UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Timothy Brown, et al., Plaintiffs, v. United Parcel Service of America, Inc., et al., Defendants.	)	Civil Action No. 1:20-CV-00460-TCB

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Plaintiffs' claims should not be dismissed for failure to exhaust administrative remedies.[1] As explained in the Amended Complaint,[2] the two Plans at issue[3] violate the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") concerning the calculation of actuarially equivalent benefits. The Plans do not provide an administrative process for challenging the illegal Plan terms at issue—only a process for interpreting and applying those terms. For the legal issues presented here, there is simply no administrative process to "exhaust."

Moreover, even if there was an administrative process to challenge the legality of the Plans' terms, there is no possible remedy. The administrators of the Plans—the Committees[4] named as Defendants in this action—do not have the power to ignore or amend the Plans' language when deciding an individual benefits claim, and even if they did, any exercise of that power would violate another federal law—the Tax Code's "definitely determinable" requirement.

Defendants' entire argument ***assumes***, incorrectly, that the Plans' administrators could go against or change the requirements of the Plans if they

---

[1] "Plaintiffs" are Timothy Brown, Ronnie Suveg, Joseph Bobertz, Clifford Potters, Stacey Richards, Warren Washburn, Nancy Youngermann, and John Braxton.

[2] ECF No. 28 ("Amended Complaint" or "Am. Compl.").

[3] Both the UPS Retirement Plan ("Retirement Plan") and the UPS Pension Plan ("Pension Plan") (collectively, the "Plans") are defined benefit pension plans, sponsored by UPS Parcel Service of America, Inc. ("UPS" or the "Company").

[4] The Retirement Plan is administered by the Administrative Committee ("Committee") and the Pension Plan is administered by the Board of Trustees ("Trustees") (collectively, the "Committees"). Retirement Plan § 9.1(a), ECF No. 38-2 at 85; Pension Plan § 11-1, ECF No. 38-3 at 57.

wanted to, but that premise is false. The administrators' authority is limited to interpreting and applying Plan terms as written; Plaintiffs are not challenging the interpretation or application of those terms. Rather, Plaintiffs claim that the Plans' language ***itself*** is illegal. Here, only the Court can provide a remedy, either by overriding the Plans' terms or reforming them to be consistent with ERISA.

Although there may be cogent policy reasons for requiring exhaustion in some cases where there is a meaningful administrative review process in an ERISA plan, those rationales are not presented here. Even if administrative remedies were available and appropriate—and they are not—it would be futile for Plaintiffs to use them. Indeed, Defendants themselves proclaim that they are standing by the Plans because they (incorrectly) believe that the Plans' actuarial assumptions are consistent with ERISA. This is no reason to require exhaustion when there is no process for challenging the legality of the Plans' terms (as opposed to interpretation or application of Plan terms); when such a process, even if it existed, could not possibly provide a remedy; and when *only* a federal court has the legal ability to provide an appropriate remedy.

I. STATEMENT OF FACTS

Plaintiffs are retired participants in the Retirement Plan and the Pension Plan, who are receiving their pensions in the form of a joint and survivor annuity ("JSA"). Am. Compl. ¶¶ 1, 14-22. A JSA provides an annuity during a participant's life, and then a percentage of that amount to the participant's beneficiary after the participant's death. *Id.* ¶ 3. ERISA requires that a JSA be actuarially equivalent to

the single life annuity ("SLA") that a participant earned when the participant retired, meaning that the present value of the benefits payable under both forms must be equal. *Id.* ¶ 4; ERISA § 205(d), 29 U.S.C. § 1055(d).

Plaintiffs allege that Defendants violated ERISA's actuarial equivalence requirement because their JSAs have lower present values than the SLAs that they earned, causing Plaintiffs to receive lower benefits each month. Am. Compl. ¶¶ 76-79, 91-98. Central to Plaintiffs' claims is that Defendants calculate JSAs using mortality assumptions that Defendants know or should know are outdated, unreasonable, and discriminatory, and which are significantly worse for the Plans' participants than the assumptions that Defendants use as their "best estimate" in UPS's audited financial statements. *Id.* ¶¶ 70-72, 76-77. Specifically, Defendants use mortality assumptions from ***1966*** to calculate JSAs for the Plans' retirees, but they use updated mortality assumptions to calculate the Company's liabilities under the Plans for UPS's shareholders. *Id.* ¶ 77.

Plaintiffs assert three causes of action in their Amended Complaint. In Count I, Plaintiffs seek a declaration that the Plans' calculation of benefits does not comply with ERISA's actuarial equivalence requirement, together with appropriate equitable relief. *Id.* ¶¶ 111-15. In Count II, Plaintiffs seek reformation of the Plans to comply with ERISA and recovery of benefits that would be due to them ***after*** the Plans are reformed. *Id.* ¶¶ 116-19. In Count III, Plaintiffs allege that the Committees and UPS breached their fiduciary duties by, *inter alia*, failing to cause UPS to

provide Plaintiffs with JSAs that are actuarially equivalent to their respective SLAs as ERISA requires. *Id.* ¶¶ 120-33.

