways or the approximate range of wear aways, or the reductions in future accruals which have left older employees with almost no future benefits.

First, Plaintiffs assert that the Notice which describes a significant reduction in future benefits must provide sufficient information to employees to enable them to understand the effects of the plan amendment, including the approximate magnitude of reduction in their future benefits. Plaintiffs agree with Defendants that no individualized explanation is required.

Plaintiffs argue that Defendants failed to disclose reductions resulting from the Conversion in accordance with ERISA § 204(h) and Treasury Regulation 54.4980F-1. Defendants argue that the notice does not describe how early retirement benefits are calculated before and after the cash balance amendment. Plaintiffs assert that the term "subsidy" is not defined in the Notice, nor is there disclosure of the percentage reductions that apply to early retirements under the cash balance formula. Moreover, Plaintiffs argue that the Notice is deficient because it does not disclose that Employees in their 40's of 50's who were

not grand-fathered can experience up to ten or more years of wear away. They argue that the individual notices do not inform participants whether they will be subject to wear aways.

Plaintiffs further object to the Notice because they assert that it does not describe the severe reductions in future retirement benefit accruals in the manner prescribed by the regulations. They argue that these reductions are not described in numerical or percentage terms as required by the regulations. They contend that the numerical information provided in Tables A and B does not conform because it does not provide the approximate magnitude of reductions in terms of future benefits.

Next, Plaintiffs contend that Defendants' violations of 204(h) are egregious because participants did not receive most of the information about the reductions and Defendants did not promptly rectify the violations. Plaintiffs assert that the decision to withhold information was deliberate and that it significantly affected every participant.

Analysis

In their Fifth Claim for Relief, Plaintiffs allege that Defendants violated ERISA § 204(h) and failed to disclose statutorily-required information in the Notice to Pension Plan participants. Specifically, Plaintiffs allege that the 204(h) Notice did not properly disclose (1) the reductions in future retirement benefit accruals; (2) how early retirement benefits are calculated before and after the Conversion; and (3) periods of wear away . The Court finds

that the 204(h) Notice sufficiently disclosed all legally-required information and thus grants summary judgment in favor of Defendants and against Plaintiffs on Claim V.

Where applicable, ERISA § 204(h) requires the plan administrator to provide participants with a notice that "shall be written in a manner calculated to be understood by the average plan participant and shall provide sufficient information (as determined in accordance with regulations prescribed by the Secretary of the Treasury) to allow applicable individuals to understand the effect of the plan amendment." 29 U.S.C. § 1054(h)(2).

Regulation 26 C.F.R. 54.4980F-1 lists the information a 204(h) notice must contain: (1) a description of the benefit formula before the amendment and under the plan as amended; (2) a description of how any early retirement subsidies are calculated from the accrued benefit before and after the amendment; (3) the effective date of the amendment; (4) sufficient information so that participants can determine the approximate magnitude of the expected reduction in their benefit, which is satisfied with the inclusion of at least one illustrative example showing the approximate magnitude and range of reductions; and (5) the assumptions used in the illustrative examples. 26 C.F.R. § 54.4980F-1 Q&A-11. This information must be written in a manner calculated to be understood by the average plan participant and be provided at least 45 days before the amendment. 26 C.F.R. § 54.4980F-1 Q&A 11(a)(2).

Disclosure of the Reductions in Future Retirement Benefit Accruals

Regulation 26 C.F.R. 54.4980F-1 Q&A-11(a)(4)(i)(A) requires that a 204(h) notice "include sufficient information for each applicable individual to determine the approximate magnitude of the expected reduction [of benefits] for that individual." The requirements of Q&A-11(a)(4) are "deemed satisfied if the notice includes one or more illustrative examples showing the approximate magnitude of the reduction in the examples." 26 C.F.R. § 54.4980F-1 Q&A-11(a)(4)(ii)(A). In amendments similar to that at issue, the illustrative examples "must show the approximate range of reductions." 26 C.F.R. § 54.4980F-1 Q&A-11(a)(4)(ii)(B).