A. Terms of the Plans.

UPS amended and restated the Plans effective January 1, 2014. Retirement Plan at Preamble, ECF No. 38-2 at 8; Pension Plan at Preamble, ECF No. 38-3 at 11. Under the Plans, participants earn a pension calculated as an SLA based on their average earnings and how many years they work for UPS. Am. Compl. ¶¶ 42, 52; *see also* Retirement Plan § 5.2(a), ECF No. 38-2 at 43; Pension Plan §§ 3.3, 4.1, ECF No. 38-3 at 25-28. The Plans offer JSAs in various percentages, and the Plans expressly set out the actuarial assumptions that must be used to convert a participant's SLA to a JSA. They use either: (a) the 1983 GAM mortality table and a 6% discount rate; or the UP-84 mortality table and a 7% discount rate. Am. Compl. ¶¶ 45-46, 49, 55. The Plans state that all types of benefits, including JSAs, "shall be determined by the provisions of the Plan." Retirement Plan § 5.1(a), ECF No. 38-2 at 41; Pension Plan § 12.6, ECF No. 38-3 at 65.

The Plans have identical provisions on administration. The Committees have the "exclusive right to interpret the Plan[s] and decide any matters arising in the administration and operation of the Plan[s]," but must do so "in a uniform manner" and "in accordance with the terms of the Plan[s]." Retirement Plan §§ 9.3, 9.6, ECF No. 38-2 at 85, 87; Pension Plan §§ 11.3, 11.6, ECF No. 38-3 at 57, 59. Among other responsibilities, the Committees hire actuaries for the Plans. Retirement Plan § 9.1, ECF No. 38-2 at 85; Pension Plan § 11.1, ECF No. 38-3 at 57. The Committees,

however, are not permitted to amend the terms of the Plans. Retirement Plan § 7.1, ECF No. 38-2 at 80; Pension Plan § 10.1, ECF No. 38-3 at 55. Only UPS may amend the Plans. *Id.*[5]

To start receiving benefits "under the Plan[s]," participants must complete the forms provided by the Committees. Retirement Plan § 4.1(a), ECF No. 38-2 at 38; Pension Plan § 6.1, ECF No. 38-3 at 48. Both Plans state that "[n]o person is entitled to any benefit under this Plan except and to the extent expressly provided under this Plan." Retirement Plan § 5.15, ECF No. 38-2 at 78; Pension Plan § 12.7, ECF No. 38-3 at 65.

The Plans have identical sections titled "Claims Procedure." Subsection (a) says that "[a]ll claims for benefits hereunder," *i.e.*, under the terms of the Plans, "shall be directed to the" Committees. Retirement Plan § 9.4(a), ECF No. 38-2 at 86; Pension Plan § 11.4(a), ECF No. 38-3 at 58. Both Plans provide that a participant's "claim for benefits" is first decided by an "Initial Reviewer" in UPS's Benefits Department, who "shall determine whether the claimant is entitled to benefits under the Plan . . . ." Retirement Plan § 9.4(a), ECF No. 38-2 at 85; Pension Plan § 11.4(a), ECF No. 38-3 at 58. The Initial Reviewer's denial of a participant's "claim for benefits," "shall include specific reference to the Plan provisions on

[5] The Defendant-fiduciaries are required to discharge their Plan-related duties "in accordance with the documents and instruments governing the plan[s] insofar as such documents and plan instruments are consistent with" ERISA. Am. Compl. ¶ 125.

which the denial is based . . . .” Retirement Plan § 9.4(b), ECF No. 38-2 at 86; Pension Plan § 11.4(b), ECF No. 38-3 at 58.

A participant who disagrees with the Initial Reviewer’s decision on a “claim for benefits” may appeal to the applicable Committee. Retirement Plan § 9.4(c), ECF No. 38-2 at 86; Pension Plan § 11.4(c), ECF No. 38-3 at 58. The decision by the Committee “shall include . . . specific reference to the Plan provisions on which the decision is based . . . .” Retirement Plan § 9.4(d), ECF No. 38-2 at 86; Pension Plan § 11.4(d), ECF No. 38-3 at 58. The Committees must follow the terms of the Plans (to the extent they comply with ERISA) when deciding a participant’s appeal of the denial of a “claim for benefits.” Retirement Plan § 9.4(d), ECF No. 38-2 at 85; Pension Plan § 11.4(d), ECF No. 38-3 at 58.

On June 24, 2016, UPS amended the Retirement Plan to provide that participants must bring any lawsuits within one year of the “date of the decision on review,” presumably referring to the Committee decision on a participant’s “claim for benefits. Retirement Plan, Amendment One § 12, ECF No. 38-2 at 279. On December 22, 2017, UPS amended the Retirement Plan’s “Claims Procedure,” keeping the language in subsection (a), which stated that it applied to “[a]ll claims for benefits,” with the Initial Reviewer deciding if a claimant is entitled to “benefits under the Plan.” Retirement Plan, Amendment Five § 5, ECF No. 38-2 at 313. UPS did not make corresponding changes to the Pension Plan in 2016 or 2017. Neither Plan limits the time for filing a “claim for benefits” in the first instance.

B. Summary Plan Descriptions.

To support their motion, Defendants submitted a Summary Plan Description ("SPD") for each of the Plans. Decl. of James Merna in Supp. of Defs.' Mot. to Dismiss ¶ 5, ECF No. 38. The SPD that Defendants submitted for the Retirement Plan is dated January 1, 2007, seven years before the Retirement Plan was amended and restated. Retirement Plan SPD at Cover Page, ECF No. 38-4 at 1; Retirement Plan at Preamble, ECF No. 38-2 at 8. The SPD that Defendants submitted for the Pension Plan is not dated, but "describes the [Pension Plan] in effect as of August 1, 2013," before the Pension Plan was amended and restated effective January 1, 2014. Pension Plan SPD at 1, ECF No. 38-5 at 5; Pension Plan at Preamble, ECF No. 38-3 at 10.

The SPD for the Retirement Plan that Defendants submitted contains a "Claims and Appeals" section, which is different than the Retirement Plan's section titled "Claims Procedure." Specifically, the "Claims Procedure" section in the Retirement Plan is limited to "claims for benefits," with both the Initial Reviewer and the Committee deciding if the participant "is entitled to benefits under the Plan . . . ." Retirement Plan § 9.4(a), ECF No. 38-2 at 85. In sharp contrast, the "Claims and Appeals" section states that participants must file a claim if they "have any grievance, complaint or claim concerning any aspect of the operation of the Plan or Trust ***including a claim for benefits*** . . . ." Retirement Plan SPD at 28, ECF No. 38-4 at 30 (emphasis added). The Retirement Plan SPD states: "If there is a difference

between this summary and the Plan document, ***the Plan document will control***." Retirement Plan SPD at 1, ECF No. 38-4 at 3 (emphasis added).

The "Claims and Appeals" section in the SPD for the Pension Plan that Defendants submitted is also different than the Pension Plan. The SPD states that participants must file the "appropriate forms with the Plan Administrator to receive any benefits or to take any other action under the Plan." Pension Plan SPD at 17, ECF No. 38-5 at 21. The only "form" mentioned in the Pension Plan related to receiving benefits, or "tak[ing] action . . . under that Plan," is the one that participants complete when they want to retire. Pension Plan § 6.1, ECF No. 38-3 at 48. When reviewing a participant's application for retirement benefits, the Trustees decide the benefits that the participant is "entitled under this Plan . . . ." *Id.*

Moreover, the SPD for the Pension Plan that Defendants submitted provides that participants must "exhaust[] the Plan's claims and appeals procedures," but only if (1) they "have a claim for benefits which is denied or ignored;" (2) disagree with a decision "concerning the qualified status of a domestic relations order;" (3) the Pension Plan's "fiduciaries misuse the Plan's money; or (4) if [the participant] is discriminated against for asserting [their] rights." Pension Plan SPD at 19, 20, ECF No. 38-5 at 23, 24. The SPD submitted by Defendants further provides that "if there is a difference between this SPD and the Plan document, ***the terms of the Plan will control***." Pension Plan SPD at 1, ECF No. 38-5 at 5 (emphasis added).

C. 2019 Election Window and Post-Complaint Public Statements.

On October 1, 2019, UPS amended the Plans to enable participants who were not eligible for early retirement to start receiving their pension benefits as a lump sum or one of the Plans' JSA options (the "2019 Election Window"). Retirement Plan, Amendment Seven § 15.2, ECF No. 38-2 at 322-23; Pension Plan, Amendment Five, ECF No. 38-3 at 253.

The 2019 Election Window provided that the available JSAs would be calculated "under the terms of the Plan," and "based upon an interest rate of 6% and the 1983 GAM Mortality Table for Males for Participants and the 1983 GAM Mortality Table for Females." Retirement Plan, Amendment Seven §§ 15.2(e)(2), (3), (4), (f)(4), ECF No. 38-2 at 325-28; Pension Plan, Amendment Five §§ 14.2(e)(2), (3), (4), (f)(4), ECF 38-3 at 256-59. Participants who completed the "forms and elections provided by the Committee [or Trustees]" started receiving their JSAs—calculated by the Committee and Trustees—on January 1, 2020. Retirement Plan, Amendment Seven §§ 15.1, 15.2(g)(4), ECF No. 38-2 at 323, 328; Pension Plan, Amendment Five §§ 14.1, 14.2(g)(4), ECF No. 38-3 at 253, 259.

On January 31, 2020, Plaintiffs Brown, Suveg, and Bobertz filed their Complaint. On February 6, 2020, Defendants issued the following statement in response to the lawsuit:

> UPS offers competitive compensation packages and uses factors that are common to many similar benefit plans across the country to calculate those benefits. ***These factors are reasonable and comply with***

> ***all applicable laws***. We will vigorously defend ourselves, and continue to provide industry-leading compensation packages for our employees.[6]

On March 10, 2020, Plaintiffs Brown, Suveg, and Bobertz, along with Potters, Richards, Washburn, Youngerman, and Braxton, who were not originally part of the lawsuit, filed the Amended Complaint.

II. STANDARD OF REVIEW

ERISA actions, such as this, are subject to the general notice pleading standard of the Federal Rules. *See* Fed. R. Civ. P. 8(a). Plaintiffs' Amended Complaint easily meets this standard. As Defendants acknowledge, to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint need only provide enough facts "'to state a claim to relief that is plausible on its face.'" Mem. of Law in Supp. of Defs.' Rule 12(b)(6) Mot. to Dismiss ("Def. Br.") at 2, n.2, ECF No. 37-1 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009)). In addition, this Court should "view the allegations of the complaint in the light most favorable to [p]laintiff, consider the allegations of the complaint as true, and accept all reasonable inferences therefrom." *Omar ex. rel. Cannon v. Lindsey*, 334 F.3d 1246, 1247 (11th Cir. 2003) (per curiam).