The Notice satisfies the requirements of Q&A-11(a)(4) through the illustrative examples contained in Tables A and B. Tables A and B each provide eight different examples of participants at various ages and years of service that illustrate and compare the amount of Pension Plan retirement benefits under the FAP formula and the CB formula if the participant left employment at age 55 or 65. (Defs.' Ex. 7, 204(h) Notice). Tables A and B provide sample side-by-side comparisons that were calculated to show the magnitude of the reduction in Pension Plan benefits. Further, Tables A and B illustrate the approximate range of reductions with their use of sample employees ranging from age 30 with 5 years of service to age 60 with 20 years of service, as well as the use of two representative annual pay rates

of $45,000 and $90,000.

Although Plaintiffs argue that the Notice does not disclose the approximate magnitude of the reductions in narrative form, information similar to that of Example 4 to Q&A-11(b), and the reductions in terms of a percentage of participants' highest average pay, neither ERISA § 204(h), nor 26 C.F.R. § 54.4980F-1 require the disclosure of this information through a 204(h) Notice.

The Court finds that the Notice provided "sufficient information for each applicable individual to determine the approximate magnitude of the expected reduction [of benefits] for that individual" through the illustrative examples contained in Tables A and B. The Court therefore finds that Plaintiffs fail to establish that the Notice violates ERISA or the regulations; therefore, the Court denies Plaintiffs' Motion for Partial Summary Judgment on Claim V as to this allegation.

Description of Early Retirement Subsidies

Under 26 C.F.R. § 54.4980F-1 Q&A(a)(3)(ii) "the notice must describe how the early retirement benefit or retirement-type subsidy is calculated from the accrued benefit after the amendment." 26 C.F.R. § 54.4980F-1 Q&A-11(a)(3)(ii). The Notice discloses how the Pension Plan's early retirement subsidies were calculated before and after the Conversion in its sections entitled "Summary of Plan Formula Changes" and "Early Retirement Benefits."

(Defs.' Ex. 7, 204(h)Notice). The Notice was also provided in writing on or about September 2004, i.e. 45 days in advance of the Conversion, and provided that the Pension Plan amendment will be "[e]ffective January 1, 2005."

The 204(h) Notice section entitled "Summary of Plan Formula Changes" includes a description of the FAP formula, including early retirement and early retirement subsidies. It states:

> Under the current plan, you earn a life annuity commencing at age 65 equal to a percentage of average earnings prior to retirement for each year of service (1.1% of average earnings plus 0.6% of average earnings in excess of Social Security covered compensation). Generally, this benefit cannot be taken as a lump sum. The current plan also allows you to retire as early as age 55 and receive a life annuity commencing on your early retirement date but reduced to reflect the earlier commencement. The current plan formula includes an early retirement subsidy.

(Defs.' Ex. 7, 204(h) Notice) (emphasis added). This "description" provided that under the FAP formula, participants could retire early at age 55 subject to reductions to reflect the earlier retirement, and notes that there is an early retirement subsidy. In addition, the 204(h) Notice section entitled "Early Retirement Benefits" includes an illustrative example that calculates reductions under the FAP formula for an individual who is "age 54 as of December 31, 2004 with 12 years of service and earnings of $50,000." (Defs.' Ex. 7, 204(h) Notice). When one refers to the table, one sees that the table calculates the monthly accrued benefit under the FAP formula for every year from age 55 through age 65, demonstrating the early

retirement reductions. As evident, the first two columns of this table calculate that from the $500 age-65 monthly benefit, an earlier retirement at age 64 would provide for a reduced benefit of $485 (which is 3% less than the $500 age 65 benefit). (Defs.' Ex. 7, 204(h) Notice). Each subsequent year provided in the illustration has a corresponding reduction. (Defs.' Ex. 7, 204(h) Notice).

The 204(h) Notice also adequately describes the CB formula and how the early retirement benefit is calculated after the amendment by noting the lack of early retirement subsidies.