III. ARGUMENT

Effectively conceding that the Amended Complaint alleges valid claims under ERISA, Defendants argue only that the case should be dismissed because Plaintiffs

---

[6] John Manganaro, *ERISA Pension Lawsuit Targets UPS*, PLANSPONSOR (Feb. 6, 2020), https://www.plansponsor.com/erisa-pension-lawsuit-targets-ups/ (emphasis added).

did not resort to administrative review under the Plans before filing suit.[7] *See* Def. Br. at 12-13. Defendants' argument is contrary to the governing Plan documents and ERISA, and misapprehends Plaintiffs' claims which seek Plan-wide relief. In a nutshell, the Plans do not provide an administrative procedure for challenging whether the Plans violate ERISA. Moreover, even if Plaintiffs availed themselves of the Plans' inapplicable administrative procedures, their efforts would have been futile. Accordingly, Defendants' motion should be denied.

A. Plaintiffs' Claims Are Not Subject to Exhaustion.

ERISA does not require a plan participant to exhaust any potential administrative remedies as a prerequisite to bringing a civil action. *Watts v. BellSouth Telecomms., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003). Rather, as recognized by this Circuit, the exhaustion doctrine is "policy-based," and courts "are still in the process of shaping it insofar as new factual scenarios are concerned." *Id.*

[7] There has been near unanimity in courts across the country denying motions to dismiss the very type of allegations (use of legally incompliant actuarial assumptions) that are pled in the Amended Complaint. *See, e.g.*, Mem. & Order, *Duffy v. Anheuser-Busch Cos., LLC*, No. 19-1189, 2020 WL 1493558 (E.D. Va. Mar. 27, 2020); Order, *Herndon v. Huntington Ingalls Indus., Inc.*, No. 19-52 (E.D. Va. Feb. 20, 2020), ECF No. 73; *Smith v. Rockwell Automation, Inc.*, No. 19-505, 2020 WL 620221 (E.D. Wis. Feb. 10, 2020); Mem. & Order on Def.'s Mot. to Dismiss, *Belknap v. Partners Healthcare Sys., Inc.*, No. 19-11437 (D. Mass. Jan. 24, 2020), ECF No. 33 ("Granted as to all counts to the extent that they are based on an alleged violation of 29 U.S.C. § 1053(a), and Denied without prejudice as to all counts to the extent that they are based on alleged violations of 29 U.S.C. §§ 1054(c)(3) or 1055"); *Cruz v. Raytheon Co.*, --- F. Supp. 3d ----, No. 19-11425, 2020 WL 254848 (D. Mass. Jan. 17, 2020); *Torres v. Am. Airlines, Inc.*, 416 F. Supp. 3d 640 (N.D. Tex. 2019); *Smith v. U.S. Bancorp*, No. 18-3405, 2019 WL 2644204 (D. Minn. June 27, 2019).

"[W]hether to apply the exhaustion requirement is committed to the district court's sound discretion . . . . " *Curry v. Contract Fabricators Inc. Profit Sharing Plan*, 891 F.2d 842, 846 (11th Cir. 1990). The determination of whether to require administrative exhaustion is fact-specific. *Watts*, 316 F.3d at 1207 ("The facts of those cases . . . in which we have applied or declined to apply our ERISA exhaustion requirement, necessarily shape the parameters of that requirement.").

The Plans in this case do ***not*** provide an administrative review process for claims challenging the legality of plan terms. According to the Plan documents for both Plans, only "claims for benefits" pursuant to the existing Plans can be submitted for administrative review. Retirement Plan § 9.4(a), ECF No. 38-2 at 86; Pension Plan § 11.4(a), ECF No. 38-3 at 58. The stated purpose of this review is to determine "whether the claimant is entitled to benefits ***under*** the Plan . . . ." *Id.* (emphasis added).

Here, Plaintiffs are not making a claim for benefits "under the Plans," nor do they dispute that their JSA benefits have been calculated in accordance with the Plans as written. *See, e.g.*, *Lanfear v. Home Depot, Inc.*, 536 F.3d 1217, 1220 (11th Cir. 2008) (in a defined benefit plan, "benefits" are determined, or defined, by the plan's terms). Rather, Plaintiffs challenge (as a matter of law) the Plans themselves and, more specifically, the actuarial assumptions written into the Plans, and seek (1) reformation of both Plans to bring them into compliance with ERISA; and (2) payment of actuarially-equivalent benefits for all class members on a Plan-wide basis as required by ERISA. *See* Am. Compl. ¶¶ 10, 111-19.

The Plan documents do not provide for any sort of administrative review process for challenges to the legality of the Plans. *See Watts*, 316 F.3d at 1209-10 (Where plaintiff reasonably interprets plan documents "as permitting her to file a lawsuit without exhausting her administrative remedies . . . she is not barred by the court-made exhaustion requirement from pursuing her claim in court."); *Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 180-81 (2d Cir. 2013) (same). *See also K.S.B. ex rel. Harris v. Securian Life Ins. Co.*, 423 F. Supp. 3d 1365, 1372-73 (M.D. Ga. 2019), *appeal filed*, No. 19-14732 (11th Cir. Nov. 27, 2019) (exhaustion not required when "[t]he plan here did not include such a requirement"); *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993) ("exhaustion in the context of ERISA requires only those administrative appeals provided for in the relevant plan or policy").[8]

[8] To the extent the Plans' respective SPDs suggest that there is an administrative mechanism in place that could resolve Plaintiffs' claims, as noted *supra*, the SPDs themselves expressly confirm that the terms of the Plans control. Retirement Plan SPD at 1, ECF No. 38-4 at 3; Pension Plan SPD at 1, ECF No. 38-5 at 5. *See also CIGNA Corp. v. Amara*, 563 U.S. 421, 438 (2011) (concluding that statements in summary documents "do not themselves constitute the *terms* of the plan for purposes of § 502(a)(1)(B)."). Further, any ambiguities in the SPDs must be construed against the drafter. *See Watts*, 316 F.3d at 1208 (citing *Lee v. Blue Cross/Blue Shield of Ala.*, 10 F.3d 1547, 1551 (11th Cir. 1994)). *See also White v. Coca-Cola Co.*, 542 F.3d 848, 855 (11th Cir. 2008) (same). Thus, the Court should give them no weight. Indeed, they are not even properly considered on this motion. Contrary to Defendants' conclusory assertions, Plaintiffs' claims are based on the language of the Plans, not the SPDs, and thus the SPDs are not even ***relevant*** to Plaintiffs' claims, much less "central" to them. Moreover, while Plaintiffs have no reason to question that the SPDs were authentic Plan documents ***at some point,*** there is reason to doubt that the SPDs Defendants have submitted are ***current.*** The

The Plan documents are not silent as to whether the administrative process could extend to Plaintiffs' claims. To the contrary, the Plans expressly provide that UPS has the exclusive power to amend the Plans and, therefore, only UPS could address the ERISA violation pled herein. Retirement Plan § 7.1, ECF No. 38-2 at 80; Pension Plan § 10.1, ECF No. 38-3 at 55. Since the administrative procedures are limited to claims for benefits that can be provided under the existing Plan terms, there are no administrative procedures available to a Plan participant to either override Plan terms and pay actuarially equivalent benefits, or to amend the Plans and pay benefits in accordance with the Plans as amended.

In contrast, in the cases cited by Defendants, the administrative procedures were not limited to claims for benefits ***under*** the Plans, but instead were far more expansive. For example, in *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325 (11th Cir. 2006), the plan's administrative procedures applied to all "claims," and the plan administrator, the participant's employer, had "'all power necessary to . . . resolve all interpretive, equitable and other questions that shall arise in the operation and administration of this Plan.'" *Id.* at 1329 (citation omitted). This broad language gave the plan administrator the ability to decide the plaintiff's grievance, powers that the Committees do not have since the Plans limit their administrative authority to "claims for benefits." Retirement Plan §§ 9.3, 9.4(a), ECF No. 38-2 at 85-86 (Committee has powers "[e]xcept as herein expressly provided"); Pension Plan §§

listed dates on the SPDs pre-date the amended Plans. Perhaps they accurately reflected the language of prior plans, but they are inconsistent with the current Plan documents.

11.3, 11.4(a), ECF No. 38-3 at 57-58 (same). Similarly, in *Lanfear*, the plan's administrative procedures applied to "'any grievance, complaint or claim concerning any aspect of the operation or administration of the [p]lan or [t]rust, including but ***not limited to claims for benefits***.'" 536 F.3d at 1224 (emphasis added) (citation omitted). In sharp contrast, the Plans' process is limited to claims for benefits under the Plans. While the plan language in *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1226 (11th Cir. 1985) was less expansive, that case, unlike here, did not involve a challenge to the legality of the plan language itself.[9]

B. Administrative Remedies Are Futile and Inadequate.

Even assuming for the sake of argument that Plaintiffs' claims are subject to the Plans' administrative procedures (which they are not), a trial court should not require plaintiffs to exhaust administrative remedies "when resort to the administrative route is futile or the remedy inadequate." *Curry*, 891 F.2d at 846. In such circumstances, "requiring a plaintiff to exhaust an administrative scheme would be an empty exercise in legal formalism." *Perrino v. S. Bell Tel. & Tel. Co.*, 209 F.3d 1309, 1318 (11th Cir. 2000). As the Eleventh Circuit explained, this approach "simply recognize[s] that there are situations where an ERISA claim cannot be redressed effectively through an administrative scheme." *Id*. Here, resort to

[9] Defendants also fault Plaintiffs for failing to include allegations concerning exhaustion in the complaint, citing *Hoak v. Ledford*, No. 15-3983-AT, 2016 WL 8948417, at *3 (N.D. Ga. Sept. 27, 2016). But Plaintiffs had no reason, based on the language of the Plans, to believe that there were any administrative remedies to exhaust in the first instance.

administrative review would have been futile or inadequate, and this action should proceed.

1. Neither the Committee nor the Trustees have the ability to grant the requested relief.

The gravamen of Plaintiffs' Amended Complaint is that "[b]ecause the Plans used unreasonable, grossly outdated, or otherwise flawed actuarial assumptions throughout the Class Period, the benefits paid to participants and beneficiaries who receive JSAs are ***not*** actuarially equivalent to the SLAs they earned as of their retirement date in violation of ERISA § 205, 29 U.S.C. § 1055." Am. Compl. ¶ 101. The challenged actuarial assumptions are set out in the Plan documents in terms that are clear and unambiguous, requiring use of the all-male 1983 GAM mortality table with a 6% interest rate, or the UP-84 mortality table with either a 7% or 8% interest rate (depending on the Plan). *Id.* ¶ 126.

Because this case concerns a challenge to the unambiguous actuarial assumptions written into the Plan documents, and, therefore, there is no Plan language to interpret, Defendants' exhaustion argument, which depends on the Committees' asserted power to interpret the respective Plans (*see* Def. Br. at 7) misses the mark. The Committees cannot "interpret" the 1983 GAM or the UP-84 mortality tables to mean the RP-2014 (an updated mortality table used by UPS in its audited financial statements (*see* Am. Compl. ¶ 71)). Unless and until the Plan terms are amended to include actuarial assumptions that comply with ERISA, no possible

interpretation by the Committees in an administrative review could change retiree JSA benefit calculations.