Specifically, the 204(h) Notice states:

> Under the new [CB] Plan, your benefit is described in terms of an account balance, which you will be able to receive either as a lump sum or a life annuity. Your account grows each year with interest as well as pay credits. Interest credits vary each year depending on the prevailing yields on 30-year Treasury Bonds. The pay credits vary depending on your age and service as follows.
>
> . . .
>
> The benefit you have earned or accrued as of December 31, 2004 under the current plan will be converted to your starting account balance under the new plan by taking the actuarial present value of your accrued benefit based on a 5% discount rate. Early retirement factors are not considered in this calculation. The present value calculation assumes that you do not retire until age 65. Therefore, the starting account balance does not include the value of the early retirement subsidy.
>
> You can always elect to receive your account balance in the form of a life

> annuity under the new plan. Your life annuity at any retirement age will never be less than the retirement benefit you will have earned under the current plan as of December 31, 2004, which will include an early retirement subsidy, if applicable. In addition, the same optional forms of payment available under the current plan will be available under the new [CB] Plan. The benefit you earn after December 31, 2004 under the new [CB] Plan formula will not include early retirement subsidies.

(Defs.' Ex. 7, 204(h) Notice). The 204(h) Notice provides that the opening account balance does not include the value of the early retirement subsidy, and further goes on to make an explicit statement that the CB formula "will not include early retirement subsidies." (Defs.' Ex. 7, 204(h) Notice).

The Court finds that the 204(h) Notice provided an adequate description of how the Pension Plan's early retirement subsidies were calculated both before and after the Conversion. The Court therefore finds that Plaintiffs fail to establish that the 204(h) Notice violates ERISA or the regulations. The Court thus denies Plaintiffs' Motion for Partial Summary Judgment on Claim V as to this allegation.

Disclosure of Wear Away

While 26 C.F.R. § 54.4980F-1 mentions the term "wear away" in its listings of requirements for other disclosures, there is no specific disclosure requirement for "wear-away." The 204(h) Notice, however, sufficiently disclosed the potential for wear away, provided an illustrative example, and described how wear away is generated in narrative form.

(Defs.' Ex. 7, 204(h) Notice). In this way, the 204(h) Notice satisfied any possible requirements for wear away.

Although the 204(h) Notice does not specifically include the technical term "wear away," which is not required to be included, the Notice explains the potential for wear away in layman's terms and states multiple times that benefits may appear to not increase under the CB formula. (Defs.' Ex. 7, 204(h) Notice). The 204(h) Notice states that a participant may notice that "their monthly benefit may not increase at the same rate or at all in some years" and that participants may experience "flat or small monthly benefit increases." (Defs.' Ex. 7, 204(h) Notice).

The 204(h) Notice also provides an illustrative example demonstrating the effect of wear away. The Notice states that the example "compares the monthly annuity earned under the current [FAP] plan at December 31, 2004 . . . to the monthly annuity and lump sum benefit under the new [CB] plan that would be payable at each retirement age from 55 to 65," and provides chart to show such effect.

In addition, the narrative following the illustrative example states that "the actuarial equivalent monthly annuity will be no greater than the monthly annuity earned as of December 31, 2004 until this employee reaches age 61, when she will begin to earn an additional benefit under the new plan formula." (Defs.' Ex. 7, 204(h) Notice). The 204(h)

Notice highlights that in the example, "the new pension formula does not show an increase in the annuity values between ages 55 and 60 . . . ." (Defs.' Ex. 7, 204(h) Notice). In each of these ways, and in combination, these facets of the 204(h) Notice met any wear-away disclosure requirements of ERISA and 26 C.F.R. § 54.4980F-1 Q&A-11.