It is futile to require plaintiffs challenging the legality of clear plan terms to engage in administrative processes where the administrator has discretion to "interpret" plan terms, but not change them:

> ***The retirees . . . are not challenging [defendant's] interpretation*** of its amendments, ***but the amendments themselves***. It would be completely futile to require the retirees to exhaust this administrative remedy. [Defendant] would simply re-calculate their benefits . . . and reach the same result. Therefore, because the administrative process is futile, this [c]ourt in its sound discretion, will not require the retirees to exhaust their administrative remedies before seeking relief in this [c]ourt.

Costantino v. TRW, Inc., 773 F. Supp. 34, 44 (N.D. Ohio 1991) (emphasis added). Affirming that decision, the Sixth Circuit noted that the trial court "viewed [p]laintiffs' suit as directed to the *legality* of TRW's amended [p]lan, not to a mere *interpretation* of it." *Costantino v. TRW, Inc.*, 13 F.3d 969, 975 (6th Cir. 1994). *See also Durand v. Hanover Ins. Grp., Inc.*, 560 F.3d 436, 442 (6th Cir. 2009) (exhaustion "self-defeating even on its own terms" when only the employer could amend the plan and the administrators had faithfully followed the plans' terms as written.)

Similarly, in *West v. AK Steel Corp.*, 484 F.3d 395 (6th Cir. 2007), the court "concluded that resort to the administrative process would have been futile because the [plan] [c]ommittee would have simply recalculated the benefits under the method outlined in the AK Steel Plan, resulting in the same benefit amount." *Id.* at 404. The

court "found that [plaintiff's] futility argument is based on his position that ***the provisions of the AK Steel Plan violate ERISA and the Internal Revenue Code*** and that no amount of administrative review would alter the calculation of benefits under the current terms of the plan." *Id*. (emphasis added). And it explained that "[t]o accept [d]efendant's argument that [p]laintiffs cannot bring any claim, would in effect permit plan terms that blatantly violate ERISA to stand unchallenged," and ruled that "[t]he district court thus did not abuse its discretion in concluding that the exhaustion requirement does not apply in this case." *Id*. at 405.

A district court in Florida reached the same conclusion in *Bacon v. Stiefel Laboratories, Inc.*, 677 F. Supp. 2d 1331, 1340 (S.D. Fla. 2010). Plaintiffs argued that administrative procedures were futile because the plan administrator did not "have the power to re-value the stock"—the remedy sought in that case. *Id*. at 1339. The *Bacon* court explained that "[w]hen such a dispute arises, the proper course is for the [c]ourt to examine the terms of the [p]lan to determine if the [c]ommittee conceivably had the power to grant the remedy that [p]laintiffs are seeking." *Id*. Having conducted its examination of the relevant plan, the *Bacon* court found that "[a]lthough the [c]ommittee is vested with the very broad powers to 'construe, interpret, and apply the provisions of the [p]lan' and to 'perform all acts necessary to comply with ERISA' . . . the [p]lan then specifically allocates to the [t]rustee the power to determine the fair market value of the stock." *Id*. at 1340 (citation omitted). Accordingly, the *Bacon* court held that exhaustion "would be futile because the [c]ommittee does not have the power to remedy [p]laintiffs' perceived harm." *Id*.

Here, where the Plans reserve the power of amendment to UPS alone, the same result should follow. Exhaustion would be futile.

2. The actuarial assumptions in ERISA plans cannot be changed on an individual basis.

Plaintiffs' claims cannot be resolved on an individual basis through the Plans' administrative process because ERISA plans are required to state the actuarial assumptions used to convert SLAs into other benefit forms in the plan document so that employers cannot use different assumptions for individual employees. *See Smith*, 2020 WL 620221, at *3 (actuarial assumptions used to calculate benefits "'must be specified within the plan in a manner which precludes employer discretion.'") (quoting Rev. Rul. 79-90, 1979-1 C.B. 155). In other words, ERISA requires benefits to be "definitely determinable," ***not*** calculated on a participant-by-participant basis.

The actuarial assumptions at issue here are incorporated in the Plans as required by Tax Code § 401(a)(25), 26 U.S.C. § 401(a)(25). *See* Am. Compl. ¶¶ 42-49, 52-56, 76. Absent authority to amend the Plans, the Committees could not override those assumptions in the context of a benefits claim. The entire purpose of the tax code provision is to ***preclude*** the exercise of employer or administrator discretion in the calculation of benefits.[10]

[10] In contrast, many of the cases cited by Defendants could be resolved on an individual basis. *See, e.g.*, *Byrd v. MacPapers, Inc.*, 961 F.2d 157 (11th Cir. 1992) (involving a claim seeking damages for a retaliatory discharge); *Dockens v. DeKalb Cty. Sch. Sys.*, No. 07-1345-CAP/AJB, 2009 WL 10668308, at *22-24 (N.D. Ga. Feb. 12, 2009) (asserting individual disability-related claims).

What the Committee Defendants ***should*** have done (in the course of their duties continually to monitor the Plans), was to alert UPS to the fact that the actuarial assumptions in the Plans violated ERISA's actuarial equivalence requirements. What UPS should then have done was amend the Plans to comply with ERISA, at which point the Plans could have been administered in compliance with their terms. *See Smith*, 2020 WL 620221, at *4 (noting that "it is easy to draft an amendment that incorporates updated actuarial assumptions but does not also grant the employer discretion to manipulate those assumptions"). But the Plans' administrative processes do not provide such a remedy; they only allow for challenging whether individual benefits decisions comply with the terms of the Plans as written.

Because the Plans' "administrative process" did not—and, as a matter of law, ***could not***—offer Plaintiffs relief, requiring Plaintiffs to engage in that process would be an empty exercise, just as it was in *Costantino, West*, and *Bacon*. Unlike the Committees, this Court has the power to grant Plaintiffs Plan-wide relief, either (1) applying ERISA-compliant actuarial assumptions across the board to all retirees (Count I); or (2) reforming and amending the Plans, not just for Plaintiffs themselves, but for all similarly-situated retirees and beneficiaries (Count II).

3. Plaintiffs seek Plan-wide relief.

Plaintiffs are not merely seeking re-calculation of their individual JSA benefit amounts, but Plan-wide relief. *See* Am. Compl. ¶ 10 ("Plaintiffs bring this action on behalf of themselves and the proposed Class, seeking, *inter alia*, payment of benefits improperly withheld, an Order from the Court reforming the Plans to conform to

ERISA, recalculation and payment of benefits pursuant to the reformed Plans, as required under ERISA, and such other relief as the Court deems is just and equitable."). Therefore, even if the named Plaintiffs had their individual JSA calculations reviewed through an administrative process, as Defendants suggest (*see* Def. Br. at 12), that review would not have provided the Plan-wide relief Plaintiffs seek.

> While [defendant] seek[s] to miscast this action as one primarily for a claim-by-claim payment of medical benefits, in reality this action is only tangentially about the reimbursement of ***individual*** medical claims. Instead, this case centers on [plaintiff's] attempt to challenge defendants' ***across-the-board application of a methodology*** for determining reasonable and customary limitations . . . .

Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 420 (6th Cir. 1998) (emphasis added) (citation omitted). Here, Plaintiffs likewise seek to change "across-the-board" calculation of the JSA benefits using outdated or otherwise flawed actuarial assumptions for the benefit of all Plan participants, not just themselves. *See*, *e.g.*, Am. Compl. ¶ 101.

As the Court in *Durand* aptly concluded:

> We routinely enforce the exhaustion requirement when an ERISA plaintiff contends that his benefits were improperly calculated under the terms of a plan. . . . ***But the same is not true of an across-the-board challenge to the legality of a plan's methodology***. In those cases, the claimant typically concedes that her benefit was properly calculated under the terms of the plan as written, but argues that the plan itself is illegal in some respect. . . . Sending such a claimant back to the administrative process, to recalculate a benefit she concedes was already properly calculated under the terms of the plan as written,

> misses the point of the dispute. In that situation, exhaustion wastes resources rather than conserves them.

560 F.3d at 439 (emphasis added). Here, as in *Durand*, Plaintiffs do not dispute Defendants' calculation of their respective JSA benefits under the terms of the Plans as they currently stand. Rather, their claim is that the Plans' actuarial assumptions (for ***all*** Plan participants) are outdated or otherwise flawed, and do not produce an actuarially equivalent benefit as required by ERISA. *See* Am. Compl. ¶ 101. The Plaintiffs' claim is "thus directed to the [Plans'] legality; and forcing [them] to resort to [their] administrative remedies, rather than [their] legal ones, would be futile." 560 F.3d at 440.[11]

4. Defendants have reaffirmed their determination that the Plans' actuarial assumptions are appropriate under ERISA.

Even if Defendants could provide relief through an administrative process (and they could not), resort to that process would be futile because Defendants have already decided they will not grant Plaintiffs the relief they seek here. Unlike cases cited by Defendants, such as *Bickley*, this is not a matter of speculation.

On February 6, 2020, ***after*** Brown, Suveg, and Bobertz filed the initial suit in this case, Defendants issued a statement specifically asserting that the Plans' existing

[11] With regard to promoting judicial efficiencies, the *Durand* court further explained that "[a]djudication of Durand's claim need not put the district court on a path that ends with the court itself trying to estimate what her future interest credits would have been. Rather, if the district court determines that the [p]lan's methodology violates ERISA, the court could simply award injunctive relief that requires [defendant], in the first instance, to do what the law requires." 560 F.3d at 442.

actuarial factors "'are reasonable and comply with all applicable laws.'"[12] ***After*** that statement was issued, several more plan participants joined the case through the Amended Complaint on March 10, 2010. It clearly would have been futile to require those new Plaintiffs to engage in an administrative process when the Company's publicly stated position was clear.

Requiring recourse to administrative procedures when Defendants have clearly rejected Plaintiffs' position is the very definition of futility. Exhaustion in such circumstances "serves no legitimate purpose:"

> The same worthy considerations that spawned the judicially crafted exhaustion requirement in individual cases seem to counsel against such a precondition in those cases that feature across the board company-wide coverage policies. Indeed exhaustion for the sake of exhaustion, without any reasonable expectation of relief, serves no legitimate purpose except to deter insureds from seeking redress in the only forum that would offer a meaningful opportunity to vindicate rights secured in the insurance contract.

Sibley-Schreiber v. Oxford Health Plans (N.Y.), Inc., 62 F. Supp. 2d 979, 988 (E.D.N.Y. 1999).

As in *Sibley-Shreiber*, this case involves numerous individuals adversely impacted by a policy that applies equally to all of them, and Defendants have clearly and unequivocally rejected the Plaintiffs' position. "[R]equiring [p]laintiffs to go back now and engage in further administrative review would be unproductive, would serve no purpose, and would not provide them with a 'fair and reasonable opportunity' to pursue their claims." *Hoak v. Plan Adm'r of Plans of NCR Corp.*,

[12] *See* Manganaro, *supra* note 4.