The Court finds that the 204(h) Notice provided an adequate description of wear away. The Court therefore finds that Plaintiffs fail to establish that the 204(h) Notice violates ERISA or the regulations. Because the Court finds against Plaintiffs and in favor of Defendants in that there was no violation of ERISA § 204(h) and the accompanying regulations as a matter of law, it need not discuss whether the alleged violation was egregious or intentional. The Court thus denies Plaintiffs' Motion for Partial Summary Judgment on Claim V and grants Defendants' Motion for Summary Judgment as to this allegation.

Therefore, the Court finds that Defendants are entitled to judgment as a matter of law in their favor on the Plaintiffs' Fifth Claim for Relief.

(6) Plaintiffs' Sixth Claim for Relief

Defendants' Arguments

Defendants assert that in their Sixth Claim for Relief, Plaintiffs attempt to re-write ERISA, blur the requirements between a summary plan description ("SPD")and a summary

of material modification ("SMM"), and impose obligations not required under ERISA. Defendants also assert that it is unclear as to whether Plaintiffs also attempt to allege a breach of fiduciary duty claim as a means to impose disclosures that the Defendants assert are not required under ERISA's SMM provisions. Defendants ask the Court to dismiss Plaintiffs' Sixth Claim as other courts have as a matter of law when considering similar claims.

First, Defendants assert that the SMM fulfills ERISA's requirements.[1] Defendants assert that such SMM satisfied ERISA § 102(a)'s requirement because it disclosed the Conversion to the CB formula and described the changes to the Pension Plan. Defendants dispute Plaintiffs' claims that the SMM is deficient because it did not make full disclosures about the CB plan and failed to offer participants tools for calculating their future retirement benefits, thereby preventing them from engaging in financial planning. Defendants argue that ERISA § 102 does not require them to provide such information in the SMM. Specifically, Defendants dispute the following allegations made by Plaintiffs: (1) that the SMM is deficient because it does not disclose that the class members' opening account balances are discounted for pre-retirement mortality; (2) that the SMM is deficient because it did not compare the rates of benefit accruals between the old and new formulas; and (3) that the CB formula reduced

[1] It was Defendants' intention that the 204(h) Notice and Future Choice brochure served together as the required SMM.

the rate of the participants' "benefit accrual" because of age.

Second, Defendants ask the Court to find that Plaintiffs' SMM claim does not entitle them to substantive relief because in the absence of reliance or prejudice flowing from a faulty plan description, Plaintiffs are not entitled to any substantive relief. Defendants argue that Plaintiffs presented no evidence that participants relied on or were otherwise prejudiced by any alleged lack of information required to be in the SMM. Defendants further assert that they were legally entitled to change the terms of the Pension Plan and convert it to a CB formula. Defendants also argue that Plaintiffs cannot prove bad faith or active concealment. They ask the Court to dismiss Plaintiff's SMM claim because without extraordinary circumstances of bad faith, active concealment, or fraud, defects in fulfilling the reporting and disclosure requirements of ERISA do not give rise to a substantive remedy other than that provided in ERISA § 502(a)(1)(A) (the section assessing fines for nondisclosure of documents).

Third, Defendants argue that Plaintiffs' unclear breach of fiduciary duty allegation is untenable. Defendants argue that the language of Paragraph 75 of Plaintiffs' Complaint, "Solvay America's failure to understandably disclose the disadvantages of the cash balance amendments also violates the fiduciary duty under ERISA § 404(a)(1) . . ." is unclear as to whether this is a separate claim. Nonetheless, Defendants ask the Court to dismiss such a

claim because it is nothing more than a restatement of Plaintiffs' 204(h) Notice and SMM claims. Defendants contend that without any new allegations, Plaintiffs assert, without evidence, that Solvay America violated a fiduciary duty under ERISA § 404(a)(1) for failing to provide participants with the information needed to make well informed employment, savings, and retirement decisions. Defendants again assert that the 204(h) Notice and SMM were accurate and disclosed all required information. Defendants also assert that Plaintiffs may not use a claim of breach of fiduciary duty to impose disclosure that ERISA's disclosure provisions do not require.

Moreover, Defendants assert that a breach of fiduciary duty claim would also fail because Plaintiffs cannot establish that they relied on a misrepresentation or an omission from the SMM to their detriment. Defendants contend that Plaintiffs' Complaint is void of any facts or allegations that the SMM failed to disclose information and Plaintiffs cannot establish that participants cannot establish that participants did not receive the information from other sources.

Plaintiffs' Arguments

Plaintiffs first assert that Defendants' SMM inadequately disclosed the wear away that participants were facing, the changes in early retirement reductions, and the potential forfeitures in lump sum distributions. Plaintiffs argue that because Defendants did not

disclose the circumstances that may result in denial or loss of benefits, the SMM is deficient. Plaintiffs contend that the SMM in this case is also deficient because when changes are made to an employee benefit plan, an SMM must understandably disclose the full import of the changes, which was not done in this case, in light of wear away periods.

Plaintiffs assert that Defendants SMM never adequately disclosed the general classes of employees subject to wear away or the approximate range of such wear aways. They also assert that Defendants have never understandably disclosed the changes in reduction factors for early retirement. Plaintiffs assert that these failures led participant to accept lump sum distributions even when the value of their monthly benefits is higher.

Second, Plaintiffs argue that Defendants breached their fiduciary duties by refusing to provide comparative information in response to questions from employees. Plaintiffs contend that such questions included inquiries into how the old plan's benefits compared with the new plan and how opening account balances were determined. Plaintiffs assert that these questions show that Defendants' 204(h) Notice had not communicated sufficient information for employees to understand the comparison between the new and old plan benefits and make informed decisions about the terms of their employment with Solvay and their savings for retirement based on the reductions that the Defendants were about to carry out. Plaintiffs contend that Defendants did not provide responsive information to their employees.

Lastly, Plaintiffs assert that they will show prejudice from inadequate disclosures.

Analysis

Plaintiffs Sixth Claim for Relief alleges that Defendants' SMM was inadequate under ERISA § 102, while mandates that Defendants provide Plaintiffs with a satisfactory SMM. ERISA § 102(a) provides that "[a] summary of any material modification in the terms of the plan . . . shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 U.S.C. § 1024(b)(1)]." 29 U.S.C. § 1022(a). Here, Solvay's 204(h) Notice and the Future Choice brochure in combination served as the SMM. (Defs.' Ex 7, 204(h) Notice). The Court finds that the SMM satisfied ERISA's requirements because it disclosed the conversion to the CB formula and described the changes to the Pension Plan. (Defs.' Ex. 7, 204(h) Notice; Ex. 13, Future Choice Brochure). The SMM was written in a manner calculated to be understood by the average plan participant. Defendants worked with their experts at Towers and Pillsbury throughout the Conversion process to ensure the SMM was adequate.

The Court agrees with Defendants in their assertion that although ERISA § 102(a) does not expressly require it to do so, the SMM: (a) stated that the "[a]ctuarial equivalence used . . . to calculate the opening balance is based on the most recent IRS-mandated mortality

table"; (b) stated that some participants' monthly benefits may not increase at the same rate or at all in some years" and provided an example demonstrating this; (c) disclosed how initial account balances were calculated and that the opening account balances accounted for "pre-retirement mortality"; and (d) included multiple tables illustrating the benefits under the FAP and CB formulas.

Plaintiffs' attempt to "bootstrap" requirements found in ERISA regulations applicable to the Summary Plan Descriptions ("SPDs") on to the requirements for a SMM. Plaintiffs Complaint does not allege that Defendants failed to provide a proper SPD to participants and beneficiaries. Had Defendants failed to provide a proper SPD, the regulations allow for imposition of specific fines in appropriate circumstances, but not for a private right of action. 29 U.S.C. § 1024.