389 F. Supp. 3d 1234, 1269 (N.D. Ga. 2019) (citation omitted). "More importantly, it would be an 'empty exercise in legal formalism.'" *Id*. (citing *Perrino*, 209 F.3d at 1318). *See also Oliver v. Coca Cola Co.*, 497 F.3d 1181, 1201 (11th Cir. 2007), *vacated in part on other grounds*, 506 F.3d 1316 (11th Cir. 2007) (discussing how the purposes behind exhaustion would not have been advanced, "including, *inter alia*, promoting the consistent treatment of claims and minimizing unnecessary costs"); *K.S.B. ex rel. Harris*, 423 F. Supp. 3d at 1372 (When "[t]he record . . . demonstrates a 'clear and positive' showing of futility . . . [e]xhaustion under these circumstances would be a wasted exercise and futile.") (citation omitted).[13]

C. Exhaustion Would Serve No Purpose in this Case.

Defendants argue that public policy favors requiring ERISA plaintiffs to exhaust administrative remedies. Def. Br. at 14-15. But unlike the cases cited by Defendants, this is not a case where judicial intervention would be "premature," as the court found in *Bickley*, 461 F.3d at 1330, nor would administrative consideration of the facts in the case assist the court, as discussed in *Wert v. Liberty Life Assurance Co. of Boston, Inc.*, 447 F.3d 1060, 1066 (8th Cir. 2006). The facts are not in dispute; the sole issue on liability is a legal one: do the Plans' stated actuarial assumptions comply with ERISA's actuarial equivalence requirement? That question requires

[13] *Accord Corsini v. United Healthcare Corp.*, 965 F. Supp. 265, 269 (D.R.I. 1997) (where it was "undisputed that the challenged practice represents a long-standing policy that has been applied consistently in calculating the co-payment obligations of ***all*** [p]lan participants[,] . . . "it is clear that no purpose would be served by requiring the plaintiffs to seek review of their co-payment claim by the plan administrator.") (emphasis added).

expertise in federal law, not "administrative expertise," unlike the denial of benefits claims in cases like *Diaz v. United Agricultural Employee Welfare Benefit Plan & Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995), *Kross v. Western Electric Co.*, 701 F.2d 1238, 1244 (7th Cir. 1983), *Lane v. Sunoco, Inc. (R & M)*, 260 F. App'x 64, 65 (10th Cir. 2008), or *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980). And, unlike *Challenger v. Local Union No. 1 of International Bridge, Structural, & Ornamental Ironworkers*, 619 F.2d 645, 649 (7th Cir. 1980), this case does not involve a dispute as to the interpretation of plan language. The language is clear.

The Plans do not provide an administrative process for the dispute at hand, and even if the Plan administrators granted such a process, they would have no power to override or amend the Plans' specific actuarial assumptions. Accordingly, the policies that support application of the exhaustion requirement do not apply in this case.

IV. CONCLUSION

For the reasons set forth above, Defendants' motion should be denied.

RESPECTFULLY SUBMITTED this 28th day of April, 2020.

Respectfully submitted,

s/ T. David Copley
T. David Copley (admitted *pro hac vice*)
Erin M. Riley (admitted *pro hac vice*)
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101

Tel.: (206) 623-1900
dcopley@kellerrohrback.com
eriley@kellerrohrback.com

Jeffrey Lewis (admitted *pro hac vice*)
KELLER ROHRBACK L.L.P.
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
Tel.: (510) 463-3900
jlewis@kellerrohrback.com

Tanya Korkhov (admitted *pro hac vice*)
KELLER ROHRBACK L.L.P.
1140 Avenue of the Americas, 9th Floor
New York, NY 10036
Tel.: (646) 380-6690
tkorkhov@kellerrohrback.com

Robert A. Izard
Mark P. Kindall
Douglas P. Needham
Oren Faircloth
IZARD, KINDALL & RAABE LLP
29 South Main Street, Suite 305
West Hartford, CT 06107
Tel.: (860) 493-6292
Fax: (860) 493-6290
rizard@ikrlaw.com
mkindall@ikrlaw.com
dneedham@ikrlaw.com
ofaircloth@ikrlaw.com

Gregory Y. Porter
Mark G. Boyko
Alexandra S. Serber
BAILEY & GLASSER LLP
1054 31st Street, NW, Suite 230
Washington, DC 20007

Tel.: (202) 463-2101
gporter@baileyglasser.com
mboyko@baileyglasser.com

David J. Worley (GA Bar #776665)
James M. Evangelista (GA Bar #707807)
Kristi Stahnke McGregor (GA Bar #674012)
EVANGELISTA WORLEY, LLC
500 Sugar Mill Road, Ste. 245A
Atlanta, GA 30350
Tel.: (404) 205-8400
david@ewlawllc.com
jim@ewlawllc.com
kristi@ewlawllc.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE AND TYPE-SIZE COMPLIANCE

Pursuant to LR 5.1C, N.D. Ga., the foregoing pleading is prepared in Times New Roman font, 14 point, and I hereby certify that the foregoing "PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS" was filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all counsel of record.

s/ T. David Copley
T. David Copley (admitted *pro hac vice*)
KELLER ROHRBACK L.L.P.
1201 Third Avenue, Suite 3200
Seattle, WA 98101
Tel: (206) 623-1900
dcopley@kellerrohrback.com

Counsel for Plaintiffs