Plaintiffs have adduced no competent evidence that the SMM did not comply with the requirements of ERISA. Instead, Plaintiffs argue that the "regulations on making SMMs understandable to the average participant are identical to those applicable summary plan descriptions." (Response at 35). The SPD regulations to which Plaintiffs cite, 29 C.F.R. § 2520.102-2, are entitled "Style and format of summary plan description" and include no mention of SMMs. Moreover, the cases cited by Plaintiffs in support of this argument relate only to the SPD requirements, and not SMMs. Likewise, Plaintiffs have no basis on which

to argue that wear away must be disclosed in the SMM, as ERISA § 102 does not require such a disclosure in the SMM. Here again, Plaintiffs' citations to authorities addressing SPD language are misplaced.

Secondly, the Court finds Plaintiffs' fiduciary duty allegation are also contrary to law. Such arguments are unavailable to Plaintiffs, as Plaintiffs may not use a claim of breach of fiduciary duty to create disclosure obligations that do not otherwise exist under ERISA. *See Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405-06 (6th Cir. 1998) ("It would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed."); *Ehlmann v. Kaiser Found. Health Plan*, 198 F.3d 552, 555-56 (5th Cir. 2000) (rejecting claim that ERISA § 404 may require disclosure of information not expressly required and not required in other specific ERISA disclosure provisions). The Court finds that ERISA provides a specific procedure for participants to request certain plan documents and penalties for failing to reply to such requests. *See* ERISA § 502(c), 29 U.S.C. § 1132(c). Plaintiffs have presented no evidence that participants followed the procedures to request particular documents or that Defendants failed to comply with disclosure requirements under ERISA § 502(c). Again the cases cited by Plaintiffs, such as *Vanity Corp. v. Howe*, 516 U.S. 489, 504 (1996), do not support their proposition that SMMs must include information other than what is required

under the specific disclosure requirements of ERISA.

Therefore, the Court finds that Plaintiffs have failed to raise a genuine issue of material facts as to their Sixth Claim of Relief; therefore, Defendants are entitled to judgment as a matter of law in their favor on the Sixth Claim for Relief.

(7) Plaintiffs Are Not Entitled to Liquidated Damages

Defendants ask the Court to find that Plaintiffs are not entitled to double damages under the ADEA because: (1) Plaintiffs cannot prove that Defendants committed a "willful violation" of the ADEA; and (2) Plaintiffs do not seek "amounts owing."

First, Defendants contend that Plaintiffs cannot prove that Defendants committed a willful violation, so Plaintiffs should be precluded from recovering liquidated damages because under the ADEA liquidated damages are only payable in cases of willful violations. Defendants argue that Plaintiffs cannot establish a genuine issue of material fact that the employer knew or showed reckless disregard as to whether the conduct violated the ADEA. Defendants also assert that no willful violation can be found where the Defendants relied in good faith on the advice of counsel, such as Towers and Pillsbury.

Second, Defendants argue that Plaintiffs cannot establish any "amounts owing;" therefore, liquidated damages are not available. Defendants contend that throughout the

course of this litigation, Plaintiffs have represented to the Court that they are not asserting claims for benefits or any "amounts owing" (such as lost pension rights) but instead are seeking equitable relief for the alleged statutory violations of ERISA. Such equitable relief is not subject to doubling as liquidated damages.

Plaintiffs' Arguments

Plaintiffs dispute Defendants allegations.

Analysis

Because the Court has entered judgement as a matter of law in favor of Defendants on all of Plaintiffs' claims, it finds that Plaintiffs are not entitled to any relief, liquidated damages, or otherwise.

For the foregoing reasons it is hereby,

ORDERED that Defendants' Motion for Summary Judgment, at Docket Number 109, is and shall be, **GRANTED.**

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment, at Docket Number 106, is and shall be, **DENIED.**

IT IS FURTHER ORDERED that all of Plaintiffs' Claims for Relief against Defendants shall be, and are, **DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that all outstanding motions in this matter will be

rendered **DENIED AS MOOT.**

IT IS FINALLY ORDERED that this Court enters judgment as a matter of law in Defendants' favor on all claims contained in Plaintiffs' Class Action Complaint.

Dated this 3rd day of August, 2009.

ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